

## **Will the U.S. Constitution Permit Reform? Why Congress Has the Power to Pass Federal Medical Liability Reform**

By: Katie Orrico, JD

Opponents of federal medical liability reform legislation argue that the regulation of the business of insurance is a state function and traditional tort actions, such as medical negligence suits, are not federal causes of action, but rather are governed by state law. Therefore, principles of federalism hold that a federal medical liability reform law would violate the U.S. Constitution. Article VI of the Constitution states:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land..."

Thus, the U.S. Congress may pass any law, provided it is pursuant to an enumerated constitutional power. There are two sections of the Constitution that give Congress the power to enact federal medical liability reform legislation.

First, under Article I, section 8, clause 3, Congress has the power "to regulate Commerce with foreign Nations, and among the several states." The U.S. Supreme Court has held that the business of insurance constitutes interstate commerce for purposes of the Commerce Clause (*United States v. South-Eastern Underwriters Association*). In addition, in *New York v. United States*, the court held that the only significant federalism restraint on the exercise of the commerce power is that the state regulatory processes may not be "commandeered" for federal purposes; there is no federalism restraint on federal regulation of businesses and individuals in areas traditional regulated by states.

The fact that Congress has traditionally deferred in large measure to the state regulation of the insurance industry does not mean that Congress must continue to do so. Congress does not invade areas reserved to the states by the 10th Amendment "simply because it exercises its authority... in a manner that displaces the States' exercise of their... powers" (*Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*).

Secondly, under Article I, section 8, clause 1, Congress has the power to spend for the "general Welfare of the United States." The Supreme Court has held that Congress may require the states to

implement tort reform as a condition of their acceptance of federal funds. In *South Dakota v. Dole*, the court held that Congress "may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys with compliance by the recipient with federal statutory and administrative directives.' " Clearly, under either of these two standards, federal medical liability reform legislation passes constitutional muster. As the Congressional Joint Economic Committee recently reported, reform legislation that includes, among other things, a cap on noneconomic damages would:

- yield significant savings in overall healthcare spending;
- halt the exodus of doctors from high-litigation states and specialties;
- improve access to healthcare;
- produce \$12.1 billion to \$19.5 billion in annual savings for the federal government; and
- increase the number of Americans with health insurance by up to 3.9 million people.
- Other reasons to justify federal intervention based on the Commerce Clause include:
  - patients frequently cross state lines to obtain healthcare and their health insurers (who ultimately pay for increased costs associated with medical litigation system) pay for this care;
  - medical liability insurers no longer limit their services to a single state;
  - national medical liability insurers are leaving the market (St. Paul's, for example), leaving doctors in all states scrambling for coverage; and
  - doctors practice medicine in more than one state;

Nearly all states are experiencing a medical liability crisis (the American Medical Association has identified 19 states in "crisis" and 25 states "showing problem signs"), and as many states face both state constitutional and political barriers to enacting reform legislation, a federal solution to this national problem is imperative.

Katie O. Orrico, JD, is director of the AANS/CNS Washington Office.  
Article ID: 18629