

Comparison of ABA Policy with H.R. 534 and S. 354, Federal Legislation to Pre-empt State Medical Liability Laws

A. Preemption of State Laws

H.R. 534, S. 354	ABA Policy
H.R. 534 and S. 354 preempt numerous state laws relating to medical malpractice and medical products that are more favorable to the plaintiff.	The regulation of medical professional liability is a matter for state consideration; and federal involvement in that area is inappropriate. The ABA supports the rights of the states to regulate product liability law.

B. Caps on Non-economic Damages

H.R. 534, S. 354	ABA Policy
H.R. 534 and S. 354 would impose a cap on non-economic damages of \$250,000 in health care lawsuits.	No dollar limit on recoverable damages should be enacted which can operate to deny a plaintiff in a medical malpractice action full compensation. The ABA opposes caps on pain and suffering awards in all personal injury cases including medical malpractice cases. Trial and appellate courts should more effectively control pain and suffering verdicts which are either so excessive or so inadequate as to be disproportionate to the injury suffered or to community expectations.

C. Punitive Damages

H.R. 534, S. 354	ABA Policy
H.R. 534 and S. 354 would cap punitive damages at the greater of two times economic damages or \$250,000, whichever is greater. In addition, punitive damages may, if otherwise permitted by applicable State or Federal law, be awarded against any person in a health care lawsuit only if it is proven by clear and convincing evidence that such person acted with malicious intent to injure the claimant, or that such person deliberately failed to avoid unnecessary injury that such person knew the claimant was substantially certain to suffer. A claimant could not file the punitive damages initially. Subsequently, punitive damages could be sought at the discretion of the court, if the claimant first establishes by a substantial probability that the claimant will prevail on a claim for punitive damages. H.R. 534 provides for no punitive damages for medical products that comply with FDA standards. S. 354 provides that no punitive damages may be awarded where no compensatory damages are	No justification exists for exempting medical malpractice actions from the rules of punitive damages applied in tort litigation to deter gross misconduct. Punitive damages are appropriate in certain cases, but their scope should be limited. They should not be commonplace. The basic standard to establish punitive damages should be a conscious or deliberate disregard of a defendant's obligations. The standard of proof should be "clear and convincing" evidence and not a lesser standard such as "preponderance of the evidence". No defendant should be subjected to punitive damages that are excessive in the aggregate for the same wrongful act. There should therefore be safeguards to prevent the imposition of repeated punitive damages. The purpose of punitive damages is to punish, not to confiscate. The principal responsibility to control excessive awards for punitive damages rests on the courts; however, state legislation may be necessary to assure more effective judicial review of punitive damage awards.

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D. Joint and Several Liability

H.R. 534, S. 354	ABA Policy
<p>H.R. 534 and S. 354 would eliminate joint liability for economic and non-economic damages.</p>	<p>The doctrine of joint and several liability should be limited by state legislation to apply only to economic losses in certain cases. Defendants should not be held liable for someone else's share of any non-economic loss when defendant's responsibility is substantially disproportionate to liability for the entire loss suffered by the plaintiff.</p>

E. Statute of Limitations

H.R. 534, S. 354	ABA Policy
<p>A health care lawsuit may be commenced no later than 3 years after the date of injury or 1 year after the claimant discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of a health care lawsuit exceed 3 years, unless tolled for fraud, intentional concealment or the presence of a foreign body in the injured person. However, in the case of an alleged injury sustained by a minor before the age of 6, a health care lawsuit may be commenced by or on behalf of the minor until the later of 3 years from the date of injury, or the date on which the minor attains the age of 8.</p>	<p>An action for medical malpractice should be commenced within two years from the time the incident which gave rise to the action occurred, or within one year from the time the existence of an actionable injury is discovered or in the exercise of reasonable care should have been discovered, whichever is longer. Except for cases involving a foreign object or fraudulent concealment, no action should be brought more than eight years (1) after the occurrence of the incident which gave rise to the injury.</p> <p>Where a foreign object has been left in the body, a patient should have one year after the object is discovered in which to bring the action.</p> <p>Where fraudulent concealment of material facts by a health care provider has prevented the discovery of the injury or the alleged negligence, the patient should have one year after discovering that an actionable injury exists in which to bring suit.</p> <p>The statute of limitations should be tolled during continuous treatment by the same health care provider for the same condition or for complications arising from the original treatment.</p>

F. Contingency Fees

H.R. 534, S. 354	ABA Policy
<p>H.R. 534 and S. 354 cap the total of all contingent fees for representing all claimants in a health care lawsuit as follows: (1) 40 percent of the first \$50,000 recovered by the claimant(s). (2) 33 1/3 percent of the next \$50,000 recovered by the claimant(s). (3) 25 percent of the next \$500,000 recovered by the claimant(s). (4) 15 percent of any amount by which recovery by the claimant(s) is in excess of \$600,000.</p>	<p>Contingent fees provide access to the courts; and no justification exists for imposing special restrictions on contingent fees in medical malpractice actions.</p>

G. Future Damages

H.R. 534, S. 354	ABA Policy
<p>In any health care lawsuit, if an award of future damages, without reduction to present value, equaling or exceeding \$50,000 is made against a party with sufficient insurance or other assets to fund a periodic payment of such a judgment, the court shall, at the request of any party, enter a judgment ordering that the future damages be paid by periodic payments in accordance with the Uniform Periodic Payment of Judgments Act promulgated by the National Conference of Commissioners on Uniform State Laws.</p>	<p>The use of structured settlements should be encouraged.</p>

H. Collateral Source Benefits

H.R. 534, S. 354	ABA Policy
<p>Repeals the collateral source rule.</p>	<p>The collateral source rule should be retained; and third parties who have furnished monetary benefits to plaintiffs should be permitted to seek reimbursement out of the recovery.</p>