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Debate Over Medical Malpractice Liability Heats Up

Fresh on the heels of his re-election, President Bush traveled to Madison County, Illinois to convince consumers of the value of shielding healthcare providers from liability for injuries resulting from substandard medical care. [\[FN1\]](#) Medical liability premiums have soared in recent years, forcing doctors out of states like Illinois where medical malpractice premiums that are significantly higher than in California, which caps the non-economic damages an injured plaintiff may recover. [\[FN2\]](#) Not surprisingly, President Bush has the support of the medical community and insurance companies, and is opposed by consumer organizations and trial lawyers. [\[FN3\]](#)

In a "campaign-style" appearance, President Bush accused trial lawyers of flooding courthouses with frivolous lawsuits because "they know the medical liability system is tilted in their favor This liability system of ours is out of control." [\[FN4\]](#) While the President's speech portrayed tort reform as a simple and obvious answer to rising premiums, the reality is not so clear-cut. In fact, President Bush's premise, namely that the "system is tilted in [plaintiffs'] favor" is not *362 supported by the jury verdict reports from Madison County, a county with a longstanding reputation as a "judicial hellhole" for defendants. [\[FN5\]](#) The medical malpractice judgments handed down in Madison County since 1996 suggest that plaintiffs expecting a windfall are in for a rude awakening. [\[FN6\]](#) Since 1996 only 364 malpractice claims, or 40 per year, have been filed. [\[FN7\]](#) These numbers suggest that contrary to tort reform rhetoric, lawyers are not filing stacks of frivolous lawsuits against doctors and hospitals even in this "judicial hellhole." [\[FN8\]](#) Additionally, of the medical malpractice claims filed since 1996, plaintiffs have won verdicts against a hospital or doctor only eight times. [\[FN9\]](#) Of these verdicts, the average damages awarded was \$380,000. [\[FN10\]](#) These figures lead one commentator to suggest that Madison County "[s]ounds more like a hellhole for injured patients." [\[FN11\]](#) Indeed, nationwide Plaintiffs win medical malpractice cases before a jury only twenty-seven percent of the time. [\[FN12\]](#)

While President Bush's call for tort reform is "a frequent--and surefire-- crowd-pleaser," [\[FN13\]](#) the law in Illinois already includes a number of provisions for curbing the abuses that tort reformers point to. For instance, under present Illinois law injured consumers are barred from recovering punitive damages against health care providers. [\[FN14\]](#) As a consequence, a patient who wakes up to the painful discovery that a sponge or medical instrument has been stitched up inside of him has no right to punish the surgeon or the hospital, and *363 may only seek compensation for his injuries. [\[FN15\]](#) Furthermore, such a patient would have two years to bring a claim, after which time the negligent surgeon would be forever off the hook. [\[FN16\]](#) Illinois has also addressed frivolous medical malpractice claims, without the imposition of federal law, by requiring that a physician affirmatively state, in writing, that a claim is meritorious before it can be filed. [\[FN17\]](#) The Illinois approach to limiting frivolous lawsuits appears to be more effective than the President's plan because caps on damages would be unlikely to impact plaintiffs that are not legitimately injured, i.e. the classic image of the feigned neck injury following a car crash, but would instead limit the recovery available to plaintiffs that are horribly injured, crippled or killed. [\[FN18\]](#)

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President Bush told his supporters in Madison County that "[w]orld-class medical technology is expensive But some costs are unnecessary Many of the costs do not start in the operating room They start in a courtroom." [\[FN19\]](#) The President's opponents in the Senate, however, insist that consumers are not likely to realize any appreciable savings from a reduction in legal expenses because lawsuits presently account for less than two percent of healthcare spending. [\[FN20\]](#) According to the Congressional Budget Office ("CBO") "even a reduction of 25 percent to 30 percent in malpractice costs would lower health care costs by only about 0.4 percent to 0.5 percent, and the likely effect on health insurance premiums would be comparably small." [\[FN21\]](#) Physicians groups, however, argue that lawsuits are "100 percent [of the problem] for the doctor who can no longer afford to pay for the insurance" and continue to push for caps on damages for pain and suffering, referred to euphemistically as "non-***364** economic damages." [\[FN22\]](#)

Proponents of caps however seem curiously willing to ignore the fact that the CBO and insurance executives alike have repeatedly concluded that damage caps will have little to no effect on the premiums doctors and hospitals [\[FN23\]](#) pay. [\[FN24\]](#) Furthermore, states that have enacted caps have simply not realized the benefits proponents of caps seek. [\[FN25\]](#) Half of the 19 states that have enacted caps have insurance premiums that are above the national average; and 16 of the 31 states that do not cap damages have premiums below the national average. [\[FN26\]](#) California, with its low medical malpractice premiums, is often cited as an example of the effectiveness of capping liability. [\[FN27\]](#) However, it is not clear that California's low premiums are a result of liability caps. [\[FN28\]](#) In fact, California's malpractice premiums increased 450 percent between 1975, when caps were enacted, and 1988. [\[FN29\]](#) California's premiums did not start to fall until 1988 when the state began regulating medical malpractice insurance rates. [\[FN30\]](#)

***365** Seventeen states have enacted "prior rate review" of medical malpractice insurers requiring state approval before insurance premiums may be increased. [\[FN31\]](#) In contrast, Illinois insurers enjoy the most lax insurance regulation in the United States. [\[FN32\]](#) By some accounts, Illinois' lack of regulation allows insurers to keep their books out of public view while they gouge doctors and hospitals, and blame high premiums on patients who have been horribly injured or killed. [\[FN33\]](#)

In accessing the reasons for rising premiums it is important to understand that insurance companies invest the money they receive as premiums until a payout is required. [\[FN34\]](#) The money held by an insurer until payout is necessary is called "float," and insurers make a large portion of their profits by investing this money. [\[FN35\]](#) As a result, the profitability of insurance companies is, to a large extent, a product of the strength of the investment market. [\[FN36\]](#) Predictably, insurers respond to under-performing investment markets by raising insurance premiums. [\[FN37\]](#) As a consequence, doctors have seen their insurance premiums rise in conjunction with the under-performing investment markets experienced in the mid-70's, the mid-80's and then again in 2002 and 2003. [\[FN38\]](#) Thus, there is strong support for the notion that insurance rates are a product of the broader economic cycle, and not a breakdown of our tort system. [\[FN39\]](#) Insurance reform, however, is not an issue the Bush administration appears willing to tackle. [\[FN40\]](#) If insurance reform is going to be accomplished, consumers will need to look to their state governments. [\[FN41\]](#)

Not surprisingly, proponents of tort reform are quick to point to multi-million dollar medical malpractice verdicts reported in the ***366** media as proof that our court system is out of control. [\[FN42\]](#) But as with most aspects of this debate, it is important to scratch the surface to put these eye-popping verdicts into perspective. Plaintiffs rarely recover the full amount of these massive verdicts. [\[FN43\]](#) For example, a New York jury awarded plaintiffs \$112 million in a medical malpractice case filed on behalf of their severely brain damaged daughter. [\[FN44\]](#) The plaintiffs, however, received only a fraction of that amount, \$6 million in this case. [\[FN45\]](#) As is typical in these cases, the plaintiffs agreed to what is called a "high-low" agreement whereby the parties agree to settle between some amount, in this case between \$2 and \$6 million, regardless of the verdict the jury returns. [\[FN46\]](#) High-low agreements protect defendants from huge verdicts while protecting plaintiffs from recovering

nothing or facing a lengthy appeal process. [\[FN47\]](#)

In 2000, Pennsylvania registered malpractice verdicts for \$100 million, \$55 million, and \$49.6 million, drawing the ire of President Bush, who told an audience in Scranton, Pennsylvania that "[y]ou've got a problem" [\[FN48\]](#) But these cases settled for far less than their verdicts. The \$55 million verdict resulted in a \$7.5 million payment to the plaintiff, while the \$49.6 million verdict settled for \$8.4 million. [\[FN49\]](#) The \$100 million case also settled, but for an undisclosed sum reported to be significantly less than \$100 million. [\[FN50\]](#)

Defendants, however, resist dismissing large verdicts as unimportant because even verdicts that are never recovered create benchmarks which help determine the value of future cases. [\[FN51\]](#) These *367 verdicts provide plaintiffs with leverage during settlement discussions which account for ninety-six percent of medical malpractice payouts. [\[FN52\]](#) Still, with plaintiff's winning medical malpractice cases before a jury only twenty-seven percent of the time nationwide, it is difficult to believe that the U.S.' court system is slanted in their favor. [\[FN53\]](#)

Furthermore, when a jury feels compelled to buck the trend by deciding for the plaintiff and granting a large verdict, the injury which the plaintiff suffered is likely to be severe and one that, if the plaintiff is still alive, he or she will never recover from. [\[FN54\]](#) Such a proposal strikes some trial lawyers as "unconscionable." [\[FN55\]](#)

The movement to protect physicians, hospitals, and insurance companies from liability at the expense of the most seriously injured in our society is growing. [\[FN56\]](#) While lively debate may be just what is needed to fix what ails our healthcare system, consumers' interests are best served when political rhetoric is tuned out in favor of well-reasoned consideration of the economic and moral consequences of proposed reform.

Oral Arguments Heard: Consumers Anticipate Free Flow of Wine from Upcoming Supreme Court Decision

Presently, wine consumers in twenty-four states are, in effect, barred from purchasing wine from all but a fraction of America's *368 3,000 independent wineries. [\[FN57\]](#) It is illegal for consumers in these states to purchase wine in California, for instance, and have it shipped directly their homes. [\[FN58\]](#) These twenty-four states [\[FN59\]](#) require out-of-state wineries, but not their in-state counterparts, to sell their product through in-state distribution channels which handle only a small portion of the nation's wines, [\[FN60\]](#) and which considerably mark up the prices consumers pay. [\[FN61\]](#)

The Constitution's dormant Commerce Clause ordinarily prohibits states from discriminating against interstate commerce. [\[FN62\]](#) But on December 7, 2004, attorneys representing the states of New York and Michigan argued before the Supreme Court that the Twenty-First Amendment to the Constitution, the same Amendment that ended Prohibition, reserves special regulatory power to the states with regard to the sale of alcohol within state boundaries. [\[FN63\]](#) The states' argument is grounded on the notion that states should be able *369 to protect their citizens from the abuses of alcohol and therefore should have virtually unlimited power to control the sale of alcohol within their borders. [\[FN64\]](#) At first blush, the possibility that teenagers may use the Internet to order a crate of assorted wines for home delivery may give the states' argument some force.

Reports from those who witnessed the oral argument in the consolidated cases of *Granholt v. Heald* and *Swedenburg v. Kelly*, however, suggest that the Justices were not impressed the states' argument. [\[FN65\]](#) The Court noted that preventing out-of-state sellers from shipping alcohol directly to consumers did nothing to prevent in-state sellers from doing the very same thing. [\[FN66\]](#) When attorneys for the states' admitted that the states could not prevent "one-hundred percent" of sales to minors, Justice Scalia shot back, "You can't prevent it at all." [\[FN67\]](#)

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The reaction from the bench was similar when Caitlain Halligan, arguing for New York, claimed that a law requiring wine sellers to have a physical presence in New York was justified by the state's need to oversee its alcohol trade by entering the wholesaler's premises to ensure that sales are properly reported. [FN68] To this, Justice Souter asked Halligan if she could show that New York had been making such inspections. [FN69] When she conceded that she could not, Justice Souter replied, "[w]ell, isn't that the end of that issue, then . . . I mean, it is your burden, isn't it?" [FN70]

Conversely, Clint Bolick, opening for the wineries, seemed to fair better as he called the present system a "distributors' oligopoly" *370 which accomplished only "economic protectionism." [FN71] Then, former Stanford Law School Dean Kathleen Sullivan, who also argued for the wineries, seemed to score points in an exchange with Justice Ginsburg. Justice Ginsburg asked if it was the wineries position that states could ban direct sales to its citizens from out-of-state wineries if they also banned direct sales from their in-state competitors. [FN72] Sullivan responded in a way that both narrowed the issue and utilized Justice Ginsburg own reasoning, "That's exactly correct . . . As you've said in the context of gender discrimination, you can cure an equal protection problem by leveling up or leveling down." [FN73]

After witnessing the oral arguments, James Seff, who wrote a brief in the case for the Wine Institute, which represents eight-hundred wineries, said, "I am thrilled [with] the way it unfolded At the end of the day, I think the antidiscrimination notions of the dormant [c]ommerce [c]ause outweighed the jurisprudence of the Twenty-[f]irst Amendment." [FN74]

A ruling in favor of the wineries would not only allow smaller wineries to sell to previously unreachable markets, but it would also allow big discount retailers of wine to ship a variety of brands nationwide. [FN75] The latter proposition may ultimately have a greater impact on the market as a whole. [FN76] Internet sales of wine presently account for less than two percent of the \$18.2 billion U.S. domestic market, but this percentage is expected to skyrocket if the Supreme Court rules in favor of the wineries. [FN77]

Given the sophistication and the passion that many wine consumers have for their product, and given that each vintage is unique and of limited supply, a consumer victory over a stifling state-sponsored distribution system would indeed be sweet. And for consumers with less sophisticated palates, well, we can appreciate paying less for the wine we drink if the Supreme Court rules as expected.

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[FN2]. Associated Press, Bush Pushes for Lawsuit Limits (Jan. 5, 2005), available at <http://www.cnn.com/s005/ALLPOLITICS/01/05/bush.lawsuits.ap/index.html> (quoting President Bush: "I believe the voters made their position clear on Election Day on medical liability reform.").

[FN3]. Mark Silva, Bush Opens Effort to Limit Lawsuits; In Southern Illinois, President Says Congress Must Cap Pain, Suffering Awards at \$250,000, Chi. Trib., Jan. 6, 2005, at 9.

[FN4]. Id.

[FN5]. Id.

[FN6]. Kenneth T. Lumb, Editorial, Regulate Insurance to Fight Malpractice 'Crisis,' Chi. Trib., Jan. 16, 2005, at 8.

[FN7]. Id.

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[FN7]. Id.

[FN8]. Id.

[FN9]. Id.

[FN10]. Lumb, *supra* note 5, at 8.

[FN11]. Id.

[FN12]. Joseph T. Hallinan, Pennsylvania's Big Three, *Wall St. J.*, Nov. 30, 2004, at A1 (reporting on the impact that high dollar jury verdicts have on public perceptions of the of our civil justice system).

[FN13]. Lorraine Woellert, Tort Reform: Is the Road Clear At Last?, *Businessweek*, Nov. 15, 2004, at 50.

[FN14]. [735 ILCS 5/2-1115](#) (West 2005).

[FN15]. See [Medical Devices & Surgical Technology Week, Feb. 27, 2005, at 286, available at 2005 WL 55337456](#) (reporting that a former patient of the University of New Mexico Health Sciences Center is suing the University because the surgical team that operated on him for an aortic aneurysm left behind a surgical instrument called a "Glassman Vicera Retainer" in his abdomen.).

[FN16]. [735 ILCS 5/13-212](#) (West 2005).

[FN17]. [735 ILCS 5/2-622](#) (West 2005).

[FN18]. Geoff Boehm, Debunking Medical Malpractice Myths: Unraveling the False Premises Behind "Tort Reform," 5 *Yale J. of Health Pol'y, L. & Ethics* 357, 359 (Winter 2005).

[FN19]. Silva, *supra* note 2, at 9.

[FN20]. Id.

[FN21]. Bush Pushes for Lawsuit Limits, *supra* note 1.

[FN22]. Silva, *supra* note 2, at 9.

[FN23]. Max Douglas Brown, Editorial, Here's To Your Good Health; Until We Get Tort Reform, It's Patients Who Will Feel The Pain, *Chi. Trib.*, Feb. 17, 2005, at 27. Like physicians, hospitals are also carrying the burden of high insurance premiums. Id. Most hospitals in Cook County, Illinois, are not fully insured against liability exposure. Id. In fact, no major medical center in Cook County is insured against claims under \$15 million. Id. The situation is analogous to an auto insurance deductible in that the insurer does not kick in unless the damages exceed the amount of the deductible. Id. Thus, when a hospital gets hit with malpractice liability, the impact on the hospital's bottom line is direct and immediate. Id.

[FN24]. Kevin J. Conway, Editorial, Tort Reform Won't Lower Malpractice Premium, *Chi. Trib.*, Jan. 11, 2005, at 14 ("Insurance company executives have repeatedly said that they will not reduce premiums after enactment of caps.").

[FN25]. One colorful Texan had the following to say about the caps on medical malpractice liability: "In Texas, we have had

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"tort deform" up to our ears. Med-mal ... has been tort-deformed out the wazoo here--\$250,000 award caps, the whole ball of wax. Net result? Proposed rate increases for three of the state's largest med-mal carriers up 16.6 percent to 35.2 percent." Molly Ivins, Editorial, A Bounty of Bush Blunders; The White House Should Come to Grips With The Fact That It Would Do The Country A Huge Favor If It Paid Attention To The Bad News It's Ignoring, Chi. Trib., Jan. 13, 2005, at 25.

[\[FN26\]](#). Conway, supra note 23, at 14.

[\[FN27\]](#). Lumb, supra note 5, at 8.

[\[FN28\]](#). Id.

[\[FN29\]](#). Id.

[\[FN30\]](#). Id.

[\[FN31\]](#). Chicago Tribune, Editorial, Worse Than Gridlock, Chi. Trib., Feb. 4, 2005, at 22.

[\[FN32\]](#). Lumb, supra note 5, at 8.

[\[FN33\]](#). Id.

[\[FN34\]](#). Boehm, supra note 17, at 364.

[\[FN35\]](#). Id.

[\[FN36\]](#). Id.

[\[FN37\]](#). Id. at 364-65.

[\[FN38\]](#). Id.

[\[FN39\]](#). Boehm, supra note 17, at 365.

[\[FN40\]](#). Conway, supra note 23, at 14.

[\[FN41\]](#). Id.

[\[FN42\]](#). Hallinan, supra note 11, at A1.

[\[FN43\]](#). Id.

[\[FN44\]](#). Id.

[\[FN45\]](#). Id.

[\[FN46\]](#). Id.

[\[FN47\]](#). Hallinan, supra note 11, at A1. Neil Vidmar, a law professor at Duke University, examined 105 jury verdicts from 1985 to 1997 in New York City and found that 44% of jury awards were reduced after verdict. Id. The average payments to

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plaintiffs were only 62% of the verdict amounts. *Id.* Professor Vidmar also concluded that the larger the verdict, the steeper the discount. "The whopping big ones really get knocked down and they get knocked down incredibly." *Id.*

[FN48]. *Id.*

[FN49]. *Id.*

[FN50]. *Id.*

[FN51]. *Id.*

[FN52]. Hallinan, *supra* note 11, at A1.

[FN53]. *Id.*

[FN54]. See Boehm, *supra* note 17, 367-68 (arguing that there is little reason to believe that juries are not qualified to properly decide cases). "A 2000 survey sent to one thousand trial judges ... revealed that: Judges have 'a high level of day-to-day confidence in [the jury] system' 'Only 1 percent of the judges who responded gave the jury system low marks' 'Overwhelmingly ... judges said they had great faith in juries to solve complicated issues.'" *Id.*

[FN55]. *Id.*

[FN56]. Kevin Gfell, The [Constitutional and Economic Implications of a National Cap on Non-Economic Damages in Medical Malpractice Actions](#), 37 *Ind. L. Rev.* 773, 809 (2004).

[FN57]. Steve Forbes, Fact and Comment, *Forbes Mag.*, Jan. 10, 2005, at 23, available at 2005 WLNR 1066249.

[FN58]. *Id.*

[FN59]. See The Wine Institute, at http://www.wineinstitute.org/shipwine/shipping_carriers/who&uscore;ships_where.htm (listing the states that restrict interstate shipments of wine and categorizing states according to the extent of the restriction) (last visited March 13, 2005). Direct interstate shipments are prohibited in the following states: Alabama, Arkansas, Connecticut, Delaware, Florida, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah and Vermont. *Id.*

[FN60]. Forbes, *supra* note 57, at 23; see also Fred Tasker, U.S. Supreme Court Will Decide Whether Wine Lovers in Florida and 23 Other States Can Buy Wine Through the Internet or 800 Numbers, *The Miami Herald*, Feb. 10, 2005, at Sec. A (quoting a Florida wine drinker's reaction to the prospect of getting a 1994 Chateau Pontet-Canet Bordeaux for \$30 dollars, plus \$12 shipping: "That's a hell of a deal. Not just the price, but it's also an older vintage, ready to drink. You can't beat that locally at any price.").

[FN61]. Sandra Silfven, High Court Decants Cases Over Direct Shipment of Wine in Michigan and New York, *Detroit News*, Dec. 9, 2004, at A1 (estimating that this distribution channel increased the price consumers pay by 35%); see also Tasker, *supra* note 60, at Sec. A (estimating that the free flow of wine through direct shipments to consumers would reduce prices by up to 21%).

[FN62]. See Scott F. Mascianica, [Why All the Wine-ing? The Wine Industry's Battle With States over the Direct Shipment](#)

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[Issue, 17 Loy. Consumer L. Rev. 91 \(2004\)](#) (explaining and analyzing the clash between the dormant Commerce Clause and the Twenty-First Amendment).

[\[FN63\]](#). Silfven, *supra* note 61, at A1.

[\[FN64\]](#). *Id.*; but see Forbes, *supra* note 57, at 23 (quoting Clint Bolick of the Institute for Justice who argues that present state laws do little to protect state citizens who are at the greatest risk, namely teens: "Teenagers ... can find far less cumbersome ways (to get wine) than locating an appropriate Web site, producing adult identification at the time of purchase, waiting an unspecified period of time for delivery of a parcel marked 'Alcohol: Adult Identification Required,' arranging to accept delivery when a parent is not home and, at that time, producing adult identification once again.").

[\[FN65\]](#). Tony Mauro, In Vintner Veritas, 2/2005 Corp. Couns. 95 (2005).

[\[FN66\]](#). *Id.*

[\[FN67\]](#). *Id.*

[\[FN68\]](#). United States Supreme Court, at http://www.supremecourtus.gov/oral_arguments/argument&uscore;transcripts/03-1116.pdf (last visited March 13, 2005).

[\[FN69\]](#). *Id.*

[\[FN70\]](#). *Id.*

[\[FN71\]](#). Mauro, *supra* note 65, at 95.

[\[FN72\]](#). Tony Mauro, Stanford 'Babe' Joins Fight for Freer-Flowing Wine Market, 2005 San Francisco Recorder 3 (2005).

[\[FN73\]](#). *Id.*

[\[FN74\]](#). Mauro, *supra* note 65, at 95.

[\[FN75\]](#). Tasker, *supra* note 60, at Sec. A.

[\[FN76\]](#). See *id.* (reporting that 50 of the nations' 3,000 wineries account for 90% of domestic sales).

[\[FN77\]](#). *Id.*

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