
Democrats cool to Obama's offer to overhaul rules on malpractice

By Mark Arsenault

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WASHINGTON — President Obama's offer to join hands with Republicans and "rein in frivolous lawsuits" by overhauling medical malpractice rules was among the key bipartisan bullet points in his State of the Union speech.

But the president's proposal has mostly fallen flat with his allies in the Senate, including Senator Patrick Leahy, the chairman of the Judiciary Committee. It also potentially puts him at odds with the nation's trial lawyers, a powerful constituency of the Democratic Party.

Despite his willingness to reach across the aisle, the president himself remains opposed to caps on malpractice damage awards, a central element of Republican proposals to change the rules, the White House said last week in the days after his speech.

Republicans have long argued that limiting civil damages will keep down the cost of malpractice insurance doctors must buy and reduce the likelihood that doctors will practice "defensive medicine," the ordering of unnecessary and costly medical tests to hedge against negligence claims.

A bill capping damages was introduced last week in the Republican-controlled House. But while the House is likely to pass a measure, it faces strong opposition among the Democrats who hold the majority in the Senate.

Democrats resist caps, arguing that civil damages are often the only way patients can punish negligence and be made whole if they, or their children, suffer debilitating injuries from errors by a doctor or hospital staff.

"I'm not going to throw people under the bus and say if something happens to you, you're not going to have the support you need," US Senator Patty Murray, a Washington Democrat, said in an interview.

Trial lawyers, who overwhelmingly favor Democrats with their campaign contributions, vow to oppose any national limits on damages. They say there is no evidence that capping malpractice awards controls health care costs.

In his State of the Union address, Obama defended his sweeping health care overhaul, then offered "to look at other ideas to bring down costs, including one that Republicans suggested last year — medical malpractice reform to rein in frivolous lawsuits."

He did not detail how far he is willing to go with changes, but has said in the past he does not favor caps on damages.

The Obama administration last year awarded \$25 million in grants to pay for 21 pilot projects among the states to test different approaches to malpractice reform and the reduction of defensive medicine. Among those experiments, which are ongoing, are efforts to encourage doctors and hospitals to own up to errors, communicate better, and quickly compensate victims of malpractice. Some of the work is being undertaken by the Massachusetts Department of Public Health, which won \$2.9 million of the grant money.

Under current law, regulations for malpractice lawsuits are set by individual state governments. That's where the control should stay, said Senator Claire McCaskill, a Missouri Democrat.

"I do not understand why Washington thinks it's any of its business what states do in their courthouses," McCaskill said in an interview. "There is medical malpractice reform in my state as there is in many states."

This is a perfect example of the hypocrisy of Republicans on states' rights."

Leahy, a Vermont Democrat, has opposed damage caps. In an interview with the website of The Hill, an inside-the-Beltway publication, he expressed skepticism about such caps unless they were packaged with other changes, such as eliminating the antitrust exemption for health insurers.

The president's invitation to work on the issue was well received by business interests, including the US Chamber of Commerce, and the GOP.

"This could be seen as a historic change of position by the president, and Republicans should support it," Senator Mark Kirk, an Illinois Republican, said in an interview. Kirk said Illinois courts recently overturned a state cap on damages in malpractice cases. "So the only way to save Illinois right now is by federal legislation."

Trail lawyers were disappointed by the president's position, said Gibson Vance, president of the American Association for Justice, an organization of trial lawyers.

Vance said that 98,000 people die each year of preventable medical injuries, and that civil action is usually the only recourse. Caps on awards "don't benefit anybody except those who have done wrong," he said.

The American Association for Justice made \$2.8 million in political donations in the last election cycle, and 97 percent of the money went to Democrats, according to the Center for Responsive Politics.

The possible effects of damage caps is uncertain, but the amount of possible savings is minuscule when compared to how much the nation spends on health care, said Amitabh Chandra, an economist and professor of public policy at the Harvard Kennedy School of Government, who has studied the issue. He said caps on jury awards can't protect doctors from the fear of being sued.

"You can't insure against the hassle-cost of a suit," he said. "You can't insure against having your name dragged through the local newspaper and having to go to court and testify. That's why doctors hate litigation. It's not their payouts. For the payouts, they have insurance."

A serious national debate about medical liability reform is way overdue, said Dr. Alan Woodward, a past president of Massachusetts Medical Society and current vice chairman of the society's committee on professional liability.

"The current system is profoundly dysfunctional," he said, adding that courts are slow and inefficient — and often inequitable — to injured patients, and the liability system creates a "culture of fear" among doctors that drives up cost with defensive medicine.

Far better would be a system in use at the University of Michigan, he said, which requires full disclosure to patients who have been injured, along with "a sincere apology," an explanation on how the mistake would not be repeated on anyone else, as well as an offer of compensation. The program dramatically reduced litigation, he said.

Obama endorsed a similar approach in a 2006 New England Journal of Medicine article he wrote with Hillary Clinton, when both were senators, the society said.

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