

Virginia AG Ken Cuccinelli Promises Lawsuit Against Federal Tort Reform Laws

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In a Washington Post op-ed posted October 28, Virginia Attorney General Ken Cuccinelli promised to file suit in federal court against a federal tort reform bill should it become law. *"And if it were ever signed into law -- by a Republican or Democratic president -- I would file suit against it just as fast as I filed suit when the federal health-care bill was signed into law in March 2010 (15 minutes later)."*

Attorney General Cuccinelli strongly objected to S. 197, a bill sponsored in the U.S. Senate by eight Republicans, which would impose caps on awards in health care-related lawsuits and install a federal wage scale for contingent fee attorneys involved in such suits. The bill was slipped into a Senate Republican "jobs bill" in October by Republican leadership without the knowledge or approval of numerous Republican Senators, just to appease the AMA and other medical groups clamoring for special federal protection from civil liability. Attorney General Cuccinelli, a rising star in the conservative community for his lawsuit against ObamaCare and assertive defense of conservative legal positions, emphasized the constitutional right of each state to protect and run its local civil justice system:

"With Senate Bill 197 -- legislation that would have the federal government dictate how state judges are to try medical malpractice cases and cap what state courts may award -- several Republican senators have reminded us that federal impositions on states that run contrary to the U.S. Constitution and to the spirit of federalism have never been the sole prerogative of just Democrats. As a state attorney general struggling to hold back a flood of impositions by the Obama administration that violate federal law, the Constitution or both, it is disappointing to see so many Republicans making the same types of mistakes that President Obama and his allies have made..."

Senate Bill 197 takes an approach that implies "Washington knows best" while trampling states' authority and the 10th Amendment. The legislation is breathtakingly broad in its assumptions about federal power, particularly the same power to regulate commerce that lies at the heart of all the lawsuits (including Virginia's) against the individual mandate of the 2010 federal health-care law. I have little doubt that the senators who brought us S. 197 oppose the use of the commerce clause to compel individuals to buy health insurance. Yet they have no qualms about dictating to state court judges how they are to conduct trials in state lawsuits. How does this sort of constitutional disconnect happen?"

Attorney General Cuccinelli's promise to sue is the most forceful of a series of conservative and Tea Party-side condemnations of the Senate bill and of federal tort reform legislation in general. The libertarian Cato Institute recently announced that caps on medical malpractice lawsuit awards would endanger patients and wouldn't reduce health care costs. The attorney who wrote the Senate Republicans' court brief against ObamaCare, Carrie Severino, publicly urged Republicans to remove S. 197 from the jobs bill before introduction, but they ignored her. Professor Randy Barnett, one of the counsels arguing the key anti-ObamaCare lawsuit in federal court, accused S. 197 backers of being "FINOs" ("Federalists in Name Only"). In May, Professor Barnett accused House Republicans who backed a bill similar to S. 197 of being "fair-weather federalists." Six conservative legal experts, including two who regularly criticize trial lawyers, joined Professor Barnett at that time in characterizing bills to federalize medical malpractice lawsuits as an unconstitutional violation of states' rights. The non-partisan National Conference of State Legislators joined them in a letter to House Republicans against the House bill.

The AMA and its allies in the medical profession have pushed the federal tort reform bills, just as they have backed ObamaCare with its equally unconstitutional individual mandate. For 30 years, they've used their political muscle inside the Beltway, and millions of dollars in political contributions across America, as the way to persuade Congress, especially Republicans, to enact special immunity from civil liability, regardless of the constitutional implications. Republicans will have to ignore the medical profession's misshapen view of Washington as the center of political power in order to protect our constitutional rights. Attorney General Cuccinelli's forceful warning might be the nail in the coffin of the AMA's dreams.