

The Constitutional Challenge



Summary of Legal Briefs Submitted in Defense of Illinois' Medical Liability Reform Law



**2nd
update on
court challenge**

Defending Medical Lawsuit Reform

There was never a question that Illinois' medical lawsuit reform law, enacted in August 2005, would be challenged by trial attorneys seeking to maintain the status quo.

Beginning in 2006, three cases were filed with the intent of overturning reforms. The cases collectively went through the legal system in 2007, and were the impetus for a Cook County Circuit Court ruling that the comprehensive reform package is unconstitutional. The decision sent the case to the Illinois Supreme Court for determination on constitutional validity.

Recently defenders of the law offered arguments before the Supreme Court for why medical lawsuit reform is constitutional and a rational response to Illinois' health care crisis. This pamphlet identifies the legal supporters of the reforms and the rationale for why the new law must remain on the books.

While it's unclear what the state Supreme Court's decision will be, it is encouraging to witness the solidarity of diverse groups, coming together to voice a common goal: *keep doctors in Illinois*.

ILLINOIS' MEDICAL LIABILITY REFORM LAW

The General Assembly adopted these legal reforms to address the malpractice insurance crisis:

1. *Reasonable limitations on non-economic damages against doctors and hospitals in malpractice cases.*
2. *Periodic payment provisions, which reduce costs by allowing the purchase of annuities to pay for future medical expenses while ensuring a plaintiff has access to medical funds when needed.*
3. *Stronger standards for expert witnesses in malpractice cases.*
4. *Public identification of consulting physician signing "affidavit of merit."*
5. *Encouragement for health care professionals to promptly acknowledge medical errors.*

Reform Advocates Unite

The following groups have demonstrated their support for upholding the medical liability reform law by individually or jointly submitting briefs to the Illinois Supreme Court.

- *Illinois State Medical Society*
- *American Medical Association*
- *ISMIE Mutual Insurance Company*
- *Attorney General of the State of Illinois*
- *Gottlieb Memorial Hospital*
- *Advocate Health and Hospitals Corporation*
- *Illinois Hospital Association*
- *American Hospital Association*
- *Illinois Rural Health Association*
- *Illinois Catholic Health Association*
- *Loyola University Medical Center*
- *Loyola University Physician Foundation*
- *Illinois Association of Defense Counsel**
- *Cook County Government**

Opponents of the law are also expected to submit written briefs this summer, and the Supreme Court will soon schedule oral arguments in the case.

* *The Supreme Court accepts amicus briefs at its discretion and declined briefs from these two groups.*

Legal Experts to Illinois Supreme Court: Uphold the Law

ISMS/AMA Brief

The Illinois State Medical Society and the American Medical Association's joint friend-of-the-court brief was accepted by the Illinois Supreme Court. The brief's central argument states that Illinois' reforms are *clearly constitutional* and were *deliberately crafted* by the Illinois General Assembly to counter two previous unconstitutional findings by the Court.



**Illinois
State
Medical
Society**



In addition, the ISMS/AMA brief argues:

- The General Assembly reasonably concluded that limiting non-economic damages is an effective way to keep doctors practicing in Illinois.
- The General Assembly's conclusion that limiting liability through limitations on non-economic damages would increase the availability of medical care is supported by studies showing that such limits lead to increased numbers of physicians.
- Two independent economists have found that "states with caps on non-economic damages experienced about 12 percent more physicians per capita than states without such a cap."
- The law is clearly designed by the members of the General Assembly to protect the health, safety and welfare of the citizens of Illinois.
- The law has addressed escalating liability costs incurred during the delivery of life-sustaining and lifesaving health care. Health care services are more accessible and available than they were before liability reform was enacted.

- The law is rationally grounded on the principle that large non-economic damages awarded in medical malpractice cases by either judges or juries (even when sustained by the evidence) lead to excessive social costs and diminish the affordability and availability of health care in Illinois.

Further, this excerpt from the ISMS/AMA brief sums up the crucial need to uphold the reforms:

The law (Public Act 94-677) “... was designed to address a pressing crisis that threatened access to and availability of health care for all Illinois citizens, and these statutory reforms are working. In response to the Act, access to health care is widening, malpractice insurance rates have decreased, competition among insurers has increased, and health care providers are returning to or deciding to remain in Illinois. Any decision to overturn such a rational Public Act which clearly is working would unnecessarily threaten to undo two years of successful reform – which has provided expanded access to health care services and greater availability of life saving care. In essence, invalidating Public Act 94-677 would risk avoidable harm to the people of Illinois.”

Full text of the brief is available at www.RealityMedicine.com.

ISMIE Mutual Insurance Company Brief

Constitutional scholar Theodore Olson prepared the brief submitted by ISMIE Mutual and accepted by the court.



Among ISMIE’s arguments as presented in the brief:

- The General Assembly enacted the Reform Act in 2005 as a bipartisan response to what it expressly described as a “health care crisis” that “endanger[ed] the public health, safety, and welfare of the citizens of Illinois.”
- The General Assembly found that the rising costs of medical malpractice litigation had forced insurers to increase the cost of malpractice insurance to physicians and hospitals, which in turn had caused doctor flight from Illinois – reducing access to care and the quality of care available to the citizens of this state.
- By adopting the Reform Act’s integrated reforms, the legislature sought to bring rationality to the malpractice insurance market and thereby make the practice of medicine in Illinois a sustainable profession for physicians.

The ISMIE brief also reminds the Supreme Court that the circuit court confined its analysis to only one part of the Act’s legal reforms, which limits the amount of non-economic damages that can be awarded. The statute does not place any limitation on a plaintiff’s total recovery or ability to recover economic damages such as out-of-pocket medical expenses, lost wages, costs for care or custody, and reduced earning capacity. Rather, the Act limits non-economic damages to \$500,000 against physicians and \$1,000,000 against hospitals. The General Assembly found that “limiting non-economic damages is one of the significant reforms designed to benefit the people of the state of Illinois.”

In addition, the brief points out that legislators repeatedly emphasized during floor debate that the limitations on non-economic damages were designed to combat the state's health care crisis. As indicated in legislative record, the General Assembly believed the Reform Act was necessary to solve a health care crisis in Illinois – and that the limitations on non-economic damages in particular were indispensable to the Act's success.

ISMIE's brief includes other salient points:

- The Reform Act represents the General Assembly's careful, bipartisan response to a crisis in medical malpractice litigation. The particular reform at issue – limitations on non-economic damages in medical malpractice cases – was supported by numerous governmental and scholarly studies, as well as direct testimony during the legislative hearings, that similar limits in other states have been effective in reducing malpractice premiums. The General Assembly reasonably concluded from available evidence that by reducing malpractice premiums, the limitations would help ensure that doctors remained in Illinois and that Illinois residents would have access to vital health care. Few issues could be more important for the legislature to address.
- The circuit court improperly disregarded the careful judgment made by the people's elected representatives and concluded a section of the law is invalid.
- The General Assembly's responsible and thoughtful effort to follow this Court's guidance reveals that it did not usurp or unduly encroach on the authority of Illinois judges. To the contrary, its efforts are the sort of "cooperation and harmony among the branches of government" that this Court has previously approved. The congruity between the Reform Act's limitations and those imposed by other states reveals that the Reform Act is a measured response to the health care crisis the General Assembly confronted, rather than an arbitrary attempt by the legislature to intrude upon judicial authority. In fact, the Reform Act's limitations on non-economic damages are higher than those adopted in numerous other states, including California and Texas.
- As the Supreme Court previously recognized, the General Assembly is on solid constitutional footing when the lines it draws are "within the general area of limits that had been set by other states." The statutes of other states constitute independent, objective benchmarks demonstrating that the General Assembly did not engage in a constitutional "power grab," but instead enacted a reasonable solution to a pressing social need. The Act's congruity with other state statutes confirms that the "nature and scope" of the Act is measured, reasonable, and within the permissible zone of inter-branch overlap contemplated by this Court's separation-of-powers cases.



Illinois Attorney General's Brief

Illinois Attorney General Lisa Madigan is charged by the state Constitution with defending the constitutionality of the reform law. Her brief argues that the limits on non-economic damages and other provisions that plaintiffs challenge are but one part of a massive legislative response to the health care crisis in Illinois. The brief notes that the Act is a *comprehensive package of reforms* designed to alleviate the skyrocketing cost of medical malpractice insurance and the associated health care crisis – which has forced some doctors to take their practices elsewhere or to cease practicing entirely to avoid Illinois' insurance costs.

The Attorney General asserts that by requiring insurers, health care providers, and patients to make sacrifices, the Act is an equitable means of ensuring that everyone who stands to benefit from resolution of the health care crisis contributes to the solution, and the Act aims to resolve the crisis through a number of interrelated measures stretching far beyond litigation reform. The Illinois Supreme Court has long upheld comprehensive, multidimensional exercises of the General Assembly's policing power, even when the legislature has modified common law rights in the process.

Gottlieb Memorial Hospital Brief

Gottlieb Memorial Hospital was named in the case and has submitted its own brief, which the Court accepted. Gottlieb makes the following points regarding the separation of powers provisions in the Illinois Constitution:

- The separation of powers clause does not categorically prohibit the General Assembly from limiting liability for damages awarded by a jury and available under the common law.
- The Court considers the nature and scope of the challenged provision when determining whether it complies with the separation of powers clause.
- The separation of powers works both ways – while it places some limits on the legislature's ability to regulate matters in the judicial sphere, it empowers the legislature to take action on core matters of public policy. From a separation of powers perspective, then, the General Assembly is on more solid ground when exercising its police power to address social or economic problems than when its exclusive goal is to regulate how courts handle litigation.

This brief states that the circuit court's invalidation of the Act as a whole rests on a mistaken conception of the separation of powers clause and fails to implement properly the court's previous decision. Further, the Act was a lawful exercise of the General Assembly's authority to redress a serious public policy problem adversely affecting the lives of the people across the state of Illinois. Those who dispute the wisdom of the legislature's solution, in whole or in part, should present their concerns to the legislature, which time and again has proven itself willing to give a fair hearing to diverse quarters on policy matters such as these.

Hospital Group Brief

The Illinois Hospital Association, American Hospital Association, Illinois Catholic Health Association, and Illinois Rural Health Association together submitted a brief that was accepted by the court. The hospital brief illustrates to the court the consequences of the medical liability crisis and why it was imperative the General Assembly act to implement the reform law.

The hospital brief makes the following points:

- When a family physician closes shop in an Illinois rural community, access to care for Illinoisans suffers.
- When the only obstetrician in a small Illinois town stops delivering babies, access to care for Illinoisans suffers.
- When a young physician decides to practice in another state that offers lower medical liability costs, access to care for Illinoisans suffers.
- When neurosurgeons leave an Illinois community and patients must be flown out of state, access to care for Illinoisans suffers.
- When a large hospital puts an additional \$20 million every year into its self-insurance trust instead of hiring more nurses, access to care for Illinoisans suffers.

ADDITIONAL SUPPORT FOR REFORM

Four additional parties submitted briefs supporting Illinois' medical lawsuit reforms. These briefs covered a range of points highlighting the broad appeal and constitutional rationale for the Reform Act.*

Submitting briefs:

- *Advocate Health and Hospitals Corporation (accepted by Court)*
- *Cook County Government*
- *Illinois Association of Defense Trial Counsel*
- *Loyola University Medical Center and Loyola University Physician Foundation (accepted by Court)*

**The Court can accept briefs at its discretion and chose to accept only two of these four briefs.*

The hospital brief also states it is impossible to put a number on the negative impact these decisions carry for Illinois citizens. Similarly, it is hard to put a “face” on the members of the public who pay the price for these decisions. But the Illinois General Assembly heard irrefutable evidence that these decisions are taking place on a large scale and that the Illinois public is paying that price. That evidence is so strong, it persuaded the legislature to pass the Act even though it was controlled by a political party traditionally opposed to “tort reform” and persuaded a governor of the same party to sign it.

The brief concludes: If our reasonable liability limits do not pass muster, then no limit ever will. Thus, ruling that these liability limits are unconstitutional means forbidding the legislature from legislating effectively against the extremely serious

problems created by rising medical costs. That is an untenable result. Compensating medical liability plaintiffs fairly is important and (The Act) accomplished that objective.

Timeline for Ruling Uncertain

Although exact timelines for resolution of the constitutional challenge are still unclear, the case is expected to carry through into the fall of 2008, which marks the three-year anniversary of reform.

Please visit www.RealityMedicine.com for the latest information on the legal challenge and how you can support medical liability reform in Illinois.

YES, I would like to receive the following “Reality Medicine” materials supporting medical liability reform:

- The Constitutional Challenge: Summary of Legal Briefs Submitted in Defense of Illinois’ Medical Liability Reform Law* brochure
- “Don’t Let Them Tip Back the Scales” office poster
- “Medical Liability Reform...it’s the healing touch” office poster
- 50 *Keep Doctors in Illinois* wristbands



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