HUFF POST POLITICS

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# Med Mal Caps Hurt Patients

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The U.S. House is set to consider on the Republicans' Jobs Through Growth Act, which contains a section aimed at reforming medical malpractice by imposing caps on economic and non-economic damages similar to those in place in Texas. Texas limits non-economic and exemplary (punitive) damages in all cases, and limits what relatives can get in cases of wrongful death. An obvious disturbing consequence is that caps reduce compensation to severely-injured individuals. Caps would hurt consumers in a second way -- lower damage awards would reduce medical professional liability insurers' financial incentives to reduce practice risk.

Much of the protection consumers have against irresponsible and negligent behavior on the part of health care providers hinges on oversight and incentives created by the medical professional liability insurance industry. A nationwide shift to caps could result in more cases of negligence and substandard care.

Support for caps comes from individuals who see the medical malpractice system as broken, largely based on anecdotal observations. Everyone seems to have heard a story of a high verdict to a plaintiff whose claim was not valid. Yet, careful studies suggest these cases are anomalies, and the court system generally works. While there are no statistics for the country as a whole, based on the existing evidence, we can say confidently that a good chunk of initial claims (likely more than three-quarters) do not move forward because no negligence was involved. The vast majority of cases that do move forward settle.

This means that court signals from earlier trials are clear. If court awards were random, one would expect many more cases to go to court as there would be an expectation of an award even where there was no negligence. Many cases go to court because plaintiffs think they have a case when they do not. We know this because plaintiffs rarely win; less than a quarter of all cases that go to court are resolved in favor of the plaintiff. At least one study found court findings of negligence lined up with assessments by impartial reviewing physicians.

Critics of the legal system point out that many cases of negligence are not reported or

adjudicated. However, every review has found claims are concentrated among a very small subset of physicians; less than five percent of physicians are responsible for the overwhelming share of claims. Even if a large percentage of negligent actions are not reported, it would seem that the present system works in identifying physicians whose practice patterns put patients at risk.

For the system to work to reduce practice risk, malpractice premiums must be experience rated -- physicians who exhibit risky behaviors must face higher malpractice insurance premiums than their less-risky peers. The conventional wisdom among health policy experts has been that experience rating does not occur. But this is not true: high-risk physicians pay up to 500% more for insurance than their less-risky peers.

Insurance companies specialize. Some only insure physicians with spotless records. Others, the surplus lines carriers, specialize in underwriting the highest-risk physicians -- at any given time between two and ten percent of practicing physicians. As one broker put it, because it is so costly, being forced into the surplus lines market gets a physician's attention and motivates efforts to reduce practice risk.

New procedures are often left to surplus lines carriers to underwrite, adding a layer of oversight to the introduction of new procedures such as Lasik eye surgery and laparoscopic gallbladder surgery. On rare occasions, carriers deny coverage, which precludes affiliation with most hospitals and health maintenance organizations -- which effectively means these really risky physicians are forced out of practice, which is exactly the desired result.

Beyond individual underwriting to identify at-risk physicians, the medical professional liability insurance industry makes significant contributions to risk reduction in other ways. Companies offer premium discounts to physicians who take risk management seminars. The Physicians Insurers Association of America's Data Sharing Project identifies risky practice patterns. High insurance premiums motivated anesthesiologists to evaluate the risk associated with their practice patterns. As a result, anesthesiology is much safer than it used to be. Some insurers visit physician offices to evaluate safety and risk.

In 1992, when Congress tried to "help" community and migrant health centers by taking on their malpractice risk, many of the health centers resisted, lamenting the loss of the risk-management services the private carriers supplied.

Under the current system, liability motivates these efforts to reduce risk. Reducing liability, as caps do, is rarely a good idea in any situation. Placing caps would reduce malpractice insurers' incentives to oversee physician practice patterns and reduce incentives to manage risk in our health care system, and make health care that much riskier for all of us.