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New Law Deals Setback to Malpractice Foes

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By ASHBY JONES

The health-care legislation has dealt another blow to a movement seeking to limit the amount doctors have to pay in medical-malpractice suits.

As a result, tort-overhaul advocates, who battle the well-organized lobby of plaintiffs' lawyers, are struggling to find ways to fight back.

On Tuesday, President Barack Obama signed the health-care bill in law. Some advocates of a tort overhaul—critics of how the nation's courts compensate the injured—said the bill failed to address their chief concern, that outsize jury verdicts have driven up the cost of malpractice insurance. Such verdicts have also caused doctors to practice "defensive medicine" in which they order unnecessary and pricey tests or procedures, according to tort-overhaul advocates.

The setback comes after two recent and similar court decisions. In February, the Illinois Supreme Court struck down the state's cap on medical-malpractice damages, saying it conflicted with the state's constitution. Earlier this week, the Georgia Supreme Court quashed a law that had limited pain-and-suffering awards in malpractice cases to \$350,000.

Referring to the plaintiffs' lawyers lobby, a spokesman for the American Tort Reform Association, said: "These days, they're in the cat-bird seat. They're going to use these rulings to 'rah-rah' their supporters and build momentum." The association has a broad membership including nonprofits, corporations and trade groups.

During some of the earlier health discussions on Capitol Hill, a malpractice overhaul did receive some support from prominent Democrats, including Sen. John Kerry (D. Mass.) and former Sen. Bill Bradley, but petered out, critics say, after the plaintiffs' lawyers lobby applied pressure to Senate Democrats.

Anthony Tarricone, the president of the American Association for Justice, a leading lobbying group for the plaintiffs' bar, said: "Our position throughout the health-care debate was no secret: The rights of injured patients could not be used as bargaining chips. Health care is about patients, and when 98,000 people die every year from preventable medical errors, we worked to make sure their voices were heard loud and clear."

Some changes did make it into the final version, but critics say they are toothless. The law allocates \$50 million to states looking to reduce costs associated with malpractice by setting up alternative ways of trying cases or trying to improve patient safety. But the law also provides an exemption, allowing plaintiffs to back out of any alternatives to state court, and instead to file claims in state court.

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"I don't know anybody who thinks this is actual medical-liability reform, or finds this meaningful at all," said Lisa Rickard, president of the U.S. Chamber of Commerce's Institute for Legal Reform. "You're going to get watered-down demonstration projects designed to let plaintiffs' lawyers opt out at any time."

Backers of a tort overhaul have long pushed for sweeping changes to the way malpractice cases are handled. Over the years, they have won damage caps in many states, including Texas, Florida and California. Still, citing ballooning costs of malpractice premiums for doctors, they have urged more change, such as setting up a separate court system for medical-malpractice cases.

But the recent Illinois and Georgia rulings—both of which dealt with limits on "non-economic damages," or damages for pain and suffering, disability and disfigurement—have troubled advocates.

In the Georgia case, a jury awarded \$1.15 million in pain-and-suffering damages to a woman who suffered injuries during a facelift, and to her husband. On appeal, the state's Supreme Court rejected the argument that the damages cap should apply, ruling that it violated the state constitution's right to a jury trial.

In the Illinois case, lawyers for a girl born with brain damage sued for malpractice and challenged a law capping non-economic damages at \$500,000 for doctors and \$1 million for hospitals. The Illinois Supreme Court overturned the law, ruling it gave to the legislature a role traditionally reserved for the courts—the ability to reduce a verdict award—and thus violated the state's separation-of-powers doctrine.

"It's hard to comment on [the decision] because it's such a strange theory—that the legislature can't set limits on damages," said Theodore Olson, the well-known appellate lawyer for the doctor in Illinois.

Because the cases deal predominantly with state law, the defense lawyers see little point in appealing to the U.S. Supreme Court. So for now, tort-reform advocates in both states are relying on politics. Illinois Sen. Dave Luechtefeld last month introduced an amendment to the state constitution to allow for damage caps.

In both states, efforts are afoot to elect new justices in November. "We're evaluating all of their records," said Al Adomite, the vice president of the Illinois Justice League. "We want the public to get an immediate opportunity to let the justices know how they feel."

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