



The Association of the Bar of the City of New York

Tort Litigation Committee

CHAIR
JEROME I. KATZ
80 PINE ST.
NEW YORK, NY
10005
(212) 943-1090
jik@gairgair.com

REPORT OPPOSING H.R. 534/S.354 – MEDICAL MALPRACTICE LEGISLATION

The Tort Litigation Committee of the Association of the Bar of the City of New York, a committee composed of both plaintiff and defense attorneys as well as active members of the judiciary, opposes the proposed federal medical malpractice reform legislation H.R.534/S.354.

Introduction

President Bush has made "tort reform" a top priority of his second term. His Administration has raised the concern that the country is in a healthcare crisis, and that as a result of medical malpractice lawsuits and payouts to victims, doctors' premiums have skyrocketed, causing doctors to leave the profession and leaving communities and patients underserved.

The proposed solution will impose, among other limits, an artificial cap on non-economic damages recoverable in medical malpractice actions. Because this legislation will deny thousands of victims of medical negligence, especially women, children, the elderly and low-income people reasonable and necessary compensation; and will enact sweeping preemption of state laws in areas of local responsibility that have been subject to state autonomy for over two hundred years while doing nothing to cap insurance premiums or reduce the high incidence of serious medical errors, which is the root problem, we urge Congress not to enact this legislation.

Non-economic damages cap, other provisions deter court access

A factual, dispassionate examination of the provisions of the proposed medical malpractice reform bill demonstrates a decided tilt in favor of defendant doctors and business operators. The centerpiece of the bill is a compulsory cap on non-economic "pain and suffering" damages in the amount of \$250,000 regardless of the seriousness of the injury or the number of parties against whom action is brought. The proposed federal bill adopts the 1975 MICRA cap, unadjusted for inflation. According to the Rand Institute, if California's cap had been adjusted for inflation, it would have been pegged at \$774,000, in 1999.¹ Other provisions include:

¹ Nicholas M. Pace, Daniela Golinelli & Laura Zakaras, *Capping Non-Economic Awards in Medical Malpractice Trials: California Jury Verdicts Under MICRA*, 2004 RAND INST. FOR CIVIL JUSTICE.

- * statute of limitations reductions, thereby limiting the time injured patients and families have to file claims, and cutting off claims for diseases with long incubation periods, such as HIV;

- * preemption of state laws protecting patients and families while allowing states to keep in their laws that benefit doctors, hospitals, nursing homes, HMOs, drug companies and the makers and sellers of medical devices;

- * restrictions on bringing product liability actions against manufacturers of drugs and medical products, where their products have been approved by the FDA, as well as against HMOs, even though suits against such corporate entities have not been implicated as causes of the malpractice crisis and defective drugs and medical device, albeit FDA approved, have been shown to cause serious harm and death to patients and consumers;

- * elimination of joint and several liability, abandoning the longstanding determination of our civil justice system that as between an injured plaintiff and multiple defendants, it is the injured patient who deserves the greatest measure of protection;

- * introduction into evidence at trial of plaintiff's "collateral source" benefits (e.g., health insurance), while continuing to bar juries from learning of a defendant doctor's insurance coverage;

- * periodic payment of future damages over \$50,000 allowing insurers to receive interest benefits on plaintiff's unpaid jury awards;

- * restrictions on contingent fees, giving the court power to restrict plaintiff's attorney fees regardless of whether recovery is by judgment, settlement or any form of counsel can receive;

- * requirement that medical provider and medical products suits be brought separately, allowing defendants to implicate persons or entities who are not parties to the instant action; and

- * heightened pleading standards for punitive damages and limitation on the amount of recoverable punitive damages to \$250,000 or twice the amount of economic damages awarded, whichever is greater, making punitive damages virtually unrecoverable.

The compulsory cap on non-economic damages will hurt patients with the most serious injuries, and those with low or no income. Non-economic damages compensate patients for real injuries such as paralysis, loss of a limb, loss of sight, severe brain injury, disfigurement, permanent infertility and excruciating pain. They also compensate for the loss of a child or a spouse. These are injuries which juries are capable of fairly calculating. Caps on damages and limitations on contingency fees will make it difficult for patients other than the more

economically privileged to underwrite costly medical malpractice claims. By correlating harm to economic loss, juries and courts will be permitted to grant higher payouts in cases involving wealthy citizens. The effect will be to permit persons with higher economic losses to collect more in damages than persons with lower economic losses, namely lower and minimum wage earners who are disproportionately ethnic minorities and people of color, at home mothers, the young and the retired. Such a limitation on recovery will effectively leave these victims without adequate redress in the Courts for even the most serious injuries and egregious acts of medical malpractice.

Where permanently and catastrophically injured patients are left without compensation to finances the costs associated with their injuries, the government will inevitably be left to pay the bill with taxpayers' money.

Legislation aimed at meritorious suits

Caps on non-economic damages will have little to do with curtailing so called frivolous lawsuits while targeting meritorious actions, which most affect premiums. In New York, as in some other jurisdictions, the laws already provide for penalties for litigants and their lawyers who press plainly baseless claims in court. New York law also requires that before commencing a malpractice action, the attorney certify that she has conferred with a medical specialist who supports the case. Even in the absence of "sanctions," which in fact are rarely imposed, the price of bringing a meritless action is staggering. Even if by some fluke a baseless suit is settled or prevails, overall the economics of our system strongly militate against the commencement of the "frivolous" actions.

Caps do not lower malpractice premiums

To the extent that malpractice premiums may have risen, there is undoubtedly more than one factor contributing to that trend. The insurance industry points to escalating judgments and settlements as the reason for hikes, but the statistics do not bear out this argument. According to the National Practitioners Data Bank, a government service which tracks medical malpractice claims, settlements and verdicts, the number of claims has been flat since 1996 and the average payout has increased marginally from a median payout for a medical claim rising from \$100,000 in 1997 to \$135,000 in 2001.² In January 2005 President Bush selected Madison and St. Clair counties in Illinois, "judicial hellholes" of skyrocketing premiums, bankrupted hospitals and fleeing specialists leaving the state because of runaway jury awards in frivolous suits, in which to campaign for tort reform.³ The facts show that of 720 medical malpractice and wrongful death lawsuits filed in Madison and St. Clair countries between 1996 and 2003, only 14 (1.9%) resulted in jury verdicts.⁴ Six of the verdicts favored

² Nat'l Practitioners Data Bank, Dep't of Health and Human Servs., 1990-2002.

³ Tommy Denton, *So Much for Facts on Tort Reform*, ROANOKE TIMES & WORLD NEWS, Jan. 9, 2005, available at <http://www.global.factiva.com>.

⁴ *Id.*

the plaintiffs.⁵ Only one lawsuit in Madison County in the last seven years resulted in a verdict that would have qualified for the \$250,000 cap on non-economic damages proposed.⁶ The total dollar value of insurance payouts declined 20.7% in Madison County between 2002 and 2003.⁷ In St. Clair County, for the same period the decline was 26.5 %.⁸ Nor have hospitals closed their doors or been forced to abandon long-planned upgrading.⁹ On the other hand, according to the results of a Harvard study disclosed last month, 50% of all personal bankruptcies in the U.S. are caused by illness and health care bills.¹⁰

The fact is medical malpractice rates have historically had less to do with payouts to settle malpractice claims and more to do with the insurance companies' indemnity practices, and success or failure in investing idle funds. In spite of a national slow down in the growth of claims, insurers have benefited from increasing medical malpractice premiums.¹¹ And premiums have not risen more slowly in states that have imposed caps on pain and suffering awards. During the 10 years following the California legislature's imposition of a \$250,000 cap on non-economic damages in 1975, the model for present federal reform legislation, California's medical liability insurance rate increases were the same as the national average and had increased sharply since the passage of the Medical Injury Compensation Reform Act.¹² It was only after California voters passed Proposition 103 in 1988 that insurance rates in California began to decline compared with other parts of the country. Proposition 103 instituted the insurance reforms that required insurers to open their books and justify rate increases.¹³

As of 2002 the National Association of Insurance Commissioners data show that California insurers have profited greatly from caps on patients' pain and suffering. Every year since 1989 California malpractice insurers have paid out in claims less than fifty cents of every dollar they have taken in through premiums.¹⁴

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ David U. Himmelstein, Elizabeth Warren, Deborah Thorne & Steffie Woolhandler, *MarketWatch: Illness And Injury As Contributors To Bankruptcy*, 2005 HARVARD UNIV. LAW SCH. AND HARVARD UNIV. MED. SCH.

¹¹ Cong. Budget Office Report, 1992.

¹² *Medical Malpractice: Six State Case Studies Show Claims and Insurance Costs Still Rise Despite Reforms*, U.S. Gen. Accounting Office, December 1986.

¹³ Harvey Rosenfield, *California's MICRA: Profile of A Failed Experiment in Tort Law Restrictions*, June 1993.

¹⁴ *Consumer Advocate Testifies CA Limits For Malpractice Victims Failed; Malpractice Insurers Paid Out Less Than 50% of Premiums to Victims*, The Foundation for Taxpayers & Consumer Rights, (2002), at <http://www.consumerwatchdog.org/healthcare/pr/pr002549.php3>.

By contrast, malpractice insurers nationally have typically paid out in claims more than two-thirds of every premium dollar.¹⁵ California malpractice insurers' "operating profits" have been higher than the rest of the nation since the restrictions were implemented, even though many insurers claim to be "not for profit."¹⁶ In 2000, the average premium per doctor in California was only eight percent below the national average and the average malpractice premium in California between 1991 and 2000 actually grew more quickly (3.5%), than it did nationally (1.9%).¹⁷

In August 2002, Nevada passed caps on damages and within days the two major insurance companies in that state announced they had no intention of reducing rates.¹⁸ In Mississippi, during the summer of 2002, doctors were told they would face a 45% increase in liability premiums regardless of whether damage restrictions were enacted.¹⁹ Six months after Texas lawmakers passed a \$250,000 cap on compensation for non-economic damages, the nation's largest medical malpractice insurer, GE Medical Protective, attempted to raise premiums 19% claiming that non-economic damage awards are a nominal part of the crisis and would create loss savings of one percent, noting also in its filing to the Texas Department of Insurance that the Texas law provision allowing for period payments of awards would provide a savings of only 1.1%.²⁰ As further evidence that lawsuit limits such as caps will not result in affordable insurance for doctors, it is worth noting that in 2003 Farmers Insurance Group pulled out of five states, including California, that have had caps and other tort reforms in place for years, even decades.²¹

A 2004 report examining trends in medical malpractice insurance over the past 30 years found that the amount medical malpractice insurers have paid out, including all jury awards and settlements, directly tracks the rate of medical inflation.²² On the other hand, medical insurance premiums charged by insurance

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Joelle Babula, *Medical Liability Company Requests Premium Increase*, Las Vegas Review-Journal, Feb. 11, 2003; Babula, *State Insurance Program Holds Off on Lowering Rates*, Las Vegas Review-Journal, Aug. 14, 2002.

¹⁹ *Miss. Tort Reform Effort Falls Short*, Commercial Appeal, Feb. 18, 2003; Reed Branson, *Doctors In Oxford Shut, Cite Insurance*, Commercial Appeal, Feb. 14, 2003; Ben Bryant, *Tort Reform Has Done Little to Ease Malpractice Crisis*, Biloxi Sun Herald, Feb. 2, 2003.

²⁰ *Nation's Largest Medical Malpractice Insurer Declares Caps on Damages Don't Work, Raises Docs' Premiums*, The Foundation for Taxpayers & Consumer Rights, (2004), at <http://www.consumerwatchdog.org/insurance/pr/pr004698.php3>

²¹ Peter Neurath, *Hospitals Lose Provider of Malpractice Coverage*, Puget Sound Business Journal, Dec. 26, 2003; see also *News and Notes*, Illinois Trial Lawyers Association, at http://www.itla.com/2003_VESTED/nov_2003_news.htm.

²² *Medical Malpractice Insurance: Stable Losses/Unstable Rates 2004*, 2004 AMS. FOR INS. REFORM.

companies have not corresponded to increases or decreases in payouts.²³ Rather, they have risen and fallen in synch with the state of the economy, reflecting gains and losses experienced by the insurance industry's market investments.²⁴ The year 2003 saw no explosion in medical malpractice insurer payouts or costs to justify skyrocketing rate hikes.²⁵ In fact, rather than exploding, inflation-adjusted payouts per doctor have dropped for the last two years.²⁶ Further, medical malpractice premiums rose faster in 2003 than was justified by insurance payouts.²⁷ Several other studies have similarly rejected the notion that enactment of caps on damages will lower insurance rates. A Weiss Ratings study analyzing this issue found that between 1991 and 2002, states with caps on non-economic damage awards saw median doctors' malpractice insurance premiums rise 48 percent – a greater increase than in states without caps.²⁸ In states without caps, median premiums increased only 36 percent.²⁹

Assuming for the moment that malpractice premiums were reduced and stabilized by legislating artificial limits on non-economic damages, it is unlikely that there would be any impact on healthcare spending. The Congressional Budget Office (CBO) has reported that even large savings in premiums would not lower private or government health care spending because malpractice insurance accounts for less than two percent of overall healthcare spending, and the percentage is falling because insurance rates have been increasing at less than half the rate of increase in health costs.³⁰ CBO went on to state that limiting medical malpractice liability would "undermine incentives for safety" while making it "harder for some patients with legitimate but difficult claims to find legal representation."³¹

Presuming that our legislators earnestly desire a reduction in malpractice premiums for the public good, and think caps are the best way to do so, one would

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Weiss Ratings, *Medical Malpractice Caps Fail to Prevent Premium Increases*, at http://weissratings.com/News/Ins_General/20030602pc.htm; <http://www.weissratings.com/malpractice.asp>

²⁹ *Id.*; see also Katherine Baicker & Amitabh Chandra, NATIONAL BUREAU OF ECONOMIC RESEARCH, *The Effect of Malpractice Liability on the Delivery of Health Care* 14, 20 (Aug. 2004)(indicating that there seems to be a fairly weak relationship between malpractice payments (for judgments and settlements) and premiums – both overall and by specialty; premium growth may be affected by many factors beyond increases in payments, such as industry competition and the insurance underwriting cycle).

³⁰ David Morris, *Malpractice Suits Aren't What Needs Fixing Here*, Minneapolis Star Tribune, at <http://www.ilsr.org/columns/2005/011005.html> (Jan. 10, 2005).

³¹ *Id.*

expect that bills under consideration would provide for reduction in premiums once the effect of the caps are adequately realized. But they do not. On plain reading, the bills do nothing for the public at all. They set arbitrary limits on the amount medical malpractice victims can recover, and make no provision as to what the insurance company must do with the windfall. And as for market forces creating adjustments, studies of past medical malpractice "crises" demonstrated no correlation between "tort reform" and lower insurance rates.

Real crisis is incidence of medical errors

Up to 100,000 people die every year from preventable medical errors, making medical malpractice the eighth leading cause of death in the United States.³² 100,000 Americans die every year from infections they received in a hospital.³³ Put another way: one in every 200 patients admitted to the hospital dies in the hospital as a result of avoidable medical error or hospital mistake.³⁴ One in three people reports that they or a family member has experienced a medical error, with one in five stating it was "serious."³⁵ Yet, it is estimated that twelve percent (12%) or less of patients who suffer serious injury or death as a result of medical malpractice ever file a lawsuit.³⁶ Proponents of reform claim that those who don't sue make that choice because they are not badly hurt, or are not litigious, or fear disrupting ongoing doctor relations.³⁷ Of those who do bring suit, the vast percentage settle out of court, usually with confidentiality requirements.³⁸ Ninety percent of the cases which end up before a judge and jury are for claims of death (33%) and permanent injury (57%).³⁹ Of those, only 27%

³² TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM (Linda T. Kohn, Janet M. Corrigan, and Molla S. Donaldson, eds., National Academies Press 1999) *available at* <http://www.nap.edu/catalog/9728.html>

³³ Michael J. Berens, *Infection Epidemic Carves Deadly Path; Poor Hygiene, Overwhelmed Workers Contribute to Thousands of Deaths*, Series: Tribune Investigation: Unhealthy Hospitals, Chi. Tribune, *available at* <http://www.global.factiva.com> (July 21, 2002).

³⁴ David M. Studdert, LLB, ScD, MPH, Eric J. Thomas, MD, MPH, Helen R. Burstin, MD, MPH, Brett I.W. Zbar, BA, E. John Orav, PhD, & Troyen A. Brennan, MD, JD, MPH, *Negligent Care and Malpractice Claiming Behavior in Utah and Colorado*, 38 MEDICAL CARE: OFFICIAL J. OF THE MED. CARE SECTION, AM. PUB. HEALTH ASS'N. 250 (2000).

³⁵ *Five Years After IOM Report on Medical Errors, Nearly Half of All Consumers Worry About the Safety of Their Health Care*, Kaiser Family Foundation, (2004) *at* <http://www.kff.org/kaiserpolls/pomr111704nr.cfm>.

³⁶ Studdert, et. al., *supra* note 34.

³⁷ *Liability For Medical Malpractice: Issues and Evidence-A Joint Economic Study*, 2003 Joint Econ. Comm. U. S. Cong.

³⁸ *Medical Malpractice Trials and Verdicts in Large Counties*, U.S. Dep't. of Justice, Bureau of Justice Statistics, (2001) *at* <http://www.ojp.usdoj.gov/bjs/abstract/mmtv1c01.htm>.

³⁹ *Id.*

result in jury verdicts in favor of plaintiffs.⁴⁰ According to the Congressional Budget Office, lawsuits remain one of the smallest factors driving rising health costs, at less than one percent of total health care spending.⁴¹

Monitor, discipline, retrain negligent doctors

Strikingly, only a tiny fraction of doctors account for the majority of malpractice awards. Yet, only one in six doctors who have had five or more malpractice payouts have been disciplined.⁴² In New York State, seven percent of physicians are responsible for two-thirds of all medical malpractice payouts.⁴³ Nationally, five percent of the doctors in the United States are responsible for a staggering 54% of all malpractice payouts.⁴⁴ According to Public Citizen, New York could cut malpractice cases by one-third by stopping doctors who make more than three malpractice payments from harming any more patients.⁴⁵

It is axiomatic that the best way to reduce the direct and indirect costs of medical malpractice is to prevent unnecessary injuries, which has been estimated to cost to the economy \$29 billion every year in excess medical expenses and lost productivity.⁴⁶

Conclusion

In the words of Frank Cornelius, a former lobbyist for the insurance industry, self proclaimed "pioneer" in the reform of medical malpractice laws in his state of Indiana, and eventual victim of serious medical malpractice and the caps he helped create:

Doctors and insurers have spent millions propagating the myth that America is awash in unjustified medical malpractice and crazy jury verdicts...the prospect that these [federal tort] reforms will be enacted is frightening... they remove the only effective deterrent to negligent medical care[.]⁴⁷

It is the Committee's opinion that to support H.R.534/S.354 would be to buy in to that myth at the expense of the public interest. Congress should reject this

⁴⁰ *Id.*

⁴¹ Cong. Budget Office, *supra* note 11.

⁴² *See Morris, supra* note 30.

⁴³ *See The Foundation for Taxpayers & Consumer Rights, supra* note 14.

⁴⁴ *Id.*

⁴⁵ *New York's Dangerous and Undisciplined Doctors*, Pub. Citizen, March 2003.

⁴⁶ *See Kohn, et.al, supra* note 32.

⁴⁷ Frank Cornelius, *Crushed by My Own Reform*, N.Y. Times, Oct. 7, 1994, (Op-ed page).

legislation and support initiatives aimed at solving the malpractice problem by actually cutting down on malpractice, identifying harmed patients and providing them prompt and fair compensation.

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