

# LIFT PERSPECTIVE

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## Six Cautions on Expanding Medical Liability

In 1997 Texas became the first state to pass an HMO liability law that provides for an external review process if a health plan denies care and gives people the right to sue the managed care organization (MCO) if a treatment decision results in physical injury or death.<sup>1</sup> Several states, as well as Congress, are considering similar proposals that would expand medical liability options and make MCOs, insurers and employers more vulnerable to lawsuits.

*A good idea?* That depends on who you talk to. The issue of expanding medical liability transcends traditional conservative-liberal distinctions. For example:

• Proponents of liability expansion claim that MCOs, insurers and employers will act much more responsibly if they are subject to lawsuits and punitive damages — and

group market are subject to liability, while large companies operating under the federal Employee Retirement Income Security Act (ERISA) are not, and that is not fair to small employers — and conservatives are big on having a level playing field.

• Liability-expansion advocates say that the current system often denies patients choice by refusing to provide care — and conservatives are strong proponents of patient choice.

On the other hand, it is liberals who are in league with the trial lawyers and support their efforts increasingly to prey on companies that are engaging in business honestly and legally, and make billions of dollars in the process.

Before the states and Congress go forward with medical liability expansion, they should consider several cautions.

### **Caution #1: Expanding Liability Will Not Necessarily Improve the Quality of Care.**

Everyone has heard horror stories about an HMO that denied care or coverage to one of its insured, which resulted in severe physical harm or death to the patient. Liability proponents argue that by making HMOs, insurers and employers more susceptible to

#### **Key Issues:**

##### **Expanding Liability Will Not**

- Necessarily Improve the Quality of Care.
- Necessarily Improve Patient Choice.

##### **Expanding Liability Will**

- Increase the Number of Lawsuits.
- Increase the Cost of Health Insurance.
- Increase the Number of Uninsured.
- Increase the Government's Role in Health Care.

conservatives are strong proponents of people and corporations being held accountable for their actions.

• Proponents of liability expansion point out that insurers and employers in the small

lawsuits, they will act more responsibly which will improve patient care.

There are several problems with this argument.

(1) *HMOs and insurers can already be sued.* Take, for example, the case of a San Francisco widow who sued Aetna last year for denying care to her husband who had cancer. The jury returned a \$120.5 million verdict, \$116 million of which was for punitive damages.<sup>ii</sup> And there was a \$51.5 million judgment rendered last September against Anthem Blue Cross & Blue Shield.<sup>iii</sup>

Even under the federal ERISA law, which usually covers large employers, HMOs can be sued, but only to recover medical damages and related losses such as time off work. Employers and HMOs operating under ERISA cannot be sued for benefit design. For example, when Houston-based H & H Music decided to cut its drug benefit to a maximum of \$2,500 per year per employee, an HIV-positive employee filed suit. The case went to the U.S. Supreme Court which ruled that under ERISA H & H Music had the option of cutting its benefit to whatever it chose, or canceling it for that matter.

(2) *More liability means more defensive medicine.* Fear of malpractice suits already has doctors and hospitals practicing defensive medicine, that is, providing unnecessary care or tests just to protect themselves from lawsuits. A greater threat of liability would mean even more defensive medicine. In addition, physicians are less likely to peer-review a colleague's work honestly if they fear it may open the doctor up to a lawsuit.

**Caution #2: Expanding Liability Will Not Necessarily Improve Patient Choice.** For the past 20 years, HMOs aggressively marketed themselves to employers as a way to provide comprehensive health care coverage at lower costs. They were able to

contain costs by controlling health care utilization from the top down. Neither doctors nor patients had all the choices they had under the fee-for-service system. That practice in and of itself did not necessarily mean patients were getting worse care, anymore than a person shifting from a diet where he ate anything he wanted to a restricted diet has necessarily lowered his nutrition intake. In fact, the restricted diet may actually be better and healthier. Patients and doctors were used to having virtually anything the medical system provided, and managed care put a stop to that. The subsequent loss in physician autonomy and patient choice has left many people disgruntled.

However, expanding liability will not necessarily increase patient choice. For some time, several MCOs have been responding to the growing demand for more choice. Increasingly, patients have a choice over a wide range of physicians, many of whom are members of a number of health plans, and other health care providers. In some cases, rather than restricting people's choices, both the health plans and employers are giving them more choices, but often requiring them to pay more if they go out of network. Thus, the market — employers and insurers responding to demand — and not the government or attorneys, is working to expand choice.

**Caution #3: Expanding Liability Will Increase the Number of Lawsuits.**

Liability proponents point to the Texas law, which has resulted in very few lawsuits so far, and contend that expanding liability will not bog down the courts with frivolous lawsuits. However, immediately following enactment on September 1, 1997, the new law was challenged in federal court. The legal wrangling over the legislation made it difficult for trial lawyers to know how to respond. It wasn't until more than a year

after enactment of the legislation that the first suit, *Plocica v. NYLCare*, was filed in federal court. And it was several months after that before the case was remanded back to the Texas State District Court. In other words, it is too soon to tell just what the impact of the legislation will be because of the political and legal wrangling surrounding it.

The sparsity of lawsuits is also a result of the trial lawyers' strategy and preparation. They are conducting seminars around the state and warning their colleagues to be careful in their case selections. According to Jerry Patterson of the Texas Association of Health Plans, "The goal is to pursue and win a few cases so as to establish a 'good' precedent, which will encourage HMOs to settle rather than risk going to trial."<sup>iv</sup>

But even the go-slow approach is about to change. Last November, a coalition of attorneys led by lawyers who pushed through the anti-tobacco suits filed a class-action lawsuit against five of the largest HMOs, covering 32 million people, claiming they were violating anti-racketeering laws.<sup>v</sup> If some of these suits are successful and set a precedent in the courts, the liability doors will be thrown wide open.

**Caution #4: Expanding Liability Will Increase the Cost of Health Insurance.**

After several years of relatively low health care cost increases, insurers and health plans are bracing for a wave of double-digit increases. There are several reasons for the increases: doctors can do more than they could in the past, more people are using pharmaceuticals, increased technology, and federal and state regulations. While malpractice claims have always played a part in health care cost increases, they were not the driving factor. However, a rash of new class-action lawsuits and plaintiffs

seeking huge settlements similar to those with the tobacco industry, health care costs will climb significantly.

**Caution #5: Expanding Liability Will Increase the Number of Uninsured.**

There are currently some 44 million Americans who do not have health insurance. If liability is expanded, that number will grow significantly for two reasons.

First, it will drive up the cost of health insurance so that fewer people can afford it. Economists know that when the price of a product or service goes up, fewer people buy the product or service. How many decline to buy it depends on a number of factors such as how much the increase is and whether people can easily substitute another product.

Health economists have estimated that a 1 percent increase in health insurance leads to between 200,000 and 300,000 becoming uninsured. Some early estimates of liability expansion predicted that it might raise the cost of health insurance by around 4 percent. If accurate, that could mean an additional 1 million people would lose their coverage — and those estimates did not factor in the problem created by huge class-action lawsuits.

But there is another reason why the number of uninsured will go up. Employers simply do not want to be exposed to more lawsuits. Except for Hawaii, employers are not required to provide health insurance; they offer it as a benefit to attract good workers. If they conclude that offering health insurance will also attract lawsuits, they are likely to drop their plans and let workers fend for themselves. Indeed, a recent survey found that about a third of employers would consider canceling their coverage if Congress passes an expanded liability provision that would expose them to an increased number of lawsuits.

**Caution #6: Expanding Liability Will Increase the Government's Role in Health Care.** Historically, the federal government has refrained from regulating health insurance, and employers have liked it that way. However, the expansion of liability could lead employers who do not cancel their insurance plans to openly invite the federal government to regulate the industry as a means of protection from plaintiffs' attorneys. They may ask Congress to write specific guidelines about what they can and cannot do, so that they would have a recourse in the courts. Such regulation would only drive up the cost of insurance, increasing, once again, the number of uninsured. And it could lead to the government monitoring health care coverage and tracking medical care. Such policies would further undermine medical privacy.

**What Can Be Done?** A number of states have already passed laws that promote external review of disputed claims or create an ombudsman to oversee the process. And Congress has passed a similar provision as part of its managed care reform legislation (though it has yet to pass the conference and go to the president's desk for his signature). Establishing a way for patients to challenge an insurer's decision not to cover a medical procedure is an effective way to resolve disputes without going to the courts.

Perhaps more importantly, putting patients in control of their health care by giving them more control over their money through Medical Savings Accounts would solve many of the problems. When patients are able to make their own decisions, rather than having an insurer or employer make their decisions for them, they are much more satisfied with the outcome and much less likely to sue.

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<sup>i</sup> Carol Patton, "Texas Offers Model Patient-Rights Law," *Physicians Financial News*, reprinted on Medscape, www.medscape.com, 1999.

<sup>ii</sup> "States, Congress Float Right-to-Sue Laws," *Best News*, March 16, 1999.

<sup>iii</sup> Laura McGinley and Milo Geyelin, "Attorneys Prepare Suits Against HMOs," *Wall Street Journal*, September 30, 1999.

<sup>iv</sup> Jerry Patterson, Memorandum on SB 386, the Texas HMO Liability Law," Texas Association of Health Plans.

<sup>v</sup> Owen Ullmann, "Coalition of Lawyers Sues 5 Major HMOs," *USA Today*, November 24, 1999.