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Pa. Docs Groups Back UPMC Over Med Mal Time-Limit Ruling

By **Y. Peter Kang**

Law360 (November 14, 2019, 8:33 PM EST) -- A day after the University of Pittsburgh Medical Center urged the Pennsylvania high court to reconsider its recent ruling that found the state's seven-year hard deadline for medical malpractice lawsuits to be unconstitutional, three doctors groups on Thursday chimed in to support UPMC's bid.

The Pennsylvania Orthopaedic Society and others said the state's Supreme Court overlooked a key fact when it ruled on Oct. 31 that the seven-year statute of repose set by the state's Medical Care Availability and Reduction of Error, or MCARE, Act did not bar a suit alleging that UPMC and two doctors botched Christopher and Susan Yanakos' son-to-mother liver transplant, which caused the transplant to fail more than a decade later.

In a 4-3 ruling, the justices had found that the statute of repose violates the open courts doctrine of the Pennsylvania Constitution — which guarantees an injured individual's access to legal remedies — because it was not substantially related to lawmakers' goal of keeping health care costs down.

But in an amicus brief lodged Thursday, the groups said the justices failed to recognize that lawmakers adopted the seven-year deadline in part because it tracks with a Pennsylvania law requiring health care providers to retain medical records for a minimum of seven years.

"The General Assembly tied these two together for good reason: it strikes a reasoned and precisely structured balance between the ability of health care providers to have access to critical evidence when defending lawsuits, on one hand, with the ability of medical malpractice claimants to seek redress, on the other," the brief states.

The groups said the records requirement upends the majority's reasoning that the seven-year deadline was an arbitrary period of time set by lawmakers.

"The seven-year statute of repose affords claimants as much time as possible to sue before medical records are destroyed, while at the same time protecting health care providers from being stripped of important evidence that may exculpate them from liability," the brief states.

Michael Feeney, an attorney for the groups, which also include state chapters of the American College of Physicians and the American Academy of Pediatrics, said the Pennsylvania Supreme Court seldom grants reargument but believes this case is worthy of being reheard.

"It's rare. But this, too, is a rare situation: I don't recall any other instance where such a

significant piece of the puzzle has been so totally overlooked," he said, referring to the medical records requirement. "So I think that would weigh strongly in favor of the court taking another look here."

John Conti, an attorney for UPMC, said the doctors' concerns underscored the import of the ruling.

"The forceful expressions of alarm from the medical community speak to the unsettling implications of a decision that imposes on the law-making branch of government what the dissent characterized as an 'exacting, even imperial' burden," he said.

An attorney for the Yanakoses did not immediately respond to a request for comment.

Also on Thursday, a coalition of insurance industry lobbying groups, as well as medical malpractice insurance companies Curi and The Doctors Company, filed a separate amicus brief in support of UPMC, saying the high court has "usurped the lawful exercise of legislative power" of state lawmakers.

"This departure, if allowed to stand, effectively turns the court into a super-legislative body and undermines Pennsylvania jurisprudence," that brief states. "This court should step back and take a second look at the legal history regarding [the open courts doctrine] and the established precedent applicable to constitutional challenges to otherwise validly enacted laws."

In an application for reargument filed Wednesday, **UPMC argued** that just two years ago the justices applied a "contradictory standard of review" in [Dubose v. Quinlan](#), a suit over a nursing home patient's death. **The court held** that MCARE's two-year statute of limitations in wrongful death cases starts running on the date of a patient's death rather than when the alleged negligence occurred or was discovered.

UPMC said that the high court ruled on that case despite a deficient legislative history for MCARE, whereas in the instant case the absence of legislative history was cited as a reason the statute of repose is unconstitutional.

The doctors groups are represented by Michael K. Feeney of Matis Baum O'Connor.

The insurance groups are represented by Andrew F. Susko, Edward M. Koch and Russell P. Lieberman of White and Williams LLP.

Christopher and Susan Yanakos are represented by Patrick K. Cavanaugh and Zachary N. Gordon of Del Sole Cavanaugh Stroyd LLC.

UPMC and the doctors are represented by John C. Conti, Megan J. Block and Steven L. Ettinger of Dickie McCamey & Chilcote PC. The doctors are also represented by Christopher C. Rulis of Rulis & Bochicchio LLC.

The case is Yanakos et al. v. UPMC et al., case number 10 WAP 2018, in the Supreme Court of Pennsylvania.

--Editing by Jack Karp.