Policymakers Look to Tort Reform as One Way to Lower Health Care Costs

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In 2002, a Kansas woman underwent a surgery to remove her right ovary. But instead, a doctor allegedly removed her left ovary by mistake.

The woman sued her doctor, resulting in a case that has gone on for eight years and questioned the validity of a 24-year-old state law.

In 2006, a jury ruled that the woman should receive about $759,000, which included $400,000 for noneconomic damages.

A district court later reduced the $400,000 award to $250,000 in order to comply with a 1986 state law that caps noneconomic damages in liability cases, including those involving medical malpractice.

According to the Kansas State Medical Society, the law “is widely credited with reversing a decade-long medical malpractice crisis that gripped the state from the mid-1970s until [the law] was passed.”

But the Kansas plaintiff argues that the cap on damages violates four parts of the state Constitution: the rights to equal protection, trial by jury and remedy by due course of law, as well as the separation of powers.

The case was heard in the state Supreme Court last fall, and a decision is expected this spring.

The Kansas case is one example of the legal and political battle over whether state or federal legislation should limit the amount of noneconomic damages that judges or juries can award in liability cases.

In recent years, particularly during the recent federal debate over health care reform, the controversy has focused on awards that result from medical malpractice lawsuits.

Illinois law thrown out

Illinois has passed three laws similar to Kansas’, and all of them have been struck down by the courts. In February, the Illinois Supreme Court ruled on a 2005 law that capped noneconomic damages at
$500,000 in cases against doctors and $1 million in cases against hospitals. The justices ruled that the law violated the Illinois Constitution’s separation-of-powers clause because it allowed legislators to interfere with the ability of courts to award damages.

The Illinois Supreme Court threw out similar laws in 1976 and 1997.

According to Dr. Michelle Mello, these laws were all part of a trend that began after California passed historic legislation in the mid-1970s.

“[The laws are] a response to complaints that [medical-malpractice] insurance premiums are rising, and the assertion is that they are rising because the average cost of an award is going up very rapidly and the number of very high-cost awards is going up rapidly,” she says.

The result, proponents of reform say, is that the cost of practicing medicine is higher — and the difference is passed on to patients.

Some argue, too, that the threat of litigation drives physicians to practice so-called “defensive medicine,” ordering tests and procedures that may be unnecessary but could help support the doctor’s case if he or she faces a lawsuit.

Another reason states have looked into limiting the number of malpractice lawsuits — and the monetary awards that come with them — is to avoid the possibility that doctors will leave the state because malpractice insurance premiums are too high. States are experiencing labor shortages in many medical specialties, especially those that tend to have high malpractice insurance costs, such as obstetrics.

**Options for reform are varied**

The most common strategy to reduce the impact of medical-malpractice lawsuits is limiting noneconomic damages in medical tort cases. Half of all states have such laws.

But Mello points out that this approach isn’t a guarantee that costs will decrease. In part because so many damage-cap laws have been challenged in recent years, many insurance companies have taken a “wait and see” approach before lowering premiums, she says.

Other state strategies for limiting the economic impact of malpractice suits include reforming “joint and several” liability laws so that defendants are responsible only for the percentage of the damages for which they are found liable.

Other laws that have been passed by states:

- limit the amount of time a patient has to file a claim,
- cap the percentage of a malpractice award that an attorney may take as a fee,
- allow or require insurers to pay awards over time (rather than in a lump sum),
- allow payments that a plaintiff receives from other sources (such as health insurance) to be deducted from the total amount owed by the defendant, and
- create panels that pre-screen cases to determine if they have enough merit to go to trial.

One of the strategies states have used to combat the practice of so-called defensive medicine is passing an “affirmative defense” law. Under these initiatives, physicians commit to using a set of evidence-based procedures; if the doctors are sued, they can use their adherence to the guidelines as a legal defense.
Mello says the idea was first implemented by Maine in the 1990s, but the project was abandoned because it failed to have an impact on health care quality. Her research shows that after seven years of the program, the affirmative defense was invoked just once.

A handful of other states have adopted such demonstration projects in the past two decades, including Minnesota.

Some people believe that the debate about tort reform distracts attention from fundamental issues in the health care system, such as how to prevent medical errors in the first place.

Others have called for initiatives that promote conflict resolution before cases end up in court.

So-called “I’m sorry” initiatives, for example, encourage doctors to admit errors and explain how they will be prevented in the future, which some say makes patients and families less likely to sue. “I’m sorry” laws allow physicians to apologize to patients and families without that information being used against them in court.

According to the Sorry Works! Coalition [6], seven Midwestern states (Illinois, Iowa, Indiana, Nebraska, North Dakota, Ohio and South Dakota) have such laws.

**Tort reform: Will it be part of a federal health bill?**

Direct malpractice liability costs — including insurance premiums, settlements and awards — accounted for $35 billion (about 2 percent of total U.S. health expenditures) in 2009, according to the Congressional Budget Office [7].

The CBO also reports that tort reform would cut the federal budget deficit by $54 billion over the next 10 years and decrease total U.S. health spending by half a percent. The cost savings would be caused by decreased malpractice insurance premiums and a change in the way doctors provide care.

As of late February, major plans put forth by the Obama administration and the U.S. Congress would provide financial incentives to states that develop and implement alternatives to litigation.

States, for example, would have an incentive to find ways to reduce medical errors from happening in the first place, to encourage the disclosure of medical errors, to promote fair resolution of disputes and ensure access to affordable liability insurance.

One of the leading Republican proposals, as of early March, was to create special courts made up of judges with medical expertise. Proponents say these special courts would be better equipped to handle medical cases and could provide clearer guidelines for what constitutes malpractice.

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