

## Federalism and medical malpractice reform

### In challenging damages caps, the AAJ is both opposing and inviting federal intervention in state law matters

By James C. Ho



Congress may soon enact medical malpractice reform — if it can overcome a curious objection by the plaintiffs' bar.

H.R. 5 would limit the amount of noneconomic and punitive damages that juries may award, in order to reduce health care costs and increase access to doctors. Two House committees approved the bill earlier this year. And just last month, the bipartisan Senate “Gang of Six” announced the inclusion of damage caps as part of their proposed deficit-reduction package.

Predictably, the proposal is opposed by the American Association of Justice, the organization formerly known as the Association of Trial Lawyers of America.

Less predictably, AAJ has begun to raise objections based on federalism concerns. Its Web site features articles blasting H.R. 5 as “a federal government takeover of an issue that has always been decided by the states.”

As a rhetorical matter, the argument makes strategic sense — designed to appeal to the tea party voices that increasingly influence congressional debate.

But as a logical matter, the argument is peculiar, considering the source. After all, AAJ-funded attorneys are currently challenging state damage caps in federal court, alleging that they violate federal law.

In short, the issue of medical malpractice caps is already a federal issue. They made it one when they filed their lawsuit.

In 2003, Gov. Rick Perry signed into Texas law H.B. 4 — an omnibus tort reform measure that, among other things, includes caps on medical malpractice awards similar to those in H.R. 5.

But Texas did not stop there. In other states, lawyers at the AAJ-funded Center for Constitutional Litigation (CCL) have challenged state damage caps under various state constitutional theories, and have won in some courts. So Texas also adopted Proposition 12, a state constitutional amendment endorsing such caps.

Two things happened next.

First, Texas experienced a significant turnaround in access to health care: A state that once suffered low rankings in physicians per capita began to enjoy sharp increases in applications for Texas medical licenses. Second, CCL lawyers filed suit in federal court, alleging that the Texas caps violate the takings clause under the Fifth and 14th amendments of the U.S. Constitution, and other federal provisions.

The claim is mistaken. In fact, the U.S. Court of Appeals for the 5th Circuit made its views quite clear in *Lucas v. U.S.*, a case involving a previous version of the cap. The court stated that “we regard the assertion that the damage cap contravenes the fourteenth amendment of the United States Constitution to be nigh frivolous.”

The takings clause protects citizens against the unwarranted taking of private property — not public law. As the 5th Circuit observed, “Our cases have clearly established that a person has no property, no vested interest, in any rule of the common law. The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law.” Accordingly, “statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.” Not surprisingly, then, CCL’s attack on the Texas law has already been rejected by a federal magistrate judge. The case is now pending before a federal district judge.

#### AN IRONY

The lawsuit is also revealing. AAJ is currently condemning federal intervention by Congress, on the ground that medical malpractice should be the exclusive province of state, not federal, law. Yet at the same time, its lawyers are inviting federal intervention by a federal court, on the ground that federal law forbids such caps.

This is particularly ironic, considering that AAJ’s own Web site condemns H.R. 5 proponents as practitioners of “fair-weather federalism.”

Reasonable minds can disagree over the fairness and effectiveness of medical malpractice damage caps. But surely we can all agree that states should have the opportunity and discretion to experiment in this area, free from interference by federal courts.

In fairness, the lawsuit in Texas was brought by CCL, not AAJ. *The National Law Journal* has reported that a majority of CCL revenues come from AAJ and state trial lawyer associations. But that doesn’t necessarily mean that AAJ is funding or supporting this particular lawsuit.

There’s one easy way to clear the air. If AAJ truly believes that the federal government has no business messing with Texas by interfering with its medical malpractice law, it can make it clear it opposes the lawsuit. That would show that AAJ is no “fair-weather federalist.”

*James C. Ho, a partner at Gibson, Dunn & Crutcher, successfully defended medical malpractice damage caps when he served as the solicitor general of Texas.*