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Despite Trump, Federal ‘Tort Reform’ Makes A Hasty Retreat

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Donald Trump’s 2018 health care budget [proposal](#) is loaded with all kinds of campaign talking points: repealing Obamacare, slashing Medicaid, severely cutting federal programs ([like](#) Children’s Health Insurance). But it also includes things that were never mentioned a single time during the election campaign, like stripping away the rights of patients severely injured by medical malpractice, or capping compensation to catastrophically-injured children.

Given that many states consider such laws unconstitutional, medical malpractice proposals like this might seem an odd choice for Trump. Voters clearly did not send politicians to Washington to rig the courts against everyday Americans or take away legal rights guaranteed by state and local governments. But then again, voters probably never imagined someone like Tom Price as Secretary of the Department of Health and Human Services.

As a member of Georgia’s legislature, Price was a huge proponent of “tort reform” ideas that his own state Supreme Court found unconstitutional. While in Congress, his own ACA replacement plan contained medical malpractice ideas that have now ended up in Trump’s budget. One idea goes like this: the federal government selects “one size fits all” clinical practice guidelines (written by medical societies) for the treatment of every medical condition. Doctors receive legal immunity if they follow a federal guideline — even if they believe the guideline is wrong for the patient and causes serious harm. If the patient then seeks recourse, they must plead their case before a biased medical industry tribunal. Families wanting to have their case heard in court would face nearly impossible obstacles.

Over a decade ago, medical societies led by the American Medical Association were a powerful, monolithic lobbying force in their push for federal limits on the rights of medical malpractice victims, similar to the Trump/Price budget ideas. For several years, federal “tort reform” was the AMA’s “top legislative priority.” Medical societies were laser focused on it. Between 2002 and 2006, the Senate voted on at least five bills to cap victims’ compensation, all of which failed.

I mention this only because, by way of contrast, today the AMA barely mentions “medical liability” in its list of priorities for Congress. This is just one indication of how low federal “tort reform” has sunk as a priority for organized medicine, generally. It is striking that not a single health care provider was available and willing to argue the case for H.R. 1215 – the legislative embodiment of the Trump/Price’s budget ideas - when the conservative Congressional Civil Justice Caucus Academy put together a recent panel on the issue.

Yet it’s more than just disinterest. Last week, in response to the Trump budget, an article appeared in *Modern Healthcare* entitled, “Providers want Trump to stay out of tort reform.” They write:

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[T]he proposed changes contradict the administration's earlier promises to reduce broad Washington directives to the states on how malpractice should be governed. Rather than dictate tort reform, the administration should be providing states with increased enforcement flexibility, according to Dr. Jane Orient, an internist and executive director of the Association of American Physicians and Surgeons, a far-right provider group.

In 30 years, there has never been messaging like this from a doctors' group. In fact, only one entity came forward to either *Modern Healthcare* or the Civil Justice Academy to argue strongly for these measures, and it was not a health care provider. It was PIAA, the trade group representing medical malpractice insurance companies. This is not a minor point. A long time ago, the liability insurance industry decided that, if possible, it was best to hide behind others to accomplish things, well aware that the public generally detests insurance companies. [Back in the 1990s](#), a representative from the American Tort Reform Association's then PR firm explained to an audience, "In a tort reform battle if State Farm - I think they're here, Nationwide - is the leader of the coalition, you're not going to pass the bill. It is not credible, O.K., because it's so self-serving."

The dilemma for H.R. 1215 proponents now is that the insurance industry seems to be the only major lobby group willing to stick its neck out for this bill. PIAA has even elected to [take public credit for helping to write it](#). This bill has so little support that it barely made it out of the Republican-led House Judiciary Committee. Along with every Democrat, Ted Poe (R-TX) voted against it. Louie Gohmert (R-TX) was absent for the vote after saying he'd vote against it. In fact, they did [the same last year](#).

Yet for those of us who have been battling Congress in their continuing war with the civil justice system, the *Modern Healthcare* article and the close House Judiciary vote was only the latest shock this year. Right before a vote on a House bill to obliterate class action lawsuits, the House Liberty Caucus wrote a [letter](#) making a strong free-market case against this legislation, calling class actions "a market-based solution for addressing widespread breaches of contract, violations of property rights, and infringements of other legal rights."

Now, none of this is terribly new conservative economic thinking. In the 1980s, Richard Posner and William Landes supplied a pretty clear free-market economic rationale for the tort system in their book, *The Economic Structure of Tort Law*. They wrote that the tort system provides deterrence of non cost-justified accidents, and creates economic incentives for “allocation of resources to safety.” It’s just that policymakers paid little or no attention to these arguments before.

The class action bill ultimately passed the House, although with bi-partisan opposition and no bi-partisan support. H.R. 1215 will probably be considered soon. And while the House may ultimately pass this bill (with little chance in the Senate), it is doubtful whether there has been anything like the current rejection of federal tort reform by so diverse a collection of voices. Such a gradual turn of events is nothing short of extraordinary.