California's Malpractice Ruse
Wall Street Journal
April 16, 2014

One of California's few emollients for employers is its limit on "pain and suffering" medical liability judgments, which has improved access to medical care and held down health costs. But look out: Plaintiffs lawyers abetted by Attorney General Kamala Harris are now trying to gut the cap with a ballot initiative dressed in patient-protection garb.

In 1975 on his first tour as Governor, Jerry Brown signed legislation limiting attorney fees and non-economic damages on medical malpractice claims to $250,000. Lawsuits were driving up malpractice premiums, causing thousands of California physicians to close their practices and insurers to drop coverage of high-risk specialties. While plaintiffs can still recoup unlimited compensation for future medical costs and lost wages, the law has deterred attorneys from filing meritless lawsuits and reduced liability insurance costs.

A 2004 article in the Archives of Internal Medicine reported that California malpractice premiums have increased by less than 3% annually, or one-third of the rate nationally, and have fallen by 40% in constant dollars since 1975. Annual liability premiums for an OB/GYN in Los Angeles are $49,804 compared to $140,092 in Chicago and $176,005 in Long Island. Neither New York nor Illinois limits non-economic awards.

California's cap, which is the gold standard in medical malpractice reform, has inspired legislation in more than a dozen states, most notably Texas. In 2003 the Lone Star State limited non-economic damages to $250,000. A January 2014 study by the Berkeley Research Group reported that the number of claims has since declined by nearly 40% while the average award has fallen to $138,429 from $214,939. Between 2002 and 2012 Texas added 30 more physicians per 100,000 residents, according to a 2013 article in the Journal of Gastrointestinal Surgery.

Attorneys unsuccessfully sued to overturn California's cap in 1985 and have been trying to persuade their friends in the legislature to lift the limit for decades. However, they have faced pushback from other Democratic interest groups including trade unions and low-income community health clinics.

Hence their new gambit to qualify an initiative for the November ballot that would lift the cap on non-economic damages to $1.1 million, which going forward would be adjusted for inflation. Lawyers complain the 1975 cap didn't include an inflation indexer. However, the average payout has since risen more than 2.5 times the rate of inflation due to soaring health costs, which factor into economic damages. Attorneys stand to win an additional $127,500 on average per judgment if the initiative passes.

Patients will ultimately bear this cost. The Berkeley Research Group estimated that raising the cap on damages to $1 million would increase malpractice premiums by between 16% and 38%, based on the experience of other states that have imposed or eliminated limits. California's annual health costs would rise by $9.9 billion, or $1,000 for a family of four.

Higher premiums would also discourage new doctors, particularly those in high-risk specialties, from setting up practices in California and cause some doctors to leave or retire. A 2010 study by the Northwestern University Feinberg School of Medicine reported that nearly half of residents trained in Illinois were leaving the state with two-thirds citing high liability insurance costs as a reason. Many community health clinics that serve low-income populations might also close.

Attorneys realize that their initiative will be a hard pill for voters to swallow, so they've encapsulated it in measures that crack down on narcotics-abusing doctors. Ms. Harris has obliged her trial bar friends by writing a ballot summary that buries the initiative's intent. "Medical negligence lawsuits" is mentioned only in the summary's fifth and final line. Too bad there's no Hippocratic Oath for politicians like Ms. Harris.