

Free-Riding Lawyers on the Obamacare Bus

By ACSH Staff — June 26, 2009

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This month, President Obama ventured into the lion's den of healthcare reform. He tried to cajole a reluctant American Medical Association -- and the physicians they represent -- to accept his push for more government-provided medical service. What he did not do, though, was offer to remove the largest thorn in physicians' paw: run-amok malpractice lawsuits.

The President's stated goal is to get more Americans more healthcare at less cost -- which means getting multiple healthcare interest groups to pitch in and give up some of their traditional perks. Unfortunately, his pitch to the AMA offered only a pretense of concern for doctors' needs. Obama merely dangled a tort-reform carrot before the doctors -- and exempted the plaintiffs' bar from his general call for team play and mutual sacrifice.

He specifically rejected capping damage awards for non-economic issues (i.e., "pain and suffering"). Such caps are the only medical malpractice remedy that reduces liability insurance premiums and decreases the need for the wasteful and inefficient practice known "defensive medicine."

No one really knows how much time is wasted by doctors (and money by patients) on tests and procedures that do not actually help diagnose or treat any condition but do help protect doctors from the appearance of sub-standard care in malpractice lawsuits. This practice is sometimes called "treating the chart rather than the patient" -- making sure all hypothetical diagnostic bases are covered. Some reliably estimate the cost to our healthcare system at \$100 billion, which does not take into consideration the (real) pain and suffering of patients needlessly subjected to tests and procedures to no good purpose nor that of doctors subjected to multi-million-dollar damage awards for such unquantifiable harms as "loss of consortium."

Over thirty states currently cap this type of award. Six-figure malpractice premiums in high-risk specialties drive obstetricians and orthopedists (among other specialists) out of states without caps, reducing patient access. The institution of caps reverses this flight by reducing frivolous lawsuits.

Our malpractice tort system is seriously flawed, to say the least. Most patients injured by medical negligence never sue, while most lawsuits filed are dismissed or rejected by juries. Many of those are frivolous -- crapshoots by greedy attorneys trying to win the "lottery by jury." There must be a better way to make injured patients and their families whole, at least financially.

One way might be medical tribunals, in which a panel of objective experts would contemplate the evidence and issue a ruling on fault. To avoid concerns about the tribunals' constitutionality, these decisions can be non-binding -- but would be available to the jury if the parties felt the need to go

that far. Another method would be a no-fault system, with damage awards determined by a board of laymen and experts, without assignment of blame or fault. That determination can be a separate matter, handled by medical boards.

One way or another, the new healthcare utopia should offer relief from tort lawyer extortion for doctors who adhere to approved practice guidelines and still find themselves under the litigation gun.

This administration is going to ask for cooperation and sacrifice from a wide spectrum of the healthcare industry and the public:

¢ Big pharma (in the form of drug discounts and possibly price controls, whether imported along with price-controlled foreign drugs or mandated via Medicare Part D "negotiations").

¢ Insurers (who will have to compete with some form of "public plan").

¢ Doctors (who will get reduced compensation from government-financed insurance plans).

¢ Patients (who will likely see the newly-empanelled "Federal Coordinating Council for Comparative Effectiveness Research" ration care to prevent "overly" expensive treatments and limit the use of innovative but expensive new drugs, as has happened in the UK).

Why are malpractice litigators exempt from pitching in? Given the recent re-estimate of the massive cost of the President's program, wouldn't a plan that included a simple, proven method to reduce costs by \$100 billion be worth more than a perfunctory "We will explore a range of options" soundbite on tort reform, tossed out to the assembled AMA doctors?

A federally mandated cap on non-economic damages would be cost-saving and would demonstrate that we *all* will be asked to do our part to improve American healthcare, even lawyers.

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