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MEDICAL MALPRACTICE REFORM: A SILVER BULLET FOR THE HEALTH CARE CRISIS?

by IAN BARNEY

Political strategy has catapulted medical malpractice reform to the forefront of the health care debate. Some see reform as a panacea, arguing that reforming the medical liability system would so significantly reduce health care costs that it should be central to any health care reform legislation.¹ Others question the notion that malpractice reform would result in any meaningful cost-savings.²

The centerpiece of any traditional reform package would likely be a cap on the amount of damages plaintiffs could recover in malpractice suits.³ By limiting

award size, damage caps provide built-in cost-savings that allow malpractice insurers to provide lower premiums.⁴

Caps may provide further savings by reducing the number of non-meritorious claims filed.⁵ Also, by increasing the predictability of malpractice costs, caps could limit the practice of defensive medicine.⁶

Opponents of reform believe that, in the end, damage caps would reduce the quality of healthcare and restrict injured patients' access to just compensation without reducing overall health care costs.⁷ Essentially, if cost-savings were not significant, the reforms would not be worth the limitations imposed on plaintiffs.

THE CASE FOR MALPRACTICE REFORM

The purpose of damage caps, and most other traditional medical malpractice reforms, is to reduce doctors' malpractice insurance premiums by reducing litigation costs and increasing the predictability of malpractice claim outcomes.⁸ Primarily, caps reduce costs by limiting plaintiffs' awards in malpractice cases.

Damage caps may also provide additional cost savings by discouraging attorneys from filing non-meritorious cases. Proponents argue that caps limit the incentive for attorneys to take on numerous medical malpractice cases, regardless of merit, in hopes that success in one case will generate a windfall.⁹

By reducing litigation costs and increasing the predictability of malpractice claim outcomes, insurers should be able to provide cheaper malpractice insurance to doctors. One corollary of cheaper insurance is a reduction in the practice of defensive medicine.¹⁰ In theory, without the fear of crippling premiums caused by expensive malpractice claims, doctors would no longer order tests and procedures that are medically unnecessary.¹¹ Eliminating this waste could result in significant health care savings.

A study by the Massachusetts Medical Society supports this idea. The study concluded that 83 percent of doctors in Massachusetts engage in defensive medicine to avoid medical malpractice liability.¹²

Recently, House Republican Leader John Boehner of Ohio and Sen. Jon Kyl, R-Ariz., postulated that Americans could save over \$100 billion a year by re-

ducing defensive medicine costs through effective medical liability reform.¹³ “Almost everybody agrees that we can save between \$100 billion and \$200 billion if we had effective medical malpractice reform,” Sen. Kyl stated.¹⁴

However, Dr. Michelle Mello, Director of the Program in Law & Public Health for the Harvard School of Public Health, estimates that defensive medicine costs total approximately \$20 billion a year.¹⁵ While her estimate may be lower than Boehner’s and Kyl’s, Mello agrees that there are savings to be had.

Though a hot target for cost-savings, many experts say that not all defensive medicine is bad. Tom Baker, a professor at the University of Pennsylvania Law School, says that the fear of malpractice liability forces doctors to engage in responsible behaviors, such as carefully examining patient records and spending more time with patients.¹⁶

Also, every extra test and procedure that doctors order is not necessarily linked to fear of malpractice liability. In a 2004 report, the Congressional Budget Office (CBO) found that “some so-called defensive medicine may be motivated less by liability concerns than by the income it generates for physicians or by the positive (albeit small) benefits to patients.”¹⁷

Nonetheless, eliminating health care costs by reducing both insurance premiums and excess defensive medicine costs is expected to produce at least some savings.¹⁸

Sen. Kyl points to Texas’ malpractice reforms as a case study. In 2003, the Texas legislature instituted a \$250,000 cap on non-economic damages in medical malpractice cases involving physicians and a \$1.6 million cap on economic damages.¹⁹ In 2007, the state reported a 21.3 percent drop in malpractice insurance premiums.²⁰ The number of claims filed against physicians dropped from 6,038 in 2005 to 5,211 in 2006.²¹

After instituting a \$500,000 cap on non-economic damages in 2005, Illinois saw an even more precipitous decline in the number of claims filed. In 2006, medical malpractice lawsuits in Cook County dropped 25 percent from the previous year.²² The American Medical Association contends that because of the cap some doctors in Illinois have experienced a 5 to 30 percent reduction in premiums.²³

A damage cap in Georgia produced similar results. According to the Medical Association of Georgia, since Georgia's state legislature instituted a damage cap in 2005, the number of malpractice claims filed has fallen by 36 percent and malpractice insurance premiums have dropped by 18 percent.²⁴

HOW MUCH WOULD MEDICAL MALPRACTICE REFORM SAVE?

Although there are savings to be found in imposing damage caps, the efficacy of medical malpractice reform as a health care "silver bullet" is hotly disputed.

Dr. Mello disputes the idea that medical malpractice reform is a cure-all.²⁵ According to her, although damage caps do provide a statistically significant reduction in malpractice costs, caps are relatively limited in their ability to bring down health care costs in the aggregate.²⁶

Why are caps so limited in their effect? The CBO estimates that in 2009 the direct costs of the medical malpractice system will only total approximately \$35 billion, or about 2 percent of total health care expenditures.²⁷ These direct costs include malpractice insurance premiums, settlements, awards and administrative costs not covered by insurance.²⁸

This means that even if malpractice insurance premiums were reduced by 25 to 30 percent, the reduction in overall health care spending would be miniscule – somewhere around 0.5 percent.²⁹ The CBO also predicts that any savings reaped from reducing defensive medicine would be "very small."³⁰ Thus, even when combined with savings from defensive medicine, medical malpractice reform barely makes a dent in overall health care spending.

The CBO also points out that much of these prospective savings have already been realized because states have implemented their own reforms.³¹ According to the National Conference of State Legislatures, over thirty states currently have some form of a statutory damage cap or an impediment to receiving non-economic damages.³²

INJURED PATIENTS AND ACCESS TO COMPENSATION

Though Sen. Kyl may view current medical malpractice compensation as "jackpot justice,"³³ a study by the Department of Justice showed that in 2005

medical malpractice plaintiffs prevailed in state court trials only 22.7 percent of the time.³⁴

Dr. Mello believes that “there are really too few claims,” and that patients should have increased access to compensation.³⁵ Indeed, only about 2 percent of medical malpractice occurrences lead to a malpractice claim.³⁶ For that reason, Dr. Mello argues for a system of health courts, where panels of expert judges would decide compensation for injured patients.³⁷

H. Thomas Wells, Jr., former President of the ABA, argues: “The work of neutral scholars provides strong and objective evidence that caps discourage lawyers from filing meritorious malpractice cases, functionally depriving . . . persons of their day in court.”³⁸ For the ABA, the reduction in access to courts is not worth the small impact that reform would have on overall health care costs.³⁹

Attorney Barry Chevitz, a partner at Corboy & Demetrio, a prominent Chicago personal injury law firm, echoes these sentiments. According to Chevitz, expenses associated with litigating medical malpractice claims are onerous. “I have never tried a med[ical] mal[practice] case for less than \$100,000 in costs,” Chevitz states.⁴⁰

Attorney Chip Berry, another partner at Corboy & Demetrio, says, “[t]he costs of bringing [malpractice] suits and pursuing them is very high. Consequently, many meritorious cases with less-than catastrophic injuries are not filed at all.”⁴¹

The ABA supports this contention. It argues that the precipitous decline in the number of medical malpractice cases filed in Illinois, following the 2005 damage cap, resulted from meritorious cases going unfiled.⁴²

In addition to calling into doubt the wisdom and efficacy of medical malpractice reform, plaintiffs’ attorneys have challenged the constitutionality of damage caps.

Currently, 4 states have constitutional provisions proscribing damage caps. Five state supreme courts have declared damage caps unconstitutional.⁴³ There are also cases challenging the constitutionality of damage cap statutes currently pending in front of the Supreme Court of Georgia⁴⁴ and the Supreme Court

of Illinois.⁴⁵ This is the second time in a little over a decade that the issue has been before the Supreme Court of Illinois; in 1997 the Supreme Court of Illinois declared a statutory damage cap unconstitutional.⁴⁶

PRACTICAL POLITICS AND THE FUTURE OF MEDICAL MALPRACTICE REFORM

It is questionable whether traditional medical malpractice reform is the “silver bullet” to solving the economics of the health care crisis. Yet reform may be the “silver bullet” needed to strike grand compromise between Democrats and Republicans on health care reform.

In October, a major health care bill containing no significant malpractice reforms hit the floor of the Senate.⁴⁷ Not surprisingly, the bill squeaked out of the Senate Finance Committee with only one Republican vote.⁴⁸ Such a slim consensus poses serious problems for a bipartisan reform package.⁴⁹

Passing any sort of health care legislation will require that the Democrats garner 60 votes to defeat a Republican filibuster. Medical malpractice reform may be the olive branch needed to achieve this. Former Sen. Bill Bradley recently proposed such a trade off: the Democrats get to overhaul the health care system and the Republicans receive major medical malpractice reforms.⁵⁰

Though this proposal may be the key to generating historic compromise, any medical malpractice reform including damage caps seems unlikely.

President Obama, despite expressing interest in reform, has been adamant in his opposition of damage caps.⁵¹ Instead, the president has suggested federally funded state programs that experiment with alternative malpractice reforms such as Certificate of Merit programs and early disclosure models.⁵²

Certificate of Merit programs would require an individual to obtain an affidavit issued by experts or a panel of doctors stating that the individual’s malpractice claim has merit before the case can proceed to court.⁵³ Early disclosure models would encourage doctors to disclose medical errors and apologize where appropriate, and the case would be sent to mediation before entering the civil court system.⁵⁴

Though significant, these proposals are likely inadequate when it comes to gathering health care reform support from Republicans whose mantra has been “oppose, oppose, oppose.”⁵⁵ Republicans are looking for more comprehensive and systematic reform involving damage caps. Until they achieve it, their mantra is unlikely to change.

While the politics of malpractice reform is certainly messy, it is clear that any successful malpractice reform would have to strike a delicate balance between reigning in unnecessary health care costs and ensuring that medical malpractice victims have adequate access to justice.

NOTES

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