111TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { 111–341

DIRECTING THE ATTORNEY GENERAL TO TRANSMIT TO THE HOUSE OF REPRESENTATIVES CERTAIN DOCUMENTS, RECORDS, MEMOS, CORRESPONDENCE, AND OTHER COMMUNICATIONS REGARDING MEDICAL MALPRACTICE REFORM

NOVEMBER 18, 2009.—Referred to the House Calendar and ordered to be printed

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Mr. CONYERS, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H. Res. 871]

The Committee on the Judiciary, to whom was referred the resolution (H. Res. 871) directing the Attorney General to transmit to the House of Representatives certain documents, records, memos, correspondence, and other communications regarding medical malpractice reform, having considered the same, report thereon without amendment and without recommendation.

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PURPOSE AND SUMMARY

On October 27, 2009, Ranking Member Lamar Smith (R-TN) introduced H. Res. 871, a resolution of inquiry. The resolution directs the Attorney General to transmit to the House of Representatives, not later than 14 days after the date of adoption of the resolution, copies of any document, record, memo, correspondence or other communications received from the American Association of Justice (AAJ), formerly known as the Association of Trial Lawyers of America, and any of its members, since January 20, 2009, that refers or relates to any recommendation regarding medical malpractice reform or that references AAJ, or any of its members, and refers or relates to any recommendation regarding medical malpractice reform, since January 20, 2009.

BACKGROUND

Under the rules and precedents of the House of Representatives, a resolution of inquiry is one of the methods that the House can use to obtain information from the Executive Branch.[1] It "is a simple resolution making a direct request or demand of the President or the head of an executive department to furnish the House of Representatives with specific factual information in the possession of the executive branch."[2] The typical practice has been to use the verb "request" when asking for information from the President, and "direct" when addressing Executive department heads.[3] Clause 7 of Rule XIII of the Rules of the House of Representatives provides that if the committee to which the resolution is referred does not act on it within 14 legislative days, a privileged motion to discharge the resolution from the committee is in order on the House floor.

In the course of the consideration of H. Res. 871, it became apparent that Ranking Member Smith had not made a direct request of the Justice Department for the information described in the resolution. At the markup on November 5, 2009, Chairman Conyers and Ranking Member Smith agreed to suspend consideration while the Department was contacted. The Assistant Attorney General for Legislative Affairs advised that a thorough search of the Department's records had found no documents received from or referencing AAJ during the period in question that refer or relate to or any recommendation regarding medical malpractice reform. He further stated that the Department would make a special effort, without setting any precedent, to confirm this in writing by the weekend. In light of this advisory, the Committee agreed by voice vote to dispense with the resolution by reporting it without recommendation.

The Assistant Attorney General's advisory was confirmed in a letter to the Judiciary Committee from the Department of Justice, dated November 6, 2009, a copy of which follows:

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[1] Christopher Davis, House Resolutions of Inquiry, CRS Report, November 25, 2008, at 1 (quoting U.S. Congress, House, Deschler's Precedents of the United States House of Representatives, H. Doc. 94–661, 94th Cong., 2nd sess., vol. 7, ch. 24, § 8.

[2] Id.

[3] Id.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 6, 2009

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Lamar S. Smith
Ranking Minority Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman and Congressman Smith:

This responds to your inquiry concerning materials described in H. Res. 871, which would direct the Department of Justice to transmit to the House of Representatives documents received from, or referencing, the American Association for Justice or any of its members since January 20, 2009 that refer or relate to any recommendation regarding medical malpractice reform. The Department's Executive Secretariat, which is responsible for tracking all correspondence (Congressional and non-Congressional) directed to the Attorney General, Deputy Attorney General, Associate Attorney General, or Office of Legislative Affairs, has conducted a search for such documents from January 1, 2009 to November 6, 2009, and reports that no such documents were found. In addition, the Civil Division conducted a similar search for correspondence directed to the Assistant Attorney General for the Civil Division and reports that no such documents were found.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of assistance with this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

HEARINGS

No hearings were held in the Committee on H. Res. 871.

COMMITTEE CONSIDERATION

On November 5, 2009, the Committee met in open session and ordered H. Res. 871 reported without recommendation, without amendment, by voice vote, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee reports that there were no rollcall votes taken during the Committee's consideration of H. Res. 871.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this resolution does not provide new budgetary authority or increased tax expenditures.

COMMITTEE COST ESTIMATE

In compliance with clause 3(d)(2) of rule XIII of the Rules of the House of Representatives, the Committee estimates that implementing the resolution would not result in any significant costs. The Congressional Budget Office did not provide a cost estimate for the resolution.

PERFORMANCE GOALS AND OBJECTIVES

Clause 3(c)(4) of rule XIII of the Rules of the House of Representatives is inapplicable, because H. Res. 871 does not authorize funding.

CONSTITUTIONAL AUTHORITY STATEMENT

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives is inapplicable, because H. Res. 871 is not a bill or a joint resolution that may be enacted into law.

ADVISORY ON EARMARKS

Clause 9 of rule XXI of the Rules of the House of Representatives is inapplicable, because H. Res. 871 not a bill or a joint resolution.

SECTION-BY-SECTION ANALYSIS

H. Res. 871 directs the Attorney General to transmit to the House of Representatives not later than 14 days after the date of

adoption of the resolution, copies of any document, record, memo, correspondence or other communications received from the AAJ, formerly known as the Association of Trial Lawyers of America, and any of its members, since January 20, 2009, that refers or relates to any recommendation regarding medical malpractice reform or that references AAJ, or any of its members, and refers or relates to any recommendation regarding medical malpractice reform, since January 20, 2009.

ADDITIONAL VIEWS

Although Members will not have the opportunity to vote for H. Res. 871 on the House floor, we hope to receive a full and complete response to the information requested in this resolution of inquiry from the administration prior to a House vote on major health care legislation.

In light of former Democratic National Committee Chairman Howard Dean's public admission that the only reason tort reform is not included in the Democrats' health care bill is because of opposition from trial lawyers, Ranking Member Lamar Smith introduced H. Res. 871, a resolution of inquiry that simply requests that the administration provide to Congress all documents describing trial lawyers' interaction with the administration on the issue of health care tort reform, so the American people can know why widely supported reforms that would make health care cheaper and more accessible—and, according to CBO, save $54 billion—have not been included in the Democrats' health care legislation.

The text of H. Res. 871 is as follows:

> *Resolved,* That the Attorney General is directed to transmit to the House of Representatives, not later than 14 days after the date of the adoption of this resolution, copies of any document, record, memo, correspondence, or other communication—
>
> (1) received from the American Association for Justice, formerly known as the Association of Trial Lawyers of America, and any of its members, since January 20, 2009, that refers or relates to any recommendation regarding medical malpractice reform; or
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> (2) that references the American Association for Justice, formerly known as the Association of Trial Lawyers of America, or any of its members, and refers or relates to any recommendation regarding medical malpractice reform, since January 20, 2009.

THE COSTS OF THE CURRENT SYSTEM

The American medical liability system is broken. According to one study, 40 percent of claims are meritless: either no injury or no error occurred. Attorneys' fees and administrative costs amount to 54% of the compensation paid to plaintiffs. The study found that completely meritless claims (which are nonetheless successful approximately one in four times) account for nearly a quarter of total administrative costs.[1]

[1] "Claims, Errors, and Compensation Payments in Medical Malpractice Litigation," David Studdert et al., *New England Journal of Medicine* (May 11, 2006).

The American civil litigation system is the most expensive in the world, more than twice as expensive as nearly any other country.[2]

DEFENSIVE MEDICINE AND ITS COSTS

"Defensive Medicine" is widely practiced—and costly. Skyrocketing medical liability insurance rates have distorted the practice of medicine. Costly, but unnecessary, tests have become routine as doctors try to protect themselves from lawsuits. According to a 2008 survey conducted by the Massachusetts Medical Society, 83 percent of physicians reported that they practice defensive medicine.[3] Another study in Pennsylvania put the figure at 93 percent.[4]

While estimates vary, the Pacific Research Institute has put the cost of defensive medicine at $124 billion.[5] Others have arrived at higher figures.[6]

A new study by the Pacific Research Institute estimates that defensive medicine costs $191 billion a year,[7] while a separate study by PricewaterhouseCoopers puts the number even higher—$239 billion.[8]

THE CURRENT SYSTEM IS CAUSING A DOCTOR SHORTAGE

Lawsuit abuse drives doctors out of practice. There is a well-documented record of doctors leaving the practice of medicine and hospitals shutting down particular practices that have high liability exposure. This problem has been particularly acute in the fields of ob-gyn and trauma care, as well as in rural areas.[9]

The absence of doctors in vital practice areas is at best an inconvenience; at worst it can have deadly consequences.[10] Hundreds or even thousands of patients may die annually due to lack of doctors.[11]

According to the Massachusetts study, 38 percent of physicians have reduced the number of higher-risk procedures they provide, and 28 percent have reduced the number of higher-risk patients they serve, out of fear of liability.[12] The American College of Obstetricians and Gynecologists has concluded that the "current medicolegal environment continues to deprive women of all ages, espe-

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[2] "U.S. Tort Costs and Cross-Border Perspectives: 2005 Update," Tillinghast-Towers Perrin.

[3] "Investigation of Defensive Medicine in Massachusetts," Massachusetts Medical Society (November 2008).

[4] "Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment," David Studdert et al., *JAMA* (June 1, 2005) at 2609–2617.

[5] *Jackpot Justice: The True Cost of America's Tort System,* L.J. McQuillan et al, Pacific Research Institute (2007).

[6] "Wasted Medical Dollars," Kevin Pho, *USA Today* (April 23, 2008).

[7] Available at http://www.heartland.org/custom/semod__policybot/pdf/26161.pdf.

[8] PricewaterhouseCoopers' Health Research Institute, *The Price of Excess: Identifying Waste in Healthcare Spending* (New York: PricewaterhouseCoopers 2008), endnote 18, at 18.

[9] For an extensive compilation of such instances see "Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Care," U.S. Department of Health and Human Services (March 3, 2003).

[10] *See* Testimony of Leanne Dyess, "Patient Access Crisis: The Role of Medical Litigation," Senate Judiciary Committee (February 11, 2003); Testimony of Dr. Thomas Gleason, "Medical Liability Reform: Stopping the Skyrocketing Price of Health care," House Small Business Committee (February 17, 2005).

[11] *See* Testimony of Theodore Frank, "Protecting Main Street from Lawsuit Abuse," Senate Republican Conference (March 16, 2009) ("The effect of the loss of productive doctors and the closing of emergency rooms . . . is in the hundreds of lives a year, and perhaps as high as 1,000 deaths and many exacerbated injuries."); "Tort Reform and Accidental Deaths," Paul Rubin and Joanna Shepherd, Emory Law and Economics Research Paper No. 05–17H (finding tort reforms saved approximately 2,000 lives in the year 2000 and 24,000 over a 20-year period).

[12] "Defensive Medicine in Massachusetts," pp. 4–5.

cially pregnant women, of their most educated and experienced women's health care providers." [13]

Excessive litigation damages the doctor-client relationship and impairs care. Beyond the dollars and cents, when doctors begin to see their clients as potential litigants, the quality of care patients receive is seriously compromised. In a recent survey, 76 percent of doctors said that their concern about being sued has hurt their ability to provide quality patient care. Nearly half of nurses say they are prohibited or discouraged from providing needed care by rules set up to avoid lawsuits.[14]

PROVEN REFORMS

The states have proven that legal reform works. While Democrats in Washington talk about the need to study the problem, states have acted to address it. Several states have limited non-economic damages—such as those for "pain and suffering—and dramatically lessened the burden of lawsuits. In states with such limits, premiums are 17 percent lower than they are in states without them.[15]

PROVEN REFORMS IN CALIFORNIA

States also have had success with a variety of other reforms. A comprehensive study of these reforms suggests that attorney-fee limits, such as those in California, are particularly effective.[16] The cumulative effect of all state reforms put together could be as much as a 74 percent reduction in premiums.[17]

California's decades-old and highly successful health care litigation reforms. California's Medical Injury Compensation Reform Act (called "MICRA") has proved immensely successful in increasing access to affordable medical care in California since it was signed into law in 1975 by Governor Jerry Brown. It has kept California medical malpractice insurance rates consistently much lower than the average in the rest of the country.[18] MICRA's reforms, which are included in the HEALTH Act, include: a $250,000 cap on non-economic ("pain and suffering") damages; limits on the contingency fees lawyers can charge, so larger percentages of awards go to victims, not lawyers; and authorization for defendants to introduce evidence showing the plaintiff received compensation for losses from outside sources (to prevent double recoveries). Some critics claim that a California automobile insurance reform measure called Proposition 103 that required a "rollback" of insurance premiums—and not California's health care litigation reforms—have controlled medical professional liability premiums in that state. However, according to the *Orange County Register,* "a rollback [under Proposition 103] never took place because the [California Supreme] court amended Prop. 103 to say that insurers could not be forced to implement the 20 percent rollback if it would deprive them of a fair

[13] "Overview of the 2009 ACOG Survey on Professional Liability."
[14] "Fear of Litigation Study, The Impact on Medicine," Harris Interactive (April 11, 2002).
[15] "The Medical Malpractice 'Crisis': Trends and the Impact of State Tort Reforms," Kenneth E. Thorpe, (January 21, 2004) at 20–30.
[16] "Tort Law Tally: How State Tort Reforms Affect Tort Losses and Tort Insurance Premiums," Nicole V. Crain, and W. Mark Crain, et al, Pacific Research Institute (2009).
[17] *Id.*
[18] *See* http://www.micra.org/about-micra/docs/micra__access__and__affordability.pdf.

profit." [19] Further, since Proposition 103 went into effect, no medical professional liability insurer has been denied a requested premium increase.

PROVEN REFORMS IN TEXAS

After Texas adopted a new liability system in 2003, medical liability premiums fell dramatically, and thousands of new doctors flooded into the state.[20] Communities in Texas that once did not have primary or specialty care doctors now have a full complement of physicians.

Texas passed significant tort reform in 1995, and more reforms have been enacted since then. A 2008 study from the Perryman Group found that perhaps the most visible economic impact of the lawsuit reforms are the benefits experienced by Texans who have better access to high-quality healthcare.[21] Doctors and hospitals are using their liability insurance savings to expand services and initiate innovative programs; those savings have allowed Texas hospitals to expand charity care by 24 percent.[22]

The total impact of tort reforms implemented since 1995 includes gains of $112.5 billion in spending each year as well as almost 499,900 jobs in the state.[23] The fiscal stimulus to the state from judicial reforms is almost a $2.6 billion per year increase in state revenue.[24] In addition, these reforms are responsible for approximately 430,000 individuals having health insurance than would otherwise, and there has been an increase in the number of doctors, particularly in regions which have been facing severe shortages.[25]

THE CONGRESSIONAL BUDGET OFFICE (CBO)

On October 9, 2009, the Congressional Budget Office pronounced that a tort reform package would reduce the Federal budget deficit by an estimated $54 billion over the next 10 years.[26] CBO recognizes that civil justice reforms also have an impact on the practice of "defensive medicine." Defensive medicine is when doctors order more tests or procedures than are truly necessary just to protect themselves from frivolous lawsuits. Studies show that defensive medicine does not advance patient care or enhance a physician's diagnostic capabilities. That billions of dollars in savings from tort reform could be used to provide health insurance for the uninsured without raising taxes on those who already have insurance policies.

According to CBO, "CBO estimates that, under [the HEALTH Act], premiums for medical malpractice insurance ultimately would be an average of 25 percent to 30 percent below what they would be under current law." [27]

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[19] *Orange County Register* (October 22, 1997).
[20] "Tort Reform: A Victory for Patient Access," Texas Medical Association (July 5, 2006); "Texas-Style Health Care Reform is Bigger and Better," Sally Pipes, *San Francisco Examiner* (July 24, 2009).
[21] Peggy Venable, "Tort Reform? We've Already Done It," *The Washington Post* (September 16, 2009).
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *See* http://cboblog.cbo.gov/?p=389.
[27] Congressional Budget Office Cost Estimate of H.R. 4600 (the HEALTH Act) (September 24, 2002).

THE GOVERNMENT ACCOUNTABILITY OFFICE (GAO)

Also, the Government Accountability Office (GAO) found that rising litigation awards are responsible for skyrocketing medical professional liability premiums. The report stated that—quote—"GAO found that losses on medical malpractice claims—which make up the largest part of insurers' costs—*appear to be the primary driver of rate increases in the long run . . .*"[28] The GAO also concluded that insurer profits "are not increasing, indicating that insurers are not charging and profiting from excessively high premium rates" and that "in most states the insurance regulators have the authority to deny premium rate increases they deem excessive."[29]

BARRIERS TO REFORM

The reason Democrats continue to refuse to add serious medical lawsuit reform to their health care legislation remains purely political, as was recently revealed by former DNC Chair Howard Dean. At a recent health care town hall meeting hosted by Rep. Jim Moran (D-VA), Dean responded to an angry constituent wondered why a supposedly comprehensive "reform" of the health-care system doesn't include tort reform to lower costs of malpractice insurance and reduce defensive medicine. Dean responded remarkably candidly, stating:

> "This is the answer from a doctor and a politician," said Dean. "Here is why tort reform is not in the bill. When you go to pass a really enormous bill like that the more stuff you put in, the more enemies you make, right? And the reason why tort reform is not in the bill is because the people who wrote it did not want to take on the trial lawyers in addition to everybody else they were taking on, and that is the plain and simple truth. Now, that's the truth."

SUPPORT FOR REFORM

The American people are demanding legal reform. A recent survey found that 83 percent of Americans believe that reforming the legal system needs to be a part of any health care reform plan.[30]

The *USA Today* editorial board also recently came out supporting tort reform, stating:

> A study last month by the Massachusetts Medical Society found that 83% of its doctors practice defensive medicine at a cost of at least $1.4 billion a year. Nationally, the cost is $60 billion-plus, according to the Health and Human Services Department. [And a] 2005 study in the Journal of the American Medical Association found 93% of Pennsylvania doctors practice defensive medicine. The liability system is too often a lottery. Excessive compensation is awarded to some patients and little or none to others. As much as 60% of awards are spent on attorneys, expert witnesses and administrative expenses

[28] General Accounting Office, "Medical Malpractice Insurance," GAO–03–702 (June 2003) at "Highlights," 4, and 25 (emphasis added).
[29] *Id.* at 32.
[30] "National Voter Survey: Health Care Reform and the Legal System 2009," Clarus Research Group (August 2009).

> . . . The current system is arbitrary, inefficient and results in years of delay.[31]

Discussing the need for tort reform, the President of the American Medical Association said "If the [health care] bill doesn't have medical liability reform in it, then we don't see how it is going to be successful in controlling costs." [32]

Obama's own doctor of over two decades also supports medical tort reform. David Scheiner was Obama's doctor from 1987 until he entered the White House; he vouched for the then-candidate's "excellent health" in a letter last year. As was recently reported in *Forbes* magazine:

> [Dr. Schneider is] still an enthusiastic Obama supporter, but he worries about whether the health care legislation currently making its way through Congress will actually do any good, particularly for doctors like himself who practice general medicine. "I'm not sure [Obama] really understands what we face in primary care," Scheiner says.
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> . . . Scheiner is critical of Obama's pick for Health and Human Services secretary—Kansas Gov. Kathleen Sebelius, who used to work as the chief lobbyist for her state's trial lawyers association.
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> . . . Scheiner says he never thought it was appropriate to talk about health policy with Obama, especially once he became a U.S. Senator. The one exception was medical malpractice reform. "I once briefly talked to him about malpractice, and he took the lawyers' position," he says.
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> . . . Scheiner, like most others in his profession, thinks that it should be harder to sue doctors and that awards should be capped. He says that he and other doctors must order too many tests and imaging studies just to avoid being sued.[33]

One of the Nation's top surgeons, with credibility and acclaim the world over for the pioneering surgeries he has and his personal story of overcoming hardship, recently severely criticized the dominant health care legislation before Congress. Benjamin Carson, director of pediatric neurosurgery at the Johns Hopkins Medical Institutions in Baltimore, Maryland, and recipient of numerous awards including the Presidential Medal of Freedom, criticized in a recent interview the approach of the current bills for their mandate, creation of a "public option," and lack of malpractice liability reform. He pointed to excessive litigation, pointing out how much malpractice insurance and other forms of "defensive medicine" to protect against lawsuits add to medical costs. In the interview with a local television station, Carson insisted that tort reform must go "hand in hand" as part of any true health care reform. "We have to bring a rational approach to medical litigation," he said. "We're the only nation in the world that really has this problem. Why is it that everybody else has been able to solve this problem but us?

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[31] *USA Today* editorial, "Our View on 'Defensive' Medicine: Lawyers' Bills Pile High, Driving Up Health Care Costs," *USA Today* (December 29, 2008).

[32] Carrie Budoff Brown, "Trial Lawyers Plan Tort Reform Fight," *Politico* (March 16, 2009).

[33] David Whelan, "Obama's Doctor Knocks ObamaCare," Forbes.com (June 16, 2009).

Simple. Special interest groups like the trial lawyers' association. They don't want a solution." [34]

As Stanley Goldfarb, MD and associate dean of clinical education at the University of Pennsylvania School of Medicine, has written: "The president points to for-profit insurance companies, but for-profit insurance companies only make up 25 percent of the system and they are not that profitable, ranking 85th among all U.S. industries. 'Reform' will redistribute the money, not reduce the overall costs. There is much that can be done to make our system more efficient. Tort reform is a great place to start." [35]

Even prominent Democrat strategist Bob Beckel has conceded medical tort reform is essential, writing recently that:

> . . . CBO has reviewed the few credible reports that do exist and concluded, "A number of those studies have found that state level tort reforms have decreased the number of lawsuits filed, lowered the value of claims and damage awards . . . thereby reducing general insurance premiums. Indeed premiums fell by 40% for some commercial policies". (CBO Report June 2004) . . . [O]ne irrefutable fact remains; between 1997 and 2007 medical tort costs (including insurance premiums) have risen from $15 billion to $30 billion a year. That fact alone should insure that yearly savings in the billions from medical tort reform would pass the credibility test." [36]

As Kimberly Strassel has written in the *Wall Street Journal:*

> Tort reform is a policy no-brainer. Experts on left and right agree that defensive medicine—ordering tests and procedures solely to protect against Joe Lawyer—adds enormously to health costs. The estimated dollar benefits of reform range from a conservative $65 billion a year to perhaps $200 billion. In context, Mr. Obama's plan would cost about $100 billion annually. That the president won't embrace even modest change that would do so much, so quickly, to lower costs, has left Americans suspicious of his real ambitions.

It's also a political no-brainer. Americans are on board. Polls routinely show that between 70% and 80% of Americans believe the country suffers from excess litigation. The entire health community is on board. Republicans and swing-state Democrats are on board. State and local governments, which have struggled to clean up their own civil-justice systems, are on board. In a debate defined by flash points, this is a rare area of agreement. Former Democratic Sen. Bill Bradley, in a New York Times piece, suggested a "grand bipartisan compromise" in which Democrats got universal coverage in return for offering legal reform.

The only folks not on board are a handful of powerful trial lawyers, and a handful of politicians who receive a generous cut of those lawyers' contingency fees. The legal industry was the top contributor to the Democratic Party in the 2008 cycle, stumping up

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[34] John Berlau, "'Gifted Hands' Surgeon Rips Into Obamacare," BogGovernment.com, available at http://biggovernment.com/2009/10/14/gifted-hands-surgeon-rips-into-obamacare/.

[35] Stanley Goldfarb, "The Malpractice Problem: We Can't Have Health Care Reform Without Tort Reform," *The Weekly Standard* (October 27, 2009).

[36] Bob Beckel, "Dems' Ace in the Hole on Health Care: Tort Reform," *Real Clear Politics* (August 17, 2009).

$47 million. The bill is now due, and Democrats are dutifully making a health-care down payment.

During the markup of a bill in the Senate Health Committee, Republicans offered 11 tort amendments that varied in degree from mere pilot projects to measures to ensure more rural obstetricians. On a party line vote, Democrats killed every one.[37]

REPUBLICAN-SUPPORTED REFORMS

Republican-sponsored legislation would make Federal law the same legal reforms California implemented over 30 years ago. That legislation, called the HEALTH Act, remains the "gold standard" for health care legal reform, and it continues to be supported by every major medical organization.

The HEALTH Act does not limit in any way an award of "economic damages" from anyone responsible for harm. Economic damages include anything whose value can be quantified, including lost wages or home services (including lost services provided by stay-at-home mothers), medical costs, the costs of pain-reducing drugs, therapy, and lifetime rehabilitation care, and anything else to which a receipt can be attached.

Only economic damages—which the Federal legislation does not limit—can be used to pay for drugs and services that actually reduce pain. Nothing in the HEALTH Act prevents juries from awarding very large amounts to victims of medical malpractice, including stay-at-home mothers and children. California's legal reforms (just like the HEALTH Act) cap non-economic damages at $250,000, but do not cap quantifiable economic damages.

THE DEMOCRATS' TRIAL LAWYERS' BAILOUT BILL

The Democrats' health care bill, H.R. 3962, not only fails to contain any of the tort reforms the CBO concluded would save at least $54 billion in health care costs, but it also contains a provision that deters states from enacting such reforms in the future by explicitly prohibiting tort reform "demonstration project" funds to states that enact limits on damages or attorneys' fees. Section 2531 of the Democrats' bill states that "the Secretary [of HHS] shall make an incentive payment . . . to each State that has an alternative medical liability law in compliance with this section," but then goes on to say a state can take advantage of such funds only if "the law does not limit attorneys' fees or impose caps on damages," which are precisely the tort reforms the CBO concluded yield real health care costs savings.

So not only does the Democrats' bill fail to contain any of the tort reforms we know bring health care costs down from decades of experience, but it even prohibits states that want to try such reforms from taking part in the government-funded tort reform demonstration projects. That is a not only blow to state reform effort. It is a federally-funded bribe discouraging states from enacting real reform, and a giant bailout for trial lawyers.

LAMAR SMITH.
F. JAMES SENSENBRENNER, JR.
HOWARD COBLE.

[37] Kimberly A. Strassel, "The President's Tort Two-Step," *The Wall Street Journal* (September 11, 2009).

ELTON GALLEGLY.
BOB GOODLATTE.
DARRELL E. ISSA.
J. RANDY FORBES.
STEVE KING.
TRENT FRANKS.
JIM JORDAN.
JASON CHAFFETZ.
TOM ROONEY.

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