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THE HEALTH-CARE BLOG

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Obamacare Would Deform State Medical-Liability Systems [Joseph M. Nixon]

The mad dash to jam through a government takeover of America's health-care system has led to some pretty blatant and noxious payoffs, even by congressional standards.

At least two Senators exchanged their votes for immunity from additional Medicaid costs — but just for their own states. Another yet-to-be-identified senator is getting \$100 million for a new hospital in his state.

But few groups make out better under the congressional leadership's health-care plans than personal-injury trial lawyers.

In reading the health-care bill approved by the House of Representatives and Harry Reid's bill pending in the Senate, I find (so far) 26 new opportunities for plaintiff lawyers to sue doctors for malpractice.

At least 26 sections in the House bill and 21 sections in Senator Reid's bill require that doctors adhere to certain standards of care in patient care, payment initiatives, payment determinations, and wellness-prevention programs that do not now exist in law. Each of these provisions could be used by a plaintiff's lawyer to assert that the doctor failed to comply with "best practices" guidelines and become the basis for a medical-malpractice lawsuit.

What frustrates physicians and state policymakers alike is that none of these proposed guidelines actually enhance patient care or safety. Instead, in inventing all these new standards of care — relating to such things as effectiveness research, accountability provisions, medical training standards, research and data recorded by pilot programs, task force and demonstration projects, qualification standards for medical personnel, and quality standards (many with enhanced civil penalties) — Congress is creating a regulatory nightmare for physicians and hospitals.

If this bill becomes law, hardly a day will go by when a physician will meet all of the required administrative and regulatory processes proposed by Congress in these bills. Physicians across the country will be exposed to many frivolous liability lawsuits based not on how they treated their patients but instead on whether they complied with certain government standards.

Contrast this with the approach to lawsuit reform taken by the state of Texas. Six years ago, Texas voters slammed the door on frivolous lawsuits by placing Proposition 12 in the state constitution. Since then, 18,000 doctors have moved to the state, including thousands of uniquely qualified specialists and primary-care physicians. Today, 99.7 percent of all Texans live within 20 miles of a doctor, despite the fact that Texas has the most rural population of any state.

Commonsense lawsuit reforms also jumpstarted \$10 billion in capital expansions of hospital and clinic infrastructure, including \$3 billion to Texas Children's Hospital. CHRISTUS Health was able to increase its already huge charity-care commitment by \$100 million per year.

In short, commonsense tort reform has resulted in a massive increase in Texans' access to health care: more doctors, hospitals, clinics, charity care, labs, and diagnostic equipment.

But the commonsense reforms adopted in Texas may well be held by a federal judge to have been implicitly preempted by the 2,000 pages of technical legalese the House and Senate bills have become. The courts have called this "conflict preemption", when it becomes impossible to reconcile both state and federal legislative intent. The federal courts have held that state law becomes a nullity when it interposes an obstacle to congressional objectives.

When this preemption problem was discussed with the drafters of the House legislation, Representative Dingell (D., Mich.) procured this amendment to the bill:

(c) Savings Clause for State Medical Malpractice Laws — Nothing in this Act or the amendments made by this Act shall be construed to modify or impair State law governing legal standards or procedures used in medical malpractice cases, including the authority of a state to make or implement such law.

Great. Except that almost any practicing attorney could tell you this language is ambiguous and neither prevents preemption nor prohibits the 26 new ways to sue doctors. Nor does it prohibit subsequent preemptive regulations. Nor does it preclude plaintiff lawyers from arguing that Congress has preempted state enacted caps on non-economic damages. Unsurprisingly, the Dingell Amendment was approved by plaintiff lawyers because it does nothing to actually prevent preemption of state lawsuit reform laws.

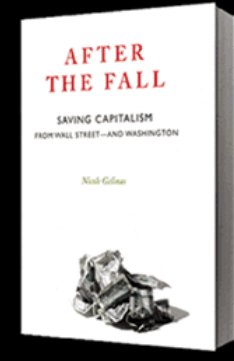
Ambiguous though the House language is, the Senate bill is worse: it doesn't even attempt to carve out a similar protection. By its silence, the Senate version suggests preemption.

Rather than adopt the kind of commonsense tort reform proven to be effective in Texas and 35 other states, the House bill provides money incentives for states to study "alternative liability law" with this language:

The contents of an alternative liability law are in accordance with this paragraph

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if . . . the law does not limit attorneys' fees or impose caps on damages.

That little passage means that states can receive incentive money only if they do not adopt tort-reform measures that have been shown to work. If this language is included in the final legislation, the laws enacted in Texas to protect doctors from frivolous lawsuits will be in jeopardy, as will those of 35 other states.

Instead of "alternative liability laws," may I propose another simple amendment: "Nothing in or about this act may be used to preempt any state law." Let's also get rid of every provision which allows a new cause of action against doctors.

What should be a debate of how best to strengthen the doctor/patient relationship has devolved into a raw exercise of political power, taking place almost exclusively behind closed doors or in the middle of the night. Instead of serving the public, this legislation serves the politicians and their benefactors — with plaintiff lawyers near the top of the list.

— *The Honorable Joseph M. Nixon is a senior fellow with the [Texas Public Policy Foundation](#) and of counsel with the Houston law firm [Beirne, Maynard & Parsons, LLP](#). He served six terms in the Texas House of Representatives and was the author of [Proposition 12](#), the medical liability reforms approved by Texas voters in 2003.*

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