

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 emphasizes “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

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.

- 1 "A Better Way: Health Care" By Paul Ryan, Better.GOP, June 22, 2016, http://abetterway.speaker.gov/_assets/pdf/ABetterWay-HealthCare-PolicyPaper.pdf (Accessed 1/27/2017), p. 18; "The Patient Choice, Affordability, Responsibility, and Empowerment Act" House.gov, <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/114/20150205-PCARE-Act-Plan.pdf> (Accessed 1/27/2017), p. 8; "Empowering Patients First Act of 2015" H.R. 2300, 114th Cong., (May 11, 2015), <http://tomprice.house.gov/sites/tomprice.house.gov/files/HR%202300%20Empowering%20Patients%20First%20Act%202015.pdf> (Accessed 1/27/2017) p. 201; "GOP Lawmakers See a Costly Malpractice Crisis — Experts Don't" By Chad Terhune, Kaiser Health News, January 4, 2017, <http://www.healthleadersmedia.com/leadership/goplawmakerssee-costly-malpractice-crisis-experts-dont> (Accessed 1/26/17).
- 2 "Modernizing America's Health Care: A Conversation With Speaker Paul Ryan (R-Wi) And The Speaker's Task Force On Health Care Reform" American Enterprise Institute, Meeting, Washington D.C., June 22, 2016, <https://www.aei.org/wp-content/uploads/2016/06/160622-AEI-Modernizing-Americas-Health-Care.pdf> (Accessed 1/26/2017); "GOP Lawmakers See A Costly Malpractice Crisis — Experts Don't" By Chad Terhune, HealthLeaders Media, January 4, 2017, <http://www.healthleadersmedia.com/leadership/gop-lawmakers-see-costly-malpractice-crisis-experts-dont#> (Accessed 1/26/2017).
- 3 "Conservatives Urge Speedup of Health Law Repeal, Dismiss Calls For Caution" By Julie Rovner, Kaiser Health News, February 8, 2017, <http://khn.org/news/conservatives-urge-speedup-of-health-law-repeal-dismiss-calls-for-caution/> (Accessed 2/10/17).
- 4 "Empowering Patients First Act of 2015" H.R. 2300, 114th Cong., (May 11, 2015; Paul Ryan, Better.GOP, June 22, 2016

- 5 "Obamacare Replacement Act: S. 222" By Rand Paul, M.D., Senate.gov, <https://www.paul.senate.gov/imo/media/doc/ObamacareReplacementActSections.pdf> (Accessed 2/14/2017); "ACA Round-Up: Rand Paul's Replacement Plan" By Timothy Jost, HealthAffairs Blog, January 27, 2017, <http://healthaffairs.org/blog/2017/01/27/aca-round-up-rand-pauls-replacement-plan-non-discrimination-litigation-and-new-cbo-projections/> (Accessed 2/2/2017).
- 6 "Health Care Professionals Protection Act of 2011" H.R. 2472, 112th Cong., (July 8, 2011), <https://www.congress.gov/112/bills/hr2472/BILLS-112hr2472ih.pdf> (Accessed 1/27/2017).
- 7 "Damages for Wrongs" California Civil Code § 3333.2 (1975).
- 8 "Medical Malpractice and Tort Reform: Urgent Crisis or Red Herring" By Robert James Cimasi and Todd A. Zigrang, Boca Raton, FL: CRC Press, 2016, Chapter 11.
- 9 "Medical Malpractice and Tort Reform: Urgent Crisis or Red Herring" By Robert James Cimasi and Todd A. Zigrang, Boca Raton, FL: CRC Press, 2016, Chapter 11, p. 271.
- 10 Paul Ryan, Better.GOP, June 22, 2016
- 11 "H.R. 5 (112th): Protecting Access to Healthcare Act" GovTrack, 112th Congress, March 22, 2012, <https://www.govtrack.us/congress/votes/112-2012/h126> (Accessed 2/14/2017); "Modernizing America's Health Care: A Conversation With Speaker Paul Ryan (R-Wi) And The Speaker's Task Force On Health Care Reform" American Enterprise Institute, Meeting, Washington D.C., June 22, 2016, <https://www.aei.org/wp-content/uploads/2016/06/160622-AEI-Modernizing-Americas-Health-Care.pdf> (Accessed 1/26/2017).
- 12 "Empowering Patients First Act of 2015" H.R. 2300, 114th Cong., (May 11, 2015), p. 3.
- 13 By Paul Ryan, Better.GOP, June 22, 2016, p. 18.
- 14 "The Patient Choice, Affordability, Responsibility, and Empowerment Act" House.gov, p. 7.

- 15 “Empowering Patients First Act of 2015” H.R. 2300, 114th Cong., (May 11, 2015), p. 201.
- 16 American Enterprise Institute, June 22, 2016, p. 7.
- 17 “Text of Obama’s Speech to the AMA” By WSJ Staff, the Wall Street Journal, June 15, 2009, <http://blogs.wsj.com/health/2009/06/15/text-of-obamas-speech-before-the-ama/> (Accessed 2/14/2017); “The Value of Clinical Practice Guidelines as Malpractice ‘Safe Harbors’: Timely Analysis of Immediate Health Policy Issues” By Randall R. Bovbjerg and Robert A. Berenson, Urban Institute and Robert Wood Johnson Foundation, http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2012/rwjf72667 (Accessed 1/26/2017) p. 3.
- 18 “Empowering Patients First Act of 2015” H.R. 2300, 114th Cong., (May 11, 2015), Paul Ryan, Better.GOP, June 22, 2016, p. 18; “The Patient Choice, Affordability, Responsibility, and Empowerment Act”, p. 8.
- 19 “Empowering Patients First Act of 2015” H.R. 2300, 114th Cong., (May 11, 2015), p. 188.
- 20 *Ibid*, p. 189.
- 21 *Ibid*.
- 22 *Ibid*.
- 23 “The Patient Choice, Affordability, Responsibility, and Empowerment Act” p. 8.
- 24 “Empowering Patients First Act of 2015” H.R. 2300, 114th Cong., (May 11, 2015), p. 191.
- 25 *Ibid*, p. 192-193.
- 26 *Ibid*, p. 196.
- 27 *Ibid*.
- 28 *Ibid*, p. 197.
- 29 *Ibid*.
- 30 *Ibid*, p. 198.
- 31 “Health Courts?” By Philip G. Peters Jr., 88 B.U. L. Rev. (2008) p. 227-228.
- 32 “Comparison of Key Repeal and Replace Proposals” By Anne O’Hagen Karl et al., for Manatt, Phelps & Phillips LLP, Manatt Health, December 15, 2016, <https://www.manatt.com/Insights/White-Papers/2016/Comparison-of-Key-Repeal-and-Replace-Proposals> (Accessed 1/26/17).
- 33 “GOP Lawmakers See a Costly Malpractice Crisis – Experts Don’t” By Chad Terhune, Kaiser Health News, January 4, 2017, <http://www.healthleadersmedia.com/leadership/goplawmakersseeecostlymalpracticecrisisexpertsdont> (Accessed 1/26/17).
- 34 WSJ Staff, June 15, 2009; “The Value of Clinical Practice Guidelines as Malpractice ‘Safe Harbors’: Timely Analysis of Immediate Health Policy Issues” By Randall R. Bovbjerg and Robert A. Berenson, Urban Institute and Robert Wood Johnson Foundation, http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2012/rwjf72667 (Accessed 1/26/2017) p. 2.




HEALTHCARE VALUATION

THE FINANCIAL APPRAISAL OF ENTERPRISES, ASSETS, AND SERVICES

Robert James Cimesi, MHA, ASA, FRICS, MCBA, AVA, CM&AA – CEO, HEALTH CAPITAL CONSULTANTS
Foreword by Shannon P. Pratt

“...the definitive treatise for the complexities of valuation in the healthcare industry.”
- Chris M. Mellen, President - Delphi Valuation Advisors, Inc.



The Adviser’s Guide to Health Care

Robert James Cimesi, MHA, ASA, FRICS, MCBA, CVA, CM&AA – CEO, HEALTH CAPITAL CONSULTANTS
Todd A. Zigrang, MBA, MHA, FACHE, ASA – President, HEALTH CAPITAL CONSULTANTS


Keep Up With the Changes in Health Care Services and Consulting Practices
Includes Foreword by Leading National Health Care Attorney

David W. Grauer, Esq.
Partner, Jones Day

TWO-VOLUME SET ➤

- Consulting Services
- An Era of Reform - The Four Pillars

To purchase, visit AICPAStore.com/AGHC




ACOs: Balancing Quality and Costs in Healthcare

Robert James Cimesi, MHA, ASA, FRICS, MCBA, AVA, CM&AA – CEO, HEALTH CAPITAL CONSULTANTS
Foreword by Peter A. Pavarini, Esq. – Squire Sanders LLP

“A must read and resource for any healthcare industry executive”
—Roger W. Logan, MS, CPA/ABV, ASA, Senior Vice President of Phoenix Children’s Hospital

Learn more at CRCPress.com



(800)FYI - VALU

*Providing Solutions
in the Era of
Healthcare Reform*

Founded in 1993, HCC is a
nationally recognized healthcare
economic financial consulting firm

- [HCC Home](#)
- [Firm Profile](#)
- [HCC Services](#)
- [HCC Experts](#)
- [Clients & Projects](#)
- [HCC News](#)
- [Upcoming Events](#)
- [Contact Us](#)
- [Email Us](#)

HCC Services

- [Valuation Consulting](#)
- [Commercial Reasonableness Opinions](#)
- [Commercial Payer Reimbursement Benchmarking](#)
- [Litigation Support & Expert Witness](#)
- [Financial Feasibility Analysis & Modeling](#)
- [Intermediary Services](#)
- [Certificate of Need](#)
- [ACO Value Metrics & Capital Formation](#)
- [Strategic Consulting](#)
- [Industry Research Services](#)



Robert James Cimasi, MHA, ASA, FRICS, MCBA, CVA, CM&AA, serves as Chief Executive Officer of **HEALTH CAPITAL CONSULTANTS (HCC)**, a nationally recognized healthcare financial and economic consulting firm headquartered in St. Louis, MO, serving clients in 49 states since 1993. Mr. Cimasi has over thirty years of experience in serving clients, with a professional focus on the financial and economic aspects of healthcare service sector entities including: valuation consulting and capital formation services; healthcare industry transactions including joint ventures, mergers, acquisitions, and divestitures; litigation support & expert testimony; and, certificate-of-need and other regulatory and policy planning consulting.

Mr. Cimasi holds a Master in Health Administration from the University of Maryland, as well as several professional designations: Accredited Senior Appraiser (ASA – American Society of Appraisers); Fellow Royal Institution of Chartered Surveyors (FRICS – Royal Institution of Chartered Surveyors); Master Certified Business Appraiser (MCBA – Institute of Business Appraisers); Certified Valuation Analyst (CVA – National Association of Certified Valuators and Analysts); and, Certified Merger & Acquisition Advisor (CM&AA – Alliance of Merger & Acquisition Advisors). He has served as an expert witness on cases in numerous courts, and has provided testimony before federal and state legislative committees. He is a nationally known speaker on healthcare industry topics, and is the author of several books, the latest of which include: “*The Adviser’s Guide to Healthcare – 2nd Edition*” [2015 – AICPA]; “*Healthcare Valuation: The Financial Appraisal of Enterprises, Assets, and Services*” [2014 – John Wiley & Sons]; “*Accountable Care Organizations: Value Metrics and Capital Formation*” [2013 – Taylor & Francis, a division of CRC Press]; and, “*The U.S. Healthcare Certificate of Need Sourcebook*” [2005 – Beard Books].

Mr. Cimasi is the author of numerous additional chapters in anthologies; books, and legal treatises; published articles in peer reviewed and industry trade journals; research papers and case studies; and, is often quoted by healthcare industry press. In 2006, Mr. Cimasi was honored with the prestigious “*Shannon Pratt Award in Business Valuation*” conferred by the Institute of Business Appraisers. Mr. Cimasi serves on the Editorial Board of the Business Appraisals Practice of the Institute of Business Appraisers, of which he is a member of the College of Fellows. In 2011, he was named a Fellow of the Royal Institution of Chartered Surveyors (RICS). In 2016, Mr. Cimasi was named a “*Pioneer of the Profession*” as part of the recognition of the *National Association of Certified Valuators and Analysts (NACVA)* “*Industry Titans*” awards, which distinguishes those whom have had the greatest impact on the valuation profession.



Todd A. Zigrang, MBA, MHA, ASA, FACHE, is the President of **HEALTH CAPITAL CONSULTANTS (HCC)**, where he focuses on the areas of valuation and financial analysis for hospitals, physician practices, and other healthcare enterprises. Mr. Zigrang has over 20 years of experience providing valuation, financial, transaction and strategic advisory services nationwide in over 1,000 transactions and joint ventures. Mr. Zigrang is also considered an expert in the field of healthcare compensation for physicians, executives and other professionals.

Mr. Zigrang is the co-author of “*The Adviser’s Guide to Healthcare – 2nd Edition*” [2015 – AICPA], numerous chapters in legal treatises and anthologies, and peer-reviewed and industry articles such as: *The Accountant’s Business Manual* (AICPA); *Valuing Professional Practices and Licenses* (Aspen Publishers); *Valuation Strategies; Business Appraisal Practice*; and, *NACVA QuickRead*. In addition to his contributions as an author, Mr. Zigrang has served as faculty before professional and trade associations such as the American Society of Appraisers (ASA); the National Association of Certified Valuators and Analysts (NACVA); Physician Hospitals of America (PHA); the Institute of Business Appraisers (IBA); the Healthcare Financial Management Association (HFMA); and, the CPA Leadership Institute.

Mr. Zigrang holds a Master of Science in Health Administration (MHA) and a Master of Business Administration (MBA) from the University of Missouri at Columbia. He is a Fellow of the American College of Healthcare Executives (FACHE) and holds the Accredited Senior Appraiser (ASA) designation from the American Society of Appraisers, where he has served as President of the St. Louis Chapter, and is current Chair of the ASA Healthcare Special Interest Group (HSIG).



John R. Chwarzinski, MSF, MAE, is Senior Vice President of **HEALTH CAPITAL CONSULTANTS (HCC)**. Mr. Chwarzinski’s areas of expertise include advanced statistical analysis, econometric modeling, as well as, economic and financial analysis. Mr. Chwarzinski is the co-author of peer-reviewed and industry articles published in *Business Valuation Review* and *NACVA QuickRead*, and he has spoken before the Virginia Medical Group Management Association (VMGMA) and the Midwest Accountable Care Organization Expo.

Mr. Chwarzinski holds a Master’s Degree in Economics from the University of Missouri – St. Louis, as well as, a Master’s Degree in Finance from the John M. Olin School of Business at Washington University in St. Louis. He is a member of the St. Louis Chapter of the American Society of Appraisers, as well as a candidate for the Accredited Senior Appraiser designation from the American Society of Appraisers.



Jessica L. Bailey-Wheaton, Esq., is Vice President and General Counsel of **HEALTH CAPITAL CONSULTANTS (HCC)**, where she conducts project management and consulting services related to the impact of both federal and state regulations on healthcare exempt organization transactions and provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services. Ms. Bailey is a member of the Missouri and Illinois Bars and holds a J.D., with a concentration in Health Law, from Saint Louis University School of Law, where she served as Fall Managing Editor for the *Journal of Health Law & Policy*.



Kenneth J. Farris, Esq., is an Associate at **HEALTH CAPITAL CONSULTANTS (HCC)**, where he provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services, and tracks impact of federal and state regulations on healthcare exempt organization transactions. Mr. Farris is a member of the Missouri Bar and holds a J.D. from Saint Louis University School of Law, where he served as the 2014-2015 Footnotes Managing Editor for the *Journal of Health Law & Policy*.