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Commentary

Curbing Medical Malfeasance

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Should malpractice reform be included in the pending health care bill? An AP poll found that 54% of Americans favor reform, while only 32% are opposed. President Barack Obama says he's open to changes; but his Democratic colleagues won't defy their powerful trial-lawyer constituents. Republicans cite $54 billion in Medicaid and Medicare waste over 10 years from excessive tests designed to frustrate lawsuits.

None of the key players mention the two most important arguments against federal malpractice reforms. The first is that they are unnecessary: All 50 states have passed, or are considering, various reform proposals.

Take Missouri. Doctors and other businesses in the Midwestern state were closing their doors because of runaway lawsuits. Then a law was passed directing that cases be heard in the county where an alleged injury occurred; plaintiffs could no longer shop for friendly judges and juries. Missouri's malpractice claims are now at a 30-year low. Texas had similar success with its 2003 reforms. The number of doctors applying for licenses increased significantly, and insurance rates declined. In Pennsylvania, malpractice filings plummeted after certificate of merit requirements were adopted to weed out weak cases. Reforms in Mississippi have virtually eliminated what the Chamber of Commerce had characterized as "jackpot justice."

The second argument against federal malpractice reforms is that unlike state-based malpractice reforms, federal reforms are unconstitutional.

Under the Tenth Amendment, the national government may exercise only those powers enumerated in the Constitution. That means, no matter how worthwhile a goal may be--even if Congress thinks it has identified a major problem and knows for sure how to fix it--if there's no constitutional authority, the federal government must step aside and leave the matter to the states or private parties. Today, that proposition is moribund if not dead. The federal government immerses itself in matters ranging from public schools to welfare, retirement, family planning and even aid to the arts--none of which can be found among Congress' enumerated powers.

Much of that mischief is supposedly justified as a regulation of interstate commerce. But the purpose of the Commerce Clause was to bar states from restricting the sale of goods across state lines. Neither its text nor the framers' intent can reasonably be interpreted to authorize federal control over the rules of malpractice litigation involving a patient, doctor or injury within a single state.

An alternative theory is that malpractice reform is authorized because Congress can impose conditions on recipients of spending for Medicaid and Medicare. But the Supreme Court has invalidated such conditions unless they are clearly specified and reasonably related to the aim of the expenditure. In this instance, Congress has not linked the receipt of federal health funding to malpractice reform, or shown that the anti-poverty goals of Medicaid and Medicare depend on such reforms. Furthermore, the proposed rules would extend to all malpractice lawsuits--including those in which federal funding plays no role.

Of course, the states can do more. Most important, states must distinguish between tort law and contract law. Tort law should be limited to resolving disputes over injuries between strangers--that is, people who had no opportunity to negotiate in advance. For example, negligent drivers and pedestrians do not meet before an accident to discuss who would pay under what circumstances.

Contract law is different. It is designed for transactions between people who have an opportunity to decide, before an injury occurs, on the terms that govern their relationship. Contracts can specify who bears how much risk and what will be done in the event of unexpected occurrences. Doctors and patients can agree up front on the definition of and remedies for negligence. Typically, if a patient bears more risk, the price of the medical procedure is reduced.

States must honor those contractual deals. The same principle applies if patients and doctors agree to arbitration for resolving

damage claims. Often, doctors will want to avoid the risk of a runaway jury and the costs of a lawsuit by requiring arbitration if something goes wrong. In return, the doctor will lower the price of his services--an arrangement that can benefit both parties. The overriding principle is straightforward: Malpractice rules may have to be changed, but they are not the business of the federal government.

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