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Potential for Tort Reform Under Republican Rule
(Part One of a Three-Part Series)

The Republican Party, which controls the Office of the President and both houses of Congress, and their plans to "*repeal and replace*" the *Patient Protection and Affordable Care Act* (ACA) have gained new urgency. Republicans have not currently put forth an omnibus plan for replacement; however, various Republican lawmakers have introduced ACA replacement plans, many of which contain medical malpractice tort reform elements. Republican lawmakers believe that medical malpractice is a major issue driving healthcare costs upward.[1] Many prominent Republican politicians assert that the cost of malpractice is crippling, estimating total payouts per year to range from $100 billion to $800 billion.[2] The movement to *"repeal and replace"* offers an opportunity for Republican lawmakers to make broad changes to medical malpractice law. Conservative Republican Congressmen are pushing for a quick repeal of the ACA, which is likely to be based on previous hallmarks of healthcare reform set forth by Republicans, such as tort reform.[3]

This *Health Capital Topics* article is the first in a three-part series that will examine the current state of tort reform in America in light of the transition to a new president. This first article will explore Republican lawmakers' stances toward malpractice reform and how the current initiatives related to proposed plans to *repeal and replace* the ACA.

Currently, House Speaker Paul Ryan (R-WI), HHS Secretary Tom Price, MD, and a coalition of Republican Senators (Richard Burr [R-NC], Fred Upton [R-MI], and Orrin Hatch [R-UT]) have introduced ACA replacement plans that include malpractice reform initiatives.[4] Additionally, Senator Rand Paul (R-KY) and other Republican lawmakers have proposed *repeal and replace* plans, that do not directly mention malpractice reforms.[5] Nevertheless, the proposed Republican plans, if included in a comprehensive repeal plan, are likely to alter the legal landscape for medical malpractice cases and tort reform. Republican potential replacements for the ACA include the following tort reform components:

(1) Changes to damages systems;

(2) Addition of clinical malpractice guidelines;

(3) Creation of expert panels; and,

(4) Creation of healthcare-specific state tribunals.[6]

Although there are differences within the Republican plans as to the role of the federal government in implementing these solutions, the central tenet of tort reform among the Republican plans concerns monetary caps on damage awards.

Republican repeal legislation will likely impose a cap on damages, like the California law on which each of the plans are based, which capped non-economic damages at $250,000.[7] The state passed the cap in the 1970s when it faced the prospect of doctors leaving the state due to increased malpractice liability.[8] Non-economic damages "*compensate victims for losses that are not traditionally measured in monetary terms, including pain and suffering, disfigurement, and loss of companionship.*"[9] Both Speaker Ryan's plan and the Senate Coalition's plan include a cap on non-economic damages, but do not specify an amount.[10] Secretary Price's ACA *replacement* plan does not include a cap on non-economic damages; however, Secretary Price previously voted on a House Bill to institute a $250,000 cap on non-economic damages, and has explicitly supported Speaker Ryan's ACA *replacement* plan with non-economic damages caps.[11]

Many Republican plans also focus on disincentivizing litigious plaintiffs and ruthless lawyers in the tort system. Secretary Price defended his plan by focusing on "*lawsuit abuse*,"[12] while Speaker Ryan extolled that plaintiffs receive "*only 46 cents of every dollar awarded … the remaining 54 cents goes to their lawyers and other administrative fees.*"[13] The Senate Coalition plan emphases "*junk lawsuits,"* even adding the term to the plan's section on tort reform.[14] In response, many ACA replacement plans disincentivize plaintiffs attorneys from filing frivolous lawsuits; Secretary Price's plan, for instance, allows judges to restructure attorney fees "*upon the interests of justice and principles of equity.*"[15]

Clinical Malpractice Guidelines (CMGs) are sets of practices and procedures that aim to regulate a base level of care in various situations. Secretary Price described CMGs as "*[i]f your doctor does the right thing for a given diagnosis or a given set of symptoms, they ought to be able to use it as an affirmative defense in a court of law.*"[16] Generally, this is a popular bipartisan reform; one that President Obama spoke about to the AMA in 2009, noting the need to "*encourage broader use of evidence-based guidelines."*[17] Many ACA replacement plans

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offered by the Republicans address CMGs, with Secretary Price's plan addressing the topic in the greatest detail.[18] In the Secretary's plan, Congress would authorize HHS to promulgate CMGs through formal rulemaking and review them every two years.[19] HHS would possess the authority to change the rules of evidence to allow CMGs to prove due care, with plaintiffs being able to refute such evidence of due care under the higher evidentiary standard of *clear and convincing evidence*.[20] Further, plaintiffs could not use CMGs in proceedings unless defendants first rely on them;[21] this proposal would prevent plaintiffs from arguing that deviation from the appropriate CMG reflects a lack of due care.[22]

Healthcare-focused expert panels have been touted by the Republicans as a way "*to provide an avenue for swift resolution"* of malpractice claims.[23] The panels, funded through federal grants to states, would halt medical malpractice court proceedings before the close of discovery for review by these panels,[24] at least half of which would be comprised of medical experts, including physicians in "*the same or similar specialty*" as the physician(s) accused of malpractice.[25] The expert panel's final finding would include a settlement offer, which would not be binding but would be admissible in further proceedings.[26]

Under many ACA replacement plans offered by the Republicans that include tort reform proposals, the next step in the litigation process after healthcare-focused expert panels would be *healthcare tribunals.*[27] Similar to the panels, persons with healthcare expertise would preside over the tribunals, and would have access to independent tribunal-commissioned witnesses.[28] Unlike the panels, healthcare tribunals would have the power to make "*binding rulings, rendered in written decisions, on standards of care, causations, compensation, and related issues.*"[29] Only after parties complete the entire administrative process (e.g., expert panel and healthcare tribunal) are they able to appeal through the courts.[30] Critics of healthcare tribunals contend that the system limits important rights, including the right to a trial by jury, without adding patient safeguards to justify the loss.[31]

Republican lawmakers are planning to convert the momentum of a presidential win into a new healthcare law. The ultimate replacement plan may substantially change the current healthcare industry through the *Four Pillars* (reimbursement, regulatory, competition, and technology), with the potential for tort reform impacting the regulatory environment of providers.[32] The belief of many prominent Republicans that there is a malpractice crisis, in conjunction with current and previous planned malpractice reforms, indicate the potential for tort reform measures to be included within ACA replacement legislation.[33] Many of these reforms may cause additional discord among Democrats already opposed to ACA repeal, as Democrats have traditionally been staunchly opposed to capping malpractice awards.[34]

The next article in this series will examine the current state of medical malpractice law and the medical liability insurance industry in the U.S.

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