Tort Reform Threatens Civil Rights

The subject of ‘tort reform’ has gotten a great deal of attention of late, nationally and here in Florida. As a law firm representing victims of medical malpractice and other acts of negligence, we at Searcy Denney Scarola Barnhart & Shipley, P.A., feel very strongly that the civil justice system must remain intact. Since this country was founded, our tort system has guaranteed that every citizen has the inalienable right to have his grievances heard by other members of our community. The current push for arbitrary caps on damages seeks to take decision-making power away from the individuals who comprise our juries and give it to the government. Statistics have proven, however, that such limitations won’t resolve the crises of our crowded courts, our doctors’ access to affordable liability insurance coverage, and our collective access to quality, affordable health care. California implemented such limitations in its tort system years ago, and has since proven that caps don’t solve the problems.

Special interests, and, in particular, insurance companies, have the most to gain by implementing changes in our tort system that would limit our legal rights as citizens. It’s time to shout back and let lawmakers know that our courts need to remain accessible to everyone. Any one of us might need to call upon our civil justice system at some point in the future. We need to play a proactive role now to preserve that system so it’s there for us if and when we need it, and, in doing so, keep the focus on reforms that will truly make a positive difference.
Dear Clients and Colleagues:

During the upcoming legislative session, the issue of medical malpractice/tort reform will be discussed. Florida and our nation are reaching a crisis situation over this issue. Insurance premiums are rising and doctors are staging walkouts and cutting back their practices. Something must be done, but we must be sure that our legislators do not mistakenly opt for a hasty solution, such as placing arbitrary caps on damages, over a meaningful solution, such as the implementation of effective medical/product safety regulations.

Insurance companies are pointing fingers at attorneys, saying that lawsuits are to blame for the crisis. They are somehow garnering favor from doctors by raising malpractice premiums to exorbitant rates, but then blaming the rates on lawsuits. They are telling the legislature that the solution to the crisis is to place caps on the damages awarded by juries in those lawsuits.

But capping damages will do nothing to improve the situation. Caps would serve only to further injure victims and their families by denying them the compensation they deserve for the negligent acts they suffered. In addition, capping damages would do nothing to reduce the number of people who fall victim to preventable medical injuries. In fact, medical errors alone kill 98,000 Americans each year – a sum equivalent to that of a 747 plane crash each day!

Attorneys don’t decide the outcomes of lawsuits, jurors do. Jurors are everyday people, from all walks of life, who have no hidden agendas. They render awards they feel are fair after evaluating all of the facts in the cases they hear. When a jury renders a large verdict, it is acting as a messenger, effectively stating, “A great injustice has been done here, someone has been hurt, and something needs to be changed.” Caps would serve only to “kill the messenger,” while doing nothing to solve the underlying problem.

The only meaningful solution to this crisis is for the legislature to spend its time creating effective medical/product safety regulations. If insurance companies were truly interested in changing things for the better, they would join us in asking that the legislature deal with the actual problem, which is that too many people are being injured or killed by acts of preventable negligence. For instance, when only 6% of Florida doctors are committing half of the medical errors in the state, why have insurance companies raised premiums for all doctors? Wouldn’t it make more sense to invoke strict regulations that would target the bad doctors?

To see what insurance companies are really after, you need only look at the rising rates of the insurance policies you buy – car, homeowners, health, etc. Insurance companies are looking to sustain profits during a time when they are losing money on investments in the ailing stock market. Unfortunately, they are attempting to recover those lost profits from consumers like you.

It’s time to say enough! Contact your legislators and let them know that you want them to stand up for what is right. They must not handcuff our juries by imposing arbitrary caps on damages or other limitations on civil liberties. Rather, they must create effective safety regulations that will decrease the number of preventable injuries in this country.

Christian D. Searcy, on behalf of Searcy Denney Scarola Barnhart & Shipley

Reform the insurance industry instead of taking away rights to hold wrongdoers accountable in court.
Tort Reforms Discriminate...

...against Women:
Linda McDougal recently went public about her horror of receiving an unnecessary double mastectomy after being mistakenly told she had cancer. (Two doctors and a technician had mixed up her test results with another woman’s. Ms. McDougal was told she had cancer, while the other patient was falsely told she was cancer-free.) She has had ongoing infections and has undergone emergency surgery as a result of the unnecessary mastectomies.

Unfortunately, women’s compensation for economic damages (e.g., lost wages) tends to be less than that of men. If a stay-at-home mom is misdiagnosed with breast cancer, the compensation available to her and her family will be extremely limited if caps on non-economic damages are in place.

It is important to recognize that many medical products and drugs that have caused some of the most serious injuries and death were marketed specifically to women. These include the anti-miscarriage drug DES, the Dalkon Shield IUD, high estrogen birth control pills, high absorbency tampons, and breast implants. Many of these products were removed from the market only after women brought lawsuits against those responsible. A $250,000 cap on non-economic damages would effectively eliminate that avenue of consumer protection.

...against Seniors:
Older patients are twice as likely as younger patients to become victims of medical malpractice. At least six percent of hospitalized patients 65 and older suffer a serious medical injury. - AARP Public Policies 2002

“Older persons [in Florida] are already afforded the least protection against medical malpractice.”
- E. Bently Lipscomb, Florida State Director; Letter to Dr. John Hitt, Chair, Governor’s Select Task Force on Healthcare Liability Insurance; November 12, 2002.

“If a cap is placed on non-economic damages...the result would be that the worth of older persons would be intolerably diminished.” - E. Bently Lipscomb, Florida State Director; Letter to Dr. John Hitt, Chair, Governor’s Select Task Force on Healthcare Liability Insurance; November 12, 2002.

Placing caps on non-economic damages would make it cost-effective for hospitals to cut back on staffing. It would not be feasible for the family of a senior killed by medical malpractice to file suit if the hospital’s liability for non-economic damages was capped.

...against Children:
In an absolutely clear-cut case of malpractice, a 2-year-old California boy was left unable to see, speak, eat, walk, or even sit up. Yet the defendants were able to argue that they should only have to pay $35,000 for this child’s lifetime of around-the-clock care. (They justified this by saying the victim would be eligible to receive “free” services from taxpayers and charities.) In that same case, the insurance company was able to reduce the boy’s economic damages because of his shorter life expectancy caused by the injury.

Ten years later, the boy, now 12, has had 74 doctor visits, 164 physical and speech therapy appointments, and three trips to the emergency room. His mother had to leave her job because caring for her son is a full-time job. All of this occurred simply because a hospital repeatedly refused to give a two year old an $800 test.
Facts and Figures: Malpractice Claims

Statistics have shown that 15 Floridians will die today because of a doctor or hospital’s negligence. Of those 15 deaths, only two will result in a lawsuit. - Institute of Medicine, combined with U. S. Census Bureau

The average malpractice premium in Florida dropped from $24,700 in 1988 to $20,500 in 1998, a 40% reduction when adjusted for inflation. - American Medical Association, Socioeconomic Characteristics of Medical Practice

Medical errors kill between 44,000 and 98,000 Americans every year, a death rate higher than AIDS, automobile accidents, and breast cancer. - Institute of Medicine, November 1999

Over half of the malpractice in Florida is committed by only 6% of the doctors. - Public Citizen, September 2000

According to a Harvard study, one out of every 200 people admitted to a hospital died due to a hospital mistake. - The Charleston Gazette, Feb. 25, 2001

Medical costs rose 13 times faster than malpractice premiums from 1988 to 1998. - American Medical Association, Socioeconomic Characteristics of Medical Practice

Profits earned by insurance companies on malpractice coverage are, as a percentage of premiums, nearly twice as high as they are on casualty and property insurance. - National Association of Insurance Commissioners, published 2001

Premiums for malpractice insurance in California, which has the most restrictive caps in the country, increased by 36% between 1988 and 1998. Florida’s premiums, over the same period, decreased by 17%. - American Medical Association, Socioeconomic Characteristics of Medical Practice

Note: Injured victims, limited by caps and unable to recover adequate sums from wrongdoers, must often turn to programs funded by taxpayers, such as Medicare, Medicaid, and Social Security, for the income and medical care necessary for them to survive.

Caps on Claims in California Have Not Worked

Statistics have shown that the total savings received by doctors and hospitals, due to caps placed on malpractice cases in California, were less than 1% of premiums paid.

California’s average medical malpractice rate is still above the national average.

Of states without malpractice caps, the majority have average medical malpractice premiums lower than those in California.

Health care costs have risen in California since caps were put in place. The number of malpractice cases filed has also increased since caps were initiated.

Statutory protection afforded in California attracts bad doctors to practice there by capping their liability for repeated errors.

Insurance companies have the incentive to needlessly prolong the litigation of meritorious claims. Victims have little recourse for such behavior when their claims are capped by law.

In the 27 years since MICRA (Medical Injury Compensation Reform Act) was enacted, the cost of living in California has increased over 200% and doctors’ salaries have increased over 350%. The $250,000 cap, however, has not been adjusted.

California’s 1975 cap of $250,000 on non-economic damages is worth $40,389 in 2002 dollars. A patient would need to recover over $1.5 million today to retain the equivalent medical purchasing power of $250,000 in 1975.

California premium rates are HIGHER than in states without caps!

According to the Medical Liability Monitor, premiums in California are 8% higher than the average of all states without caps on non-economic damages.

Laws Governing Malpractice Claims Already Exist

Florida Statute 766.207, addressing medical malpractice claims, was first passed in 1988. It affords doctors and hospitals the opportunity to submit any malpractice case to arbitration. If a plaintiff accepts an offer to arbitrate, the maximum allowed for non-economic damages is $250,000. Furthermore, economic damages are limited to 80% of wage loss and 100% of all medical expenses. If a plaintiff rejects arbitration, the defendant still enjoys a cap of $350,000 on non-economic damages.

Few people realize that doctors and hospitals have had the ability to cap plaintiffs’ non-economic damages since 1988. Despite that provision, the crisis exists. In addition, there were substantial efforts made and laws passed in 1986 to weed out frivolous lawsuits. Malpractice claims since then have been subject to pre-suit screening, wherein both sides are required to exchange information and perform good faith pre-suit investigations. A plaintiff cannot file suit without obtaining a sworn affidavit from a medical expert who vouches for the case. A defendant can challenge the validity and good faith of the plaintiff’s case, pre-suit. Courts have authority to enter sanctions against a plaintiff if his or her investigation is deemed insufficient or if the case is without merit. Attorneys’ fees and costs can then be sought from the lawyer filing the bad case.

What more do they want?

Florida has an insurance crisis, not a malpractice crisis. This insurance crisis exists despite existing legislation specifically aimed at reducing frivolous lawsuits and capping damages.

We already have “loser pays” laws in place. A defendant can file a Proposal for Settlement under Florida Statute 768.79. If a plaintiff refuses an offer, and then loses the case, the prevailing defendant can recover costs and attorneys’ fees from the plaintiff.

The Statute of Limitations, which is the time period during which a victim can formally initiate a claim, is reduced to only two years for medical malpractice cases, whereas it is four years for most other claims.

Frivolous claims are difficult to file. Florida Statute 766.102 requires a plaintiff to elicit testimony from an expert medical witness before a claim against a health care provider can be initiated. Testifying medical experts must be qualified in the same specialty as the prospective defendant, and must have practiced within the five year period preceding the alleged malpractice.

Before suing a health care provider, a plaintiff must share information with a prospective defendant, give a statement if requested, and submit to an examination if the defendant asks for one, all as provided by Florida Statute 766.106.

Governmental defendants, whether medical providers or otherwise, enjoy capped liability exposure. Florida Statute 768.28 limits a governmental defendant’s liability to $100,000 per injured person and $200,000 per overall claim. A patient injured by a governmental health care provider can only recover in excess of these statutory caps by seeking additional compensation from the state legislature (known within the industry as a “Claims Bill”), which is a monumental undertaking.

We already have a provision under Florida law for capping non-economic damages. Florida Statute 766 provides defendants with the opportunity to demand arbitration in pending cases. If a defendant demands arbitration, and a plaintiff accepts, non-economic damages are capped at a maximum of $250,000 per incident. The limitation is $350,000 if the victim rejects the offer to arbitrate and chooses instead to litigate the case.
Make a Difference... Write Your Legislators

Rest assured, your legislators are currently hearing from lobbyists hired by different factions of the insurance industry. They are also receiving letters, e-mails, and phone calls from doctors and representatives of the AMA itself, all in an effort to have laws enacted that will limit the responsibility of negligent medical care providers.

Make sure that your voice is also heard. Here are some examples of letters written by concerned citizens...

Dear Legislator:

Here we go again... It appears that supporters of "tort reform" are rearing their ugly heads again, pumping volumes of rhetoric across the airwaves. Don't fall for the rhetoric. **Vote against tort reform bills that would place arbitrary caps on damages awarded to victims of medical negligence.**

There is no doubt that individual doctors are getting squeezed in today's health care industry. On one hand, malpractice premiums are high, causing many physicians to go without coverage altogether. On the other hand, HMOs have drastically reduced the compensation paid to doctors for all types of medical procedures. But ask yourself, who is in control of the system on both ends? Insurance companies are!

As it stands, in order to make a reasonable income, doctors have had no choice but to turn their practices into medical mills, processing patients in hurried fashion. "Managed Care" insurance adjusters (with no medical training) then routinely deny payment for tests and procedures they deem unnecessary. Doctors are therefore rushed, pinched for money, and pinched for time. That leads them to make mistakes, and mistakes in doctors' offices cost lives.

Denying citizens full access to the justice system would be tantamount to giving doctors, hospitals, and HMOs license to commit malpractice without any concern for accountability. If reform is necessary, let's examine how insurance executives can siphon off hundreds of millions of dollars in personal compensation during bull markets, then cry poor to legislators during a recession. And most of all, let's be reminded that our government is supposed to be "of the people and for the people," and not swayed by the almighty dollar at the expense of the individual citizen.

Sincerely,

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Dear Legislator:

I recently learned that there is a proposal to limit how much a jury can award medical malpractice victims when they are injured by negligent doctors. This proposal lines the pockets of insurance companies.

With all due respect, I urge you to please oppose this proposal. Instead, I hope you will submit a proposal that increases the quality of patient care, decreases the number of medical errors, and addresses the insurance crisis. We must protect patients by stopping the bad doctors who continue to get away with negligent acts against vulnerable patients.

I don't think we should further hurt an already injured patient by limiting the amount of money he or she can recover for losing a limb, eyesight, or a child. How can you, a politician, put a monetary value on someone's life?

This is a dangerous proposal that protects a minority of negligent doctors at the expense of injured patients and their families. It must be defeated.

Sincerely,

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Dear Legislator:

I am writing to urge you to vote for real quality of care improvements. Rather than limiting patients' rights to recover, when they are victims of medical malpractice, we should be looking at ways to limit the number of times medical malpractice happens. Instead of risking the health and safety of patients, we need to look for a solution that punishes bad doctors instead of punishing the victims of those bad doctors.

Innocent people and the reputations of good doctors are hurt by medical mistakes. We need access to information on bad doctors, and their insurance companies should be held accountable. Our legislators should protect us and medical malpractice victims instead of punishing the victims of those bad doctors.

Sincerely,

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Who to Contact, and How

Your county Supervisor of Elections office can tell you who the elected officials are for your District. We urge you to call your local Elections office, obtain the names and addresses of all of your elected officials, and then write letters urging them to preserve your civil rights. There is also an organization called the Coalition for Family Safety, which will look up your elected representatives for you. Simply fill out the attached card and mail it to them, and they will pass on your sentiments about caps on damages for you.

Protect Your Civil Rights and Fight Tort Reform online too!

To find more information, or send emails to the right contact, please log on to the following sites:

www.insurance-reform.org (Americans for Insurance Reform)
www.consumerwatchdog.org/insurance (The Foundation for Taxpayer and Consumer Rights)
www.citizen.org (Public Citizen)
www.centerjd.org (Center for Justice and Democracy)
www.atla.org (Association of Trial Lawyers of America)
www.searcylaw.com (Searcy Denney Scarola Barnhart & Shipley, PA)

We should pay more attention to who’s really controlling the issues.
### Do Caps Reduce Malpractice Premiums?

**Average Liability Premium**

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Insurance premiums for general surgeons are 2.3% higher in states with caps on damages. Caps do not bring down malpractice premiums. Deterring malpractice is the best way to bring down costs and protect our families.

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Derived from data provided by Medical Liability Monitor (vol 26, #10 - Oct 2001). A state’s average premium is calculated as the unweighted mean value of premiums for all companies for which data is provided across all regions. A state is classified as having a “cap” when there exists a general noneconomic damage cap that affects medical malpractice or a broad medical malpractice specific cap on noneconomic damages. Caps that affect one area of medical malpractice (e.g. just wrongful death cases) or punitive damage caps are not counted since these represent a small number of cases.

Also in this issue:

A postage-free card to tell your legislator that you want to protect patient safety...not insurance industry profits!