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## **Medical Liability Reform: A National Problem In Need of a Federal Solution**

In many states, patient-friendly legislatures and Governors have been able to stand up to the personal injury lobby, protecting patients in the wake of a deteriorating liability climate that fails those who need help the most. Unfortunately, not every state has been so lucky – leaving patients to foot the personal injury lawyers' bill.

The absence of medical liability reform has increased health care costs and reduced access to care, and the federal government, within the confines of the Constitution, has a responsibility for making changes to our broken liability system. Don't be fooled by the personal injury lawyers and their political allies looking to convince lawmakers otherwise.

### ***History of Support for Federal Medical Liability Reform***

Since the 1970s, lawmakers have understood that the absence of medical liability reform puts physicians and patients in critical condition. While states have taken action on their own, reforms at the federal level would ensure that patients across the country are equally protected.

- In 1986, President Ronald Reagan made it a point to focus on remedies to fix a broken liability system, and established a special task force to study the need for reform. The Tort Policy Working Group consisted of representatives of ten Reagan Administration agencies and the White House.
- The final report of that task force concluded as follows: *“In sum, tort law appears to be a major cause of the insurance availability/affordability crisis which the federal government can and should address in a variety of sensible and appropriate ways.”*<sup>1</sup>
- The Reagan task force specifically recommended that federal medical liability reform should:
  - Eliminate joint and several liability;
  - Provide for periodic payments of future economic damages;
  - Schedule [limit] contingency fees of attorneys;
  - Limit non-economic damages to a fair and reasonable amount.
- Since 1995, the House has passed comprehensive medical liability reform legislation *twelve* times, most recently in 2005. The personal injury lawyer lobby successfully prevented medical liability reform from coming to the House floor from 2006-2010.

### ***Medical Liability Reform is Constitutional***

Small government advocates can look to the Constitution and our Founding Fathers for guidance on the constitutionality of federal medical liability reform efforts:

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<sup>1</sup> “Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability,” February 1986.

- Fixing a broken medical liability system at the federal level falls under the Constitution's Commerce Clause.
- Founding Father James Madison predicted at the time that in the future, states would see the rise of new forms of rules and regulations – unforeseen at the time of our nation's founding – that would increase the costs of goods nationwide. Madison argued that Congress would need its Commerce Clause authority to counter those cost-increasing influences.
- The inability of certain states to enact medical liability laws has encouraged lawsuit abuses that increase the costs of health care delivery and services that cross jurisdictions.
- A broken medical liability system forces doctors out of the practice of medicine in highly litigious states, leaving patients without the care they need when they need it. This is true across multiple states. In this case, Congress *can and should* enact reform at the federal level to preserve federalism principles.
- A non-partisan report by the Congressional Research Service found that, "*Congress has the authority to enact tort reform legislation generally, under its power to regulate interstate commerce, and to make such legislation applicable to intrastate torts, because tort suits generally affect interstate commerce.*"<sup>2</sup>
- The CRS determination refers to reforms that have been widely implemented at the state level, including reasonable limits on non-economic damages, collateral source reform, and changes to joint and several liability clauses.

#### ***State Flexibility Included in H.R. 5, The HEALTH Act***

The Help, Efficient, Low-cost, Timely Healthcare (HEALTH) Act of 2011, H.R. 5, establishes a federal framework for medical liability reform to preserve patient access to quality medical care and help reduce health care costs for all Americans. H.R. 5 protects states' rights by preserving current and future liability reforms passed by individual states. In fact, Section 11 of H.R. 5, entitled "State Flexibility and Protection of States' Rights," was drafted specifically to ensure that the principle of federalism is maintained by ensuring:

- H.R. 5 only affects provisions of state law that directly address that same issues covered in the bill. Any aspect of a medical liability lawsuit that is not included in H.R. 5 (such as the standard of negligence or standard of proof to be applied, or any pre-trial requirements for filing suit) is left solely to the states' discretion.
- The reforms in H.R. 5 serve as a national framework, but in no way inhibit a state's ability to enact laws that take additional steps to end medical lawsuit abuse.
- The HEALTH Act states, "*No provision of this Act shall be construed to preempt...any State law (whether effective before, on, or after the date of the enactment of this Act) that specifies a particular monetary amount of compensatory or punitive damages (or the total amount of damages) that may be awarded in a health care lawsuit, regardless of whether or not such monetary amount is greater or lesser than is provided for under this Act...*" Thus, the bill leaves the states complete discretion regarding whether or not they apply the federal cap on noneconomic damages, or create their own caps at any other level and on any element of damages.

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<sup>2</sup> "Federal Tort Reform Legislation: Constitutionality and Summaries of Selected Statutes," *Congressional Research Service*, February 23, 2003.

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***In states across the country, patient access to care is threatened, and defensive medicine has become the new norm for physicians protecting themselves from meritless lawsuits. Medical liability reform is needed at the federal level to protect patients and control health care costs.***