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# President Obama's Medical Liability Reform Proposal: No Silver Bullet

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In an apparent concession to Republicans on health care reform, President Obama broached the topic of medical liability reform Wednesday night in his health care speech before Congress:

> Now, finally, many in this chamber—particularly on the Republican side of the aisle—have long insisted that reforming our medical malpractice laws can help bring down the cost of health care.... Now, I don't believe malpractice reform is a silver bullet, but I've talked to enough doctors to know that defensive medicine may be contributing to unnecessary costs. So I'm proposing that we move forward on a range of ideas about how to put patient safety first and let doctors focus on practicing medicine. I know that the Bush Administration considered authorizing demonstration projects in individual states to test these ideas. I think it's a good idea, and I'm directing my Secretary of Health and Human Services to move forward on this initiative today.

Upon analysis, however, the President's medical malpractice proposal is meaningless in the context of the health care reform debate and does not affect the trajectory of Democrat health care reform bills currently before Congress in any way.

**More of the Same.** Many observers looked for President Obama to strike a mollifying tone with opponents by putting forward serious compromises on issues such as the public option and the total cost of the plan. Instead, what they heard was a rehashing of his prior speeches on health care reform: sticking with the public plan; maintaining the budget-busting, $900 billion-plus price tag (which includes hefty tax increases); overruling traditional state authority to regulate the health insurance industry; completely ignoring states' important role as laboratories in developing innovative health reform solutions; and imposing onerous mandates on individuals and employers to purchase health insurance.

The lone paragraph on medical malpractice may have been the most conciliatory moment in President Obama's entire speech. Yet the President did not say that he demanded or would support medical liability reform as part of a health care reform bill sent to his desk. Rather, he proposed a purely administrative action led by Secretary of Health and Human Services Kathleen Sebelius that requires no action by Congress. He also did not give any specifics on the types of demonstration projects that would go forward, nor did he offer any timeline or say how results would be evaluated, disseminated, or used.

While what exactly the President wants to do on the medical liability reform issue remains a mystery, the following is clear enough:

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*States Already Have the Authority to Move Forward with Medical Liability Reform.* Medical malpractice reform falls squarely within the authority of the states. Many states—including Georgia, Texas, and Mississippi—have moved forward with reforming their own medical liability laws and have seen positive results for their citizens. Texas, for example, enacted serious reforms in 2003, including a cap on non-economic damages in medical malpractice suits. Since then, medical liability insurance premiums have declined and doctors have flooded into the state to practice medicine.[1]

*Defensive Medicine Exists, and It* Does *Increase Unnecessary Costs.* While President Obama admitted that defensive medicine "may" lead to unnecessary costs, there is no doubt that defensive medicine occurs every day and that the costs to the health care system are staggering.

A 2008 study found that 83 percent of Massachusetts doctors surveyed admitted to practicing some kind of defensive medicine. The study estimated that 18–28 percent of tests, procedures, referrals, and consultations and 13 percent of hospital admissions were prescribed to avoid lawsuits. The researchers conservatively estimated $281 million in unnecessary physician costs and over $1 billion in excessive hospital admissions in Massachusetts alone.[2] In 2004, Duke University Professor Christopher Conover estimated nationwide defensive medicine costs at $70 billion a year, a sum that would cover nearly 80 percent of the Obama plan.[3]

*The Current Medical Liability System Serves Trial Lawyers, Not Patients or Doctors.* A highly credible 2006 study published in the *New England Journal of Medicine* concluded that 40 percent of medical malpractice claims lacked merit. Whether or not a claim has merit, the doctors' costs of defending a claim in court are substantial, averaging over $52,000 per claim. The same study found that medical malpractice claims take an average of five years to resolve, imposing significant hardship on severely injured patients as well as doctors called to defend their reputations and livelihoods in court.

The tort system carries with it enormous administrative overhead costs, including court costs, attorney fees, and expert witness fees. These overhead costs consume the largest share of injured plaintiffs' damage awards in medical malpractice cases, absorbing a whopping 54 cents of every dollar of patient compensation.[4]

*Promising Medical Malpractice Reform Options Exist for States.* While capping non-economic damage awards has been highly successful in a number of states, it is not the only option available to state policymakers. Other innovative proposals exist, such as early offer programs, special medical courts, and even special kinds of insurance that patients can purchase to insure themselves against adverse medical outcomes.[5]

Provided they are held to be enforceable in court, private contracts between patients and doctors can also serve as gateways into innovative settlement arrangements designed to dispose of claims quickly, compensate injured patients for their real economic losses, and reduce overhead costs. Parties to a lawsuit can even reach a settlement online.[6]

1. Ralph Blumenthal, "More Doctors in Texas after Malpractice Cap," *The New York Times*, October 5, 2007, at *http://www.nytimes.com/2007/10/05/us/05doctors.html* (September 15, 2009).
2. Massachusetts Medical Society, "MMS First-of-Its-Kind Survey of Physicians Shows Extent and Cost of the Practice of Defensive Medicine and Its Multiple Effects of Health Care on the State," November 17, 2008, at *http://www.massmed.org/AM/Template.cfm?Section=Advocacy_and_Policy&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=23559* (September 15, 2009).
3. Christopher J. Conover, "Health Care Regulation: A $169 Billion Hidden Tax," Cato Institute, October 4, 2004, at *www.cato.org/pubs/pas/pa527.pdf* (September 15, 2009).
4. David M. Studdert *et al.*, "Claims, Errors, and Compensation Payments in Medical Malpractice Litigation," *New England Journal of Medicine*, Vol. 354, No. 19 (May 11, 2006), pp. 2024–2033.
5. See Randolph W. Pate and Derek Hunter, "Code Blue: The Case for Serious State Medical Liability Reform," Heritage Foundation *Backgrounder* No. 1908, January 17, 2006, at *http://www.heritage.org/Research/HealthCare/bg1908.cfm.*
6. See, for example, Cybersettle (*http://www.cybersettle.com*), a company offering a dispute resolution service where parties can submit settlement offers through an online mediator.

These innovative settlement or arbitration agreements, entered into before treatment is initiated and binding on the parties, are theoretically possible in nearly every state.[7] However, states may have to bolster such agreements' enforceability in court and require that best practices are followed to protect patients' rights.

**Olive Branch or Fig Leaf, but No Silver Bullet.** By proposing a nebulous, non-committal, no-strings-attached demonstration project on medical liability reform Wednesday night, President Obama has moved the ball forward little on his health care reform agenda. Perhaps demonstration projects can provide some information that will be useful in the future, but there is no indication that his proposal will have any impact on the health reform debate.

While some Members of Congress may try to use the proposal as a fig leaf with their constituents in an effort to say they are doing something about runaway medical lawsuits, it is indeed the slimmest of olive branches for those who are deeply concerned about the direction of health care reform. And it is certainly no silver bullet for what ails the President's health care reform proposal going forward.

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7. See, for example, *Buraczynski v. Eyring*, 919 S.W.2d 314 (Tenn. 1994) (Tennessee Supreme Court case upholding the enforceability of an arbitration clause between physicians and patients.)