Med-mal caps nothing more than a red herring

Industry transparency, market competition true source of insurance reform

By Bruce D. Goodman

Yet again the Illinois Supreme Court has stepped in to correct the legislative wrong of arbitrarily capping non-economic damages in medical malpractice cases.

As has been widely reported, our Supreme Court in the case of *Lebron v. Gottlieb Memorial Hospital*[1] recently struck down monetary caps on jury verdicts for individuals harmed by the negligence of doctors and hospitals. The law capping damages against doctors at $500,000 and against hospitals at $1 million was unconstitutional, the court ruled, because it violated the separation of powers clause[2] of the state constitution. Assessing the appropriate amount of a jury verdict is a judicial power, not legislative, according to the court. This is the third time since the 1970s our state's highest court has overturned jury verdict caps as unconstitutional.[3]

The monetary caps were part of an insurance reform law passed in 2005.[4] But the Legislature included a provision that if one part of the law was overturned then the entire legislation would be void.[5]

That's unfortunate.

Other provisions of the insurance reform law certainly have merit because they meaningfully address the business practices of medical insurance companies. It's these practices – not caps on jury verdicts – that most directly impact the premiums charged to doctors and accessibility to health care. The Legislature should reenact those provisions

so Illinois can stay on track for stabilizing medical insurance premiums and controlling health care costs.

No one is saying doctors don't have a legitimate gripe about expensive insurance policies, but putting arbitrary caps on damages in personal injury lawsuits is not the answer to their complaint. Jury verdict caps simply don't have the intended effect of decreasing insurance rates and making health care more affordable.[6] Even worse, limits on jury verdicts are misguided because they deprive the most seriously injured patients of their legal rights.

The insurance industry's propaganda that "tort reform" will control insurance premiums is nothing more than a red herring. The truth of the matter is that capping verdict damages and insurance reform have little to do with one another, because the premiums charged by insurance companies are instead tied mainly to market conditions and business cycles.[7]

Insurance carriers essentially function as financial companies. Because there is a lag time between receipt of premiums and any obligation to pay claims, they invest premiums in bonds and other financial instruments.[8] When the market tanks and the economy slows they increase premiums to make up for their losses. Even if malpractice claims remain stable, insurance companies can incur significant losses if earlier pricing of premiums was premised on unduly optimistic projections of future investments returns or future payment obligations.[9] Study after study shows that what carriers pay out on claims, including malpractice awards, has little to do with what they charge for premiums.[10]

Yet time and again, the insurance industry plays the "blame-the-lawyers" card to deflect the public's and policy makers' attention from their business practices. And, unfortunately, this tactic at times has proven successful.

But to their credit Illinois lawmakers wisely included insurance reform provisions in the now overturned 2005 law. It's these measures that have stabilized insurance premiums and controlled health care costs by increasing transparency on insurance industry price setting, and opening up the insurance marketplace to more competition.[11]

Why is transparency important? Insurance companies have to show regulators that the premiums being charged are reasonably related to their *actual* payouts and costs of doing business, such as defending lawsuits and establishing reserves.

Insurance companies and their political supporters consistently claim that damages caps are the reason liability premiums stabilized over the past four years. That's simply not true. Premiums essentially flat-lined the past four years because the 2005 reform law required public hearings on premium rates, which had to be approved by the state Department of Insurance.[12] According to published reports, the Department of Insurance discovered that ISMIE had been overcharging doctors, leading to a rebate to physicians. Also, ISMIE has had to share its statewide claims data with other carriers, which, according to the other carriers, has enabled them to set "accurate" premium rates.

Prices have also stabilized since the 2005 law was passed because more carriers have entered the health care liability insurance market in Illinois, challenging the market domination of ISMIE Mutual Insurance Company. Price competition always benefits consumers, in this instance doctors and other medical care providers.

Our common law system is based on the tried-and-true principle that individuals harmed due to the fault of others should be compensated for their injuries. Our system of law has withstood the test of time, and isn't a "something-for-nothing" jackpot erroneously and cynically claimed by the insurance industry.

Using overheated rhetoric like "runaway jury verdicts," "lawsuit crisis," and "frivolous lawsuits," tort reform advocates politicize an otherwise legal issue, and would have us believe that individuals seeking fair compensation because they've been harmed due to no fault of their own are at the root of skyrocketing malpractice premiums and health care costs.[13] In fact, empirical studies show that the tort system in the U.S. generally and malpractice liability in particular have been stable the last 20 years in terms of case filings and payouts.[14] Verdict cap advocates have carelessly and cynically labeled two down state counties, Madison and St. Clair, as "judicial hellholes." However, an independent report to the Illinois State Bar Association has debunked this myth, showing that plaintiffs won 11 out of 40 medical malpractice trials in those two counties from 1992 to 2005, with only two exceeding $1 million.[15]

Medical providers have to meet professional standards of care and must be held accountable when they fall short.[16] The legal system acts as an incentive for doctors to practice safe medicine for the benefit of their patients.

Our legal system has checks in place to control the number of medical malpractice lawsuits. Malpractice cases are often expensive to litigate. No reasonable attorney representing a plaintiff would gamble the many hours and thousands of dollars of out-of-pocket costs needed for a case if he or she didn't think it had a legitimate basis. In fact, there's no such thing as a "frivolous" med-mal lawsuit in Illinois. Before a medical

malpractice lawsuit can even be filed, an independent physician must review the relevant medical records, and then file a report that the malpractice claim has a reasonable basis in fact and law.

The law also reins in jury awards that far exceed what the evidence supports. In fact, it's that very judicial prerogative (the fancy legal term is "remittitur") that was at the core of the Supreme Court's decision in the *Lebron v. Gottlieb Memorial Hospital* case. The court said the Legislature violated the state constitution's separation of power clause by encroaching on the judicial power to reduce verdicts on a case-by-case basis.

If we entrust juries to make life or death decisions in criminal cases, surely we can trust them to properly weigh the evidence and make reasonable decisions in medical malpractice cases. When a jury occasionally strays off the reservation and renders an aberrational verdict that far exceeds what the evidence supports, a judge can and should reduce the award.

Hopefully, the Legislature has finally learned its lesson: Monetary caps are unconstitutional! But just as important, the Legislature should stay on course and reenact the reform measures that shine a bright light on the insurance industry and encourage market competition. We'll all be better off for it.

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[1] The opinion can be found online at http://www.state.il.us/court/Opinions/SupremeCourt/2010/February/105741.pdf

[2] Ill. Constitution, art. II, §1.

[3] *Best v. Taylor Machine Works*, 179 Ill.2d 367 (1997); *Wright v. Central Du Page Hospital Ass'n*, 63 Ill.2d 313 (1976).

[4] Public Act 94-677. The caps were codified at 735 ILCS 5/2-1706.5.

[5] Public Act 94-677, § 995.

[6] Illinois Trial Lawyers Association's White Paper, The Whole Truth About Medical Malpractice and Insurance, pp. 15-16.

[7] *Id*. at p. 16.

[8] Medical Malpractice Myths and Realities: Why an Insurance Crisis is not a Lawsuit Crisis, Douglas A. Kysar, Thomas O. McGarity and Karen Sokol, 39:2 Loyola of Los Angeles Law Review, 785, 798 (2006).

[9] *Id*. at 798.

[10] *Supra* note 6, p. 17. *See also* Thomas Baker, The Medical Malpractice Myth, 53-54 (2005).

[11] Following insurance rate hearings held in 2005, the Illinois Department of Insurance ordered Illinois State Medical Inter-Insurance Exchange (ISMIE), the state's largest medical malpractice liability carrier, to reduce its premium rates, and to create a dividend distribution process to give refunds to policyholders. *See* Dept. of Financial and Professional Regulation, Div. of Insurance, Order, In the Matter of the Medical Malpractice Rate Increase of ISMIE Mutual Insurance Co. *See* Illinois Trial Lawyers Association's White Paper, The Whole Truth About Medical Malpractice and Insurance, p. 22. The insurance law reform measures also led to ISMIE making available to competitors its actuarial and claims data. This permitted competing insurance companies to accurately assess how to write medical liability policies in Illinois and establish competitive rates. Michael McRaith, director of the Illinois Department of Insurance, said more companies are writing medical liability policies since this data was made available, leading to a stabilization or decline in premium rates. *Id*. at p. 19.

[12] "Insurance Department Orders Rate Breaks for Many Illinois Doctors," *Chicago Defender*, March 15, 2006, p. 2.

[13] Suffolk University Law School Professor Marc A. Rodwin published a study concluding that even though list prices for malpractice insurance premiums periodically rose and fell from 1970 to 2000, premiums actually paid by physicians rarely exceeded 10 percent of doctors' total practice expenses, and typically amounted to about seven percent of total expenses (which include office rent, medical supplies and equipment, and health insurance for staff). Marc Rodwin, "Malpractice Premiums and Physicians' Income: Perceptions of a Crisis Conflict with Empirical Evidence," 25 Health Affairs 750 (May/June 2006).

[14] *Supra* note 6, at 787, 796.

[15] Neil Vidmar, Medical Malpractice and the Tort System in Illinois: A Report to the Illinois State Bar Association (2005), pp. 52, 64. The report of Duke University Law Professor Vidmar can be found at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1932&context=faculty_scholarship

[16] The Congressional Budget Office estimates that over 180,000 patients are injured every year by medical negligence across the United States. CBO, Key Issues, pp. 150-54 (Dec. 2008).