

Liability Insurance Markets and the Need for Settlement Disclosure

Rules: The Case of Medical Malpractice

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We use economic analysis of law to explore the medical malpractice oversight mechanisms in the healthcare and medical liability insurance markets and litigation stages, demonstrate the incomplete information problems that cause partial collapse of the healthcare market and the mainly empirically based phenomena of the medical malpractice litigation. We then suggest *settlement disclosure rules* (SDRs), requiring the parties to a medical malpractice lawsuit, *inter alia*, to jointly and uniformly draft a report of the main facts, legal findings and medical lessons derived from the claimed adverse event, as a solution to those problems. These suggested SDRs are innovative as they are currently not included in the civil procedure rules, even not a specific prohibition on settlement confidentiality. Moreover, the literature is ambiguous even regarding the expected social welfare effects of a ban on settlement confidentiality.

We claim that properly designed SDRs that would require the parties to draft *common, public and adequate information* and the court acting as gatekeeper – as an efficient oversight mechanism of the healthcare market – will both solve the incomplete information problems inherent in this market. Moreover, in litigation stages, with incomplete information on the true nature of claims, SDRs without liability insurance will not change the number of suits filed or settlements reached at pre-filing or at the end of the revealing stage of positive expected value (PEV) and most negative expected value (NEV) cases, although they might have two minor effects: they might slightly reduce the expected settlement amount and cause a slight decrease in the number suits, settlements and drops of the weakest NEV claims.

We claim that with liability insurance and incomplete information, SDRs would reinforce the positive effects of the liability insurers' gate-keeping role and mitigate its negative ones.

Moreover, in medical malpractice litigation, liability insurance affects litigation outcomes similarly to SDRs; however, and contrary to the recent literature which focuses on a ban on settlement confidentiality, if liability insurance already exists, the SDRs' effects on litigation outcomes, if any, will be insignificant and thus without negative effect on litigation outcomes. We explain how SDRs should be constructed and conclude that properly designed SDRs are socially desirable.