MANAGED Care

Medical Malpractice Reform: A Fix for a Problem Long out of Fashion

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You may remember Y2K: anxiety that computers would crash, trains would stop running, and the electric grid would shut down. Turns out it was hype, and at 12:00:01 on Jan. 1, 2000, the world kept functioning.

Around that time, there was also what was called "the medical malpractice crisis," when doctors' malpractice premiums spiked and lawsuits were reaching an all-time high. That same year, a presidential task force called medical errors a "national problem of epidemic proportions." In late 1999, the Institute of Medicine came out with its *To Err is Human* report that said as many as 98,000 people die every year from otherwise preventable medical errors.

That was a long time ago, and state tort reforms have all but relegated the malpractice crisis to the history books. But there's good news for those of you into all things retro: The House of Representatives just voted to fix the malpractice crisis. In June, the House passed HR 1215, the "Protecting Access to Care Act of 2017," by a 222–197 margin, with 17 Republicans joining the majority of Democrats to vote against it.

What HR 1215 would do

The legislation would apply to any health care provided through federal programs or supported by federal subsidies. It would cap noneconomic damages like pain and suffering in malpractice cases at $250,000, limit lawyers' contingency fees, and allocate damages proportionately to all parties involved. That is, it would do those things if it became law, but it probably won't. "When a bill comes out of the House with a vote like that, it goes to Senate in a very weakened state," says Joanne Doroshow, who has followed the legislation as executive director of the Center for Justice and Democracy, a consumer rights organization founded by Doroshow, a former staff attorney for Ralph Nader. GOP opposition in the House has diminished any Senate incentive to take up the legislation, she says.

But if Y2K isn't retro enough for you, sponsor Richard Hudson, Republican of North Carolina, boasted in a press release that the legislation is modeled on "successful reforms implemented in California in 1976."

Break out the bicentennial garb!

Crisis? What crisis?

HR 1215 may be the classic example of a solution looking for a problem. At last count, 32 states have adopted some type of limits on medical malpractice claims. As those regulations have taken

hold in the past dozen years or so, the sheer number of medical malpractice claims has dropped off. “The malpractice reforms we have in place now across the county have been pretty effective,” says Paul Greve, executive vice president of the benefits consulting company Willis Towers Watson. “They’ve helped drive down the number of claims and suits.” But Greve also points out that the rising number of large verdicts and settlements in excess of a million dollars has caused concern and cut into insurer profits.

As Hudson’s bill crawled through the House, Public Citizen compiled a report on malpractice trends from 1991 to 2015 based on data from the National Practitioner Data Bank and the Bureau of Labor Statistics. When analyzing malpractice trends, there are two factors to look at: the total number of claims paid and the total value of claims paid. The total number of claims paid on behalf of physicians—Public Citizen’s data does not include hospital-paid claims—peaked at 16,529 in 2001. In 2015, the total number of claims paid had fallen to 9,043.

Value of medical malpractice payments on behalf of doctors, 1991 to 2015

Value of total payments adjusted by blend of medical services index and CPI (in billions of 2015 dollars)

With regard to the value of claims, the Public Citizen analysis showed that it also peaked in 2001 at $6.7 billion (in 2015 dollars).

However, inflation-adjusted payouts have inched up since 2011, and the proportion of payouts of $1 million or more has also crept up, from 7.7% in the 1992–1996 period to 8% between 2009 and 2014, according to a separate analysis of the practitioner data bank conducted by Allen Kachalia, MD, chief quality officer at Brigham and Women’s Hospital in Boston, and his colleagues. They reported their results earlier this year in *JAMA Internal Medicine.*

By many measures, malpractice premiums are also declining. For example, in 2014, total premiums were 20% lower than their 11-year peak in 2006, according to A.M. Best data. In 2015, medical liability premiums accounted for 0.29% of overall national health care costs, half of what it was in 2003, according to Public Citizen’s analysis.

Trends behind the trends

The decline in malpractice claims could be related to a host of factors, says Kachalia, including the effect of state-level tort reform, care getting safer, and some organizations taking a more proactive approach to resolving cases of injury so patients feel less of a need to sue.

Telemedicine may require tort reform at a national level says Michael C. Stinson of PIAA, the trade association for the medical liability insurance industry.

Greve says the response to the Great Recession is evidence that the public may have soured on suing. “The most dramatic proof to me is that, every time we’ve had an economic downturn in the past, we’ve seen civil litigation go up,” he says. “That did not happen in 2008.” Michael C. Stinson, vice president of government affairs and public policy for PIAA, the trade association for the medical liability industry, points to another factor: safer medicine. That’s probably a function of hospitals embracing safety protocols and things like checklists, he says. “Just being more aware of how to make health care better and safer for everyone involved has definitely had an impact,” he says.

Leave it to the states

Any time the federal government gets involved in anything that states have traditionally regulated, the question always comes up if the feds are overstepping their bounds. In 2012, when the House considered attaching federal malpractice legislation to another bill, the National Conference of State Legislatures opposed it.

States, not the federal government, should continue regulating medical malpractice, says Jeffrey Singer of the Cato Institute.

National medical malpractice legislation has long been a goal of many physician professional organizations. But there are dissenting voices in the medical community. One belongs to Jeffrey Singer, a general surgeon in Phoenix and a senior fellow at the libertarian Cato Institute. “I don’t think it’s constitutional unless we’re dealing with interstate issues, and most medical malpractice is intrastate civil tort law,” he says of HR 1215. “I just don’t think the federal government has a role to play.” Allowing federal involvement even when federal dollars are at stake, is a “slippery slope,” he says. “If we go down the road of allowing federal intrusion into areas that are constitutionally the province of the states based upon federal subsidies or funding, almost no program and no person can feel safe from federal intrusion.”

No one interviewed for this story sees a return to out-of-control malpractice premiums, even as trends tick up slightly. Stinson, at PIAA, says an argument can be made that as medical care delivery starts to cross state lines because of telemedicine, a national medical tort standard may take its place. “We think it’s important to have a uniform playing field across the country so that a physician based in Indiana doesn’t have to worry about, when they’re talking to a patient via Skype, whether or not that patient is in a state that has no reforms or has better reforms,” Stinson says.

But that probably won’t be enough to get the Senate to take it up.