

Issues & Overview

Healthcare And Tort Reform

As politicians fight to put together healthcare-reform legislation, virtually every interest group – from pharmaceutical companies to insurers, from doctors to seniors – has been asked to make sacrifices. One group, however, has been notably absent from the sacrifice table: the plaintiffs' bar. As former Democratic National Committee chairman (and doctor) Howard Dean admitted at an August 26 town hall meeting, "The reason why tort reform is not in the bill is because the people who wrote it did not want to take on the trial lawyers."

Although tort reform is broadly popular – fully 83 percent of Americans want any healthcare reform to address medical-malpractice litigation – the trial bar simply injects too much cash into federal campaigns to make it feasible for reformers to attack its interests. Since 1990, lawyers and law firms have contributed over \$1 billion to federal elections, exceeding every other industry not only in the aggregate but in each political cycle. Three of the top six contributors to Senate Majority Leader Harry Reid (D-NV) are out-of-state plaintiffs' firms, and Senate Majority Whip Dick Durbin (D-IL) lists plaintiffs' firms among nine of his top twenty donors, including his largest contributor.

Such political realities underlie the problem with expecting Congress to come up with any good proposals to flesh out President Obama's otherwise-encouraging call for "demonstration projects" in the states to improve the liability system and to test "ideas about how to put patient safety first." The recently passed House version of healthcare reform not only limits such demonstration projects to *de minimis* window dressing; it actually is likely to make things worse.

The Pelosi bill authorizes incentive grants to the states to fund "medical liability alternative" demonstrations in Section 2351, beginning on page 1,431 of the legislation. The key limitation on the demonstration projects funded by the bill is that they cannot in any way "limit attorneys' fees or impose caps on damages." Section 2351(a)(4)(B).

Some corporate attorneys I know have worried that this provision might imperil existing state laws that cap damages or limit contingent fees, by requiring that states eliminate such reforms to obtain incentive grants. While there is no way to know how political advocates in the states would try to spin the bill's language, I think these fears are misplaced.

Section 2531(a)(2) defines "an alternative medical liability law" for purposes of the bill as a "law . . . enacted after the date of enactment" of the health-reform statute (emphasis added). There is of course no guarantee that the Secretary of Health and Human Services would not try to twist the language of the statute and deny grants to states with *previously enacted* tort-reform laws. But such a reading would fly in the face of the statute's plain language and be unlikely to survive judicial review, even under the deferential *Chevron* standard, particularly given the statute's instruction that the Secretary "shall determine that a State has an alternative medical liability law" if it meets the statutory thresholds, Section 2351(a)(2) (emphasis added).

Even if the Pelosi health bill would not threaten existing state tort reforms, however, it still would skew *new* liability reform efforts in states, in a negative way. The most recent empirical studies suggest that damage caps on medical-malpractice liability verdicts lower overall health costs on the order of one to two percent, although some earlier studies suggest cost savings of as much as ten percent. Even the more modest estimates, however, constitute *twelve percent* of the difference between doctor-and-hospital spending in the U.S. and other developed nations – significant savings, although certainly not a panacea.

In light of recent empirical work, the nonpartisan Congressional Budget Office – historically cautious about claiming any cost savings whatsoever from tort reforms – determined that "traditional" tort reforms (damage caps, joint and several liability changes, and collateral source reforms) would net \$54 billion for the government fisc over the next decade. The CBO probably underestimated the savings; it estimated that savings from lower liability premiums for doctors would exceed reductions in costs generated by defensive medicine, even though empirical studies suggest that defensive-medicine savings are larger by several orders of magnitude.

In any event, both the CBO estimates and empirical studies are limited because they can only test reforms that states have actually implemented. Damage caps and other reforms seem to work in containing costs, but that hardly means that alternative reforms, yet untried, might not reduce costs more – not to mention reducing the time it takes to receive compensation from injury, weeding out bad suits, and reaching determinations on questions of negligence and causation more based on science than jury sympathy.

The Manhattan Institute has called for changing the way the legal system handles settlements and attorney fees – through early-offer systems and offer-of-judgment reforms – that would reduce the incidence of weak suits (and improve compensation for high-quality, low-value claims). Public health researchers at Harvard have echoed Covington & Burling's Philip Howard in arguing for specialized health courts that take medical malpractice out of the traditional civil courts altogether.

Thus, the president's call for demonstration projects that try new ideas is welcome. Unfortunately, the Pelosi bill is more geared toward protecting the trial bar's interests than in giving real alternatives a try. The bill authorizes funding for "early offer" reforms, but its restrictions on damage- and fee-limitations would preclude any workable early-offer ideas, including the Manhattan Institute's suggested reforms and alternative ideas developed by University of Virginia torts professor Jeffrey O'Connell. The bill has no provision to encourage health courts at all.

Instead, what the bill offers to fund are merely "certificate of merit" proposals, Section 2351(a)(4)(A). Although such proposals can help to weed out bad lawsuits – particularly if legislation calls for panels with robust authority to screen claims – in practice, certificate-of-merit reforms often amount to little more than requiring that a plaintiffs' lawyer obtain an affidavit from a doctor before proceeding to discovery. Since any decent med-mal claim requires expert witness testimony anyway, such reforms do very little indeed, which is why even plaintiffs' lawyer John Edwards embraced them as a presidential candidate.

Thus, the Pelosi healthcare bill essentially only funds "demonstration projects" likely to do little – and in the process creates a powerful fiscal incentive for state legislatures to *ignore* alternative reforms that might actually improve medical liability outcomes. As of this writing, the Senate bill was not yet passed, but its most current version contains no liability reform provision at all other than a toothless "sense of the Senate" provision. The trial bar could hardly have designed better bills for protecting its interests.

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