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MEDICAL TORT REFORM

*ATR's Comprehensive Guide to Federal & State Efforts
- as of July 2008 -*

"Our profession is good, if practiced in the spirit of it; it is damnable fraud and iniquity when it's true spirit is supplied by a spirit of mischief-making and money catching." – Daniel Webster, 1806

The current healthcare problem in the United States is largely due to the suppression of the free market. Noneconomic damage awards in medical malpractice cases have proven to be unpredictable and to bear little relationship to the practitioner's negligence. As a result, the cost of liability insurance is not proportional to the actual risk of the practice being insured. Instead, that risk is artificially inflated through the threat of frivolous litigation, driving prices up.

Tort reform at the state level has proven to be an effective tool in proportioning premiums to risk, thus restoring the free market cost of medical care.

At the federal level, the Medical Justice Act, H.R. 3509, is modeled after successful state legislation and seeks to implement tort reform at the national level.

Support for this legislation is essential to the conservative cause. As anti-market liberals pursue more government spending in the form of "universal coverage," Conservatives need to offer a solution to healthcare consistent with principles of limited government and fiscal responsibility.

Americans for Tax Reform comprehensive medical tort reform and believes it will help achieves the aforementioned goal.

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What is “Medical Tort Reform”?

Tort reform may be described as an effort to reign in noneconomic damages to a level which deters wrongful behavior without detriment to the economy. Multi-million dollar jury awards have become common in medical negligence cases, resulting in a ripple effect which has driven up the cost of healthcare at a rate twice that of inflation.¹ Proponents of tort reform believe a rogue judicial system has suppressed the free market principles which would normally keep such costs in check. ATR believes the solution should consist of legislation designed to maximize the impact of these principles.

Why is Comprehensive Medical Tort Reform Necessary?

The United States currently spends 4.3 times more on healthcare than on national defense.² Medical spending as a percentage of GDP grew from 8.8% in 1980 to 15.2% in 2003. By 2016, this figure is projected to be well over 20%.³ Such growing costs represent a threat to economic growth. Funds which could be spent to create new jobs, invest in capital expansion, issue dividends, purchase consumer goods, or save for retirement are instead rerouted to a healthcare system overrun with price inflation.

The average liability judgment in medical negligence cases increased by 234% between 1996 and 2002, and the trend continues.⁴ These costs are shouldered initially by insurers, who in turn raise their premiums for malpractice insurance. Healthcare providers are then forced to raise fees to cover the increased expense. While it is no doubt true that large punitive awards are not the only source of this problem, they are a root cause which can be alleviated through fairly simple legislation.

In addition to the economic harms, the threat of grossly disproportionate verdicts has also reduced the level and availability of healthcare in the United States. In many areas, lawsuits have rendered liability insurance either unaffordable or unattainable.⁵ The result is physicians who refuse to perform certain procedures for risk of suit and large groups of consumers who are artificially priced out of the insurance market.

110th Congressional Efforts at Medical Tort Reform

Rep. Michael Burgess (R-Tex.) recently introduced the Medical Justice Act of 2007 (H.R. 3509).⁶ This bill aims to establish tort reform at the national level.

The Medical Justice Act calls for a \$250,000 cap on noneconomic damages assessed against healthcare practitioners, a \$500,000 cap on noneconomic damages assessed

against healthcare institutions, and a \$1,400,000 cap on total damages. Furthermore, these figures are to be adjusted annually in proportion to the consumer price index, preventing inflation from eating away at the value of awards.⁷

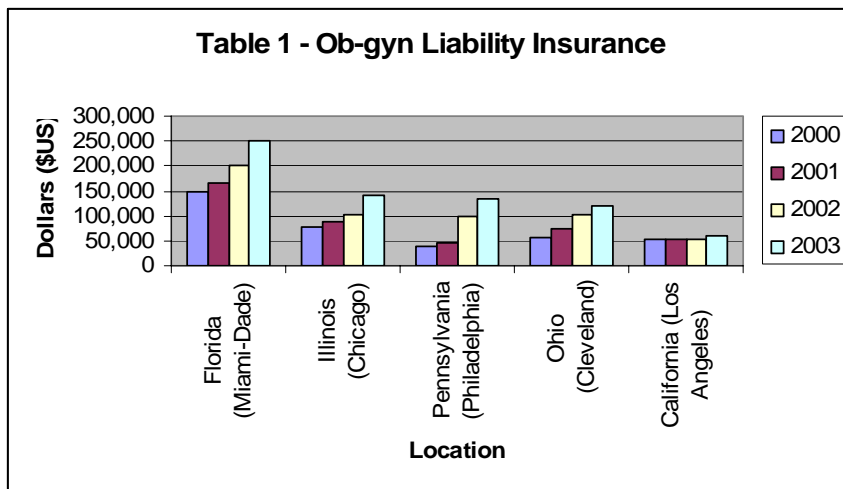
Similar legislation has been successful at the state level, and several factors indicate its nationwide adoption would be even more efficacious. Insurance companies are typically multistate corporations. Because of this, losses incurred in one state may be spread across other states and hidden in the base price of the policy. By applying a national cap to noneconomic damages, this effect should virtually disappear over time. Forum shopping will also be rendered obsolete, putting an end to the “judicial hellholes” capable of driving prices up nationwide.⁸

State Efforts at Medical Tort Reform

Esteemed Supreme Court Justice Louis D. Brandeis viewed the states as the laboratories of policy experimentation.⁹ In formulating national tort legislation, it is then prudent to analyze successes and failures at the state level.

California

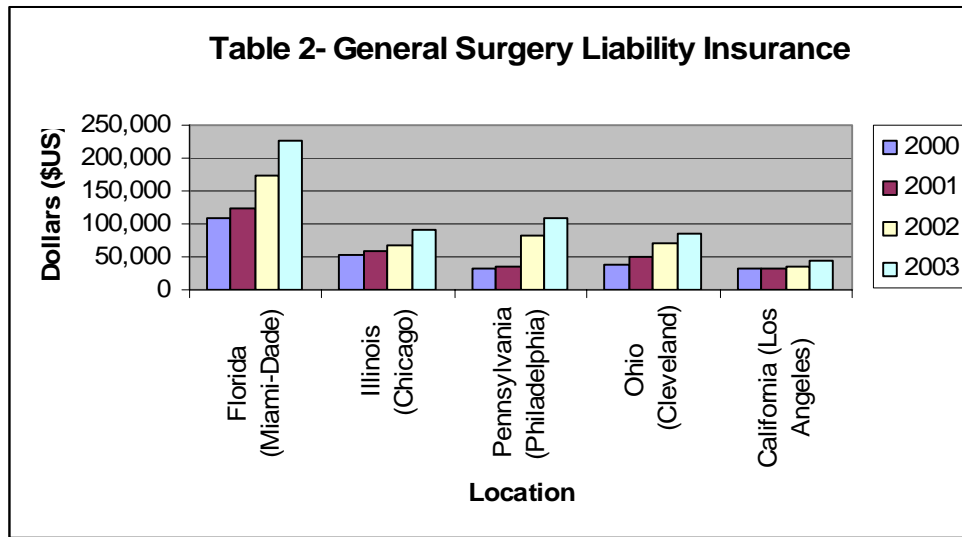
Despite having larger overall monetary tort losses than any other state,¹⁰ California has managed to keep the rise of medical liability insurance premiums well below the average of similar markets.¹¹ This has been accomplished through the Medical Injury Compensation Reform Act (MICRA). MICRA prescribes, among other things, a \$250,000 cap on noneconomic damages in medical negligence cases.¹² This limit essentially removes the threat of a massively disproportionate punitive award from actuarial calculations, with market forces in turn lowering premiums. The same forces then pass the savings on to consumers.



Since the introduction of MICRA in 1975, malpractice premiums in California have grown more slowly than in the rest of the country (167% v. 505%),¹³ indicating a direct correlation between the legislation and

lower healthcare costs. The success of MICRA has been so incontrovertible that people as varied as Pres. George W. Bush and Sen. Dianne Feinstein have advocated its adoption at the national level.¹⁴

Table 1 and 2 illustrate the efficacy of MICRA in slowing the rise of liability premiums compared to similar markets without such legislation.¹⁵



Florida

Florida was one of twelve states named as a “disaster area” by the American Medical Association in 2002.¹⁶ Absent tort reform, the State’s malpractice premium per doctor was 55% higher than the national average. The number of insurance companies willing to underwrite policies went from a high of sixty-six to twelve, with only four of the latter writing general policies.¹⁷ Practitioners unable to obtain or afford coverage either retired early or left the state. Consumers were left with fewer doctors and bank-breaking costs. In response, the Florida Legislature passed a bill in 2003 capping noneconomic damages at \$500,000.¹⁸ Data compiled since the passage of the bill indicates the cap is too high to have any real effect on insurance rates. Medical liability premiums in Florida were the highest nationwide in 2007, with general surgeons paying as much as \$275,000 a year for coverage. Conversely, states which imposed a \$250,000 cap saw significant results during the same time period.¹⁹

Texas

The Texas Legislature passed a tort reform package in 2003 which, like MICRA, caps noneconomic damages against doctors at \$250,000.²⁰ The result has been a dramatic decrease in the number of lawsuits filed. The San Antonio, Fort Worth, Dallas, and Houston areas saw medical malpractice claims decrease by nearly 50% within two years. Practitioners currently pay premiums 24.9% lower than they did before the passage of tort reform.²¹

It is important to note the Texas legislation does not close the courthouse door to plaintiffs with meritorious claims. The tools for litigation remain in place, as evidenced by the potential for high economic damage awards. In Texas, tort reform has simply achieved its goal of lowering costs through the discouragement of frivolous lawsuits.

Mississippi

Mississippi, like Florida, was one of the twelve states listed as a “disaster area” by the American Medical Association in 2002.²² Major insurance providers had either closed shop, refused coverage, or significantly raised rates in the State as a result of disproportionate and unpredictable damage awards. Mississippi became known as “lawsuit central, the place where jackpot justice prevails.”²³ In response, the Legislature passed tort reform legislation in 2002. The bill caps noneconomic damages in medical malpractice cases at \$500,000, places limits on joint and several liability, and requires that attorneys consult with a qualified expert before filing suit.²⁴ This cap increases to \$750,000 in 2011 and \$1,000,000 in 2017.²⁵

Unfortunately, the above measures have done little to help Mississippi’s healthcare problems. Few malpractice insurers have been willing to write new policies, resulting in an expensive and increasingly unavailable level of care.²⁶ Like in Florida, the cap is simply too high to have the desired effect.

If the states are the laboratories of policy, as Justice Brandeis said, tort reform has been an effective experiment. Caps on noneconomic damages have proven to be a dynamic tool in controlling healthcare costs when applied in prudent amounts.

Discounting the Opposition

The trial bar often seeks to prevent tort reform based on the notion that such measures infringe upon the plaintiff’s right to recovery. Such arguments are specious. The aim of tort reform is primarily to restrain noneconomic damages, which serve more to punish defendants than to compensate plaintiffs. The potential for economic damages remains high under the proposed legislation, preserving both the plaintiff’s right to recovery and the physician’s right to practice.

Some have argued against federal tort reform legislation on the grounds that it preempts state law. While this is true to an extent, and state’s rights have no doubt been trampled upon in the past, preemption in this case is in accord with our federalism. In a string of recent cases, the Supreme Court has found excessive verdicts violate both the procedural and substantive due process safeguards of the Fourteenth Amendment.²⁷ It is sensible that an extreme punitive award grounded more in emotional appeal than fact robs the defendant of property without due process of law. A cap on damages, adjusted for inflation, simply establishes a constitutional benchmark for state tort systems.

Why Tort Reform is Essential to the Conservative Cause

“The wildly expanding cost [of healthcare] is unsustainable. Likewise, it is an international embarrassment to spend so much and yet perform so poorly on basic health scores. Everyone agrees that something has to be done, but the real question is what?”²⁸

An estimated 47 million Americans (roughly 16% of the population), lack health insurance.²⁹ Many more are frustrated by the rising cost of healthcare and view the current system as broken. The Democrat plan for universal healthcare, defeated in 1993, is once again gaining steam and will be a central campaign issue in the 2008 election. If it is successful, the tax consequences and overall economic impact will be disastrous.

Conservatives have a unique opportunity to showcase how free market principles, and not big government, are the solution to this problem. Tort reform allows these principles to flourish by removing the price inflation associated with large and disproportionate punitive damage awards. Competition then forces prices down and quality up over time.

Universal healthcare has the opposite effect. It is a central tenet of economics that, if something is free, people will consume more of it. The European systems indicate this is true of medical services. The result is overconsumption and soaring prices.³⁰

Despite advocating plans which bear a striking resemblance to the European model, Senators Hillary Clinton and Barack Obama illogically conclude that a universal system will save money. The current Medicare debacle is an illustrative microcosm of why such arguments fail. Medicare recipients pay almost nothing out of pocket for healthcare. As such, they have little incentive to avoid unnecessary expenses or find the best deal for their dollar. The result has been overconsumption, with the establishment responding by trying to force seniors into managed care to save costs. Access to treatment is then limited, negating the concept of universal coverage and reflecting the notion of healthcare as a finite resource which must be consumed responsibly. Medicare is also insolvent, spending more than it takes in, and is expected to run out of money before 2018. At that point, taxes will probably be raised to cover the shortfall. It makes little sense to assume that government can responsibly manage on a large scale what it has failed to keep solvent on a comparatively small scale.³¹

The same market forces which keep prices in check also keep innovation alive. When the profit motive is suppressed, as it would no doubt be in a universal system, companies are more apt to keep the status quo or reduce care rather than invest large sums at a diminished return. Consumers eventually end up with fewer choices and less progressive methods of care.

Tort reform legislation allows conservatives to address the healthcare problem, and the large constituency which it affects, in a manner consistent with principles of limited government and fiscal responsibility.

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