Utah Senate Bill 150 threatens negligent credentialing as a valid cause of action

In February, Utah Sen. J. Stuart Adams proposed Senate Bill (S.B.) 150, which aims to no longer recognize negligent credentialing as a valid cause of action in medical malpractice cases. In other words, if this bill passes and a physician is sued for malpractice, the plaintiff cannot seek the hospital's deeper pockets by claiming that it was negligent in credentialing the physician. Rather, the plaintiff would only be able to go after the physician.

In its entirety, the proposed bill reads:

> *It is the policy of this state that the question of negligent credentialing, as applied to medical providers in malpractice suits, is not recognized as a cause of action.*

Even in few words, the bill is clear: Negligent credentialing isn't reason for malpractice. However, only months before, Utah upheld negligent credentialing as a valid cause of action.

Case history

Rewind to May 2010 when the Supreme Court of Utah ruled in *Archuleta v. St. Mark's Hospital* that state statutes upheld negligent credentialing claims.

The patient, Tina Archuleta, brought several claims in the case, including negligent credentialing, against St. Mark's Hospital in Salt Lake City. She claimed St. Mark's negligently credentialed Dr. R. Chad Halversen, who performed a laparotomy on her. After being discharged from St. Mark's, Archuleta was admitted to another hospital due to postoperative complications. This subsequent treatment included six corrective surgeries.

In its defense, St. Mark's argued that the patient's claim was not valid because three separate Utah statutes immunize hospitals from liability for various conduct. The Utah Supreme Court rejected this argument, concluding that the language of the three statutes does not bar negligent credentialing claims. However, two of the justices dissented, claiming that the language was misinterpreted and that Utah law does not uphold negligent credentialing claims.

"The senator who sponsored this bill does not like the court's interpretation in Archuleta. He felt like the peer review statute was sufficient to preclude the negligent credentialing claim and decided that in light of Archuleta, the state needs to ban negligent credentialing outright," says **Forrest Read IV, Esq.,** associate in the Health Employment and Labor Group at EpsteinBeckerGreen in Washington, DC.

Nearly a year after the Archuleta ruling, Utah is singing a different tune and bucking the trend that other states have established. According to Read, of the state courts that have considered negligent credentialing claims (about 30 states), only two have chosen not to recognize negligent credentialing as a valid cause of action. If S.B. 150 passes, one of those majority decisions will be superseded.

An alternative approach

With exception to Utah's previous ruling in favor of negligent credentialing claims, and despite the trend around the country, S.B. 150 is consistent with the culture in the state, which places responsibility on individuals rather than government agencies, says **Matthew Wride, Esq.,** an attorney with Kirton & McConkie, PC, in Orem, UT.

"On one hand, you want to make sure that there is a remedy for a wrong. If someone is known to have a substance abuse problem and he or she causes injury to a plaintiff, you want a remedy for that," says Wride. "On the other hand, maybe it is the patient's responsibility to verify that the medical provider they are using is competent."

But the motivation for the bill may have more to do with medical malpractice costs than personal responsibility. According to Read, many states blame the rising cost of healthcare on the escalating number of medical malpractice lawsuits and are looking for ways to curb the litigation frenzy.

However, to Wride's point that there must be a remedy for a wrong, eliminating negligent credentialing altogether may not be the best solution. One possible alternative

to eliminating negligent credentialing altogether is the approach Texas has taken. Negligent credentialing is still a valid claim in Texas, but plaintiffs must take a series of steps to prove that the negligent credentialing claim is indeed valid. For example, the Texas Medical Professional Liability Law establishes a two-year statute of limitations and requires plaintiffs to notify all persons who will be named in the suit via certified mail 60 days prior to filing the suit. (For a full summary of the Texas Medical Professional Liability Law, visit *www.texmed.org/Template.aspx?id=2821*.)

The potential effect of Senate Bill 150

If S.B. 150 passes, neither Wride nor Read believes that medical staffs in Utah would behave any differently. "They would still have to go through the same credentialing process and they would still be beholden to their obligations under The Joint Commission and other accrediting bodies," says Read.

Wride adds that medical staffs are not likely to turn a blind eye to problem physicians simply because they could no longer be dragged into court. "They don't want to injure patients," he says. "There is still every incentive from a best practices standpoint to try to make sure that the doctors who are using their facilities are doing so competently."

In fact, if negligent credentialing were no longer a valid cause of action, it could cause some medical staffs to be even more vigilant in their credentialing practices. Wride notes, even though ideally medical staffs should always perform rigorous credentialing, there is the remote possibility that some medical staffs may not be as thorough because they no longer fear being named in a neligent credentialing suit. Thus, other hospitals will want to protect themselves from physicians who fall through the cracks.

Although proposed S.B. 150 is notable (and will be more notable if it passes), medical staffs should not assume the trend will continue, says Read. "We can't presume that as goes Utah, so goes the rest of the country. Utah is a conservative state, and what is friendly in the Utah legislature may not be as friendly in other states," he says. Thus, the legislatures in the roughly 30 states that already recognize negligent credentialing claims aren't necessarily going to follow Utah's lead and ban the actions legislatively.

However, if S.B. 150 does pass, it may influence the thinking of the 20 other state courts that have not addressed the viability of negligent credentialing claims. "[The bill] is not to be scoffed at, as it's possible that other state legislatures could take proactive measures rather than wait for other courts to decide the viability of negligent credentialing," says Read. ■

Editor's note: Do you think S.B. 150 will pass? Take the poll at www.CredentialingResourceCenter.com/blog.