Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

H.R. 5: Restricts Patients' Rights and Shields Special Interests from Liability

In recent years, America has faced a medical malpractice "crisis" on two fronts. There has been a temporary spike in insurance rates that is now abating. The latest national data on physician malpractice payments shows there is no evidence that the spike in some doctors' insurance rates was due to lawsuits and patients seeking compensation in the legal system. Both the number and total value of malpractice payouts to patients have been flat since 1991 and have shown a significant decline since 2001, when the so-called "crisis" began.[1] The second "crisis" is the huge number of preventable medical errors that kill and injure hundreds of thousands of Americans each year.

H.R. 5, the medical liability shield act, would do nothing to prevent the sudden, dramatic malpractice premium increases that insurers periodically impose on health care providers, nor would it reduce the socio-economic cost of preventable medical errors. Instead, H.R. 5 would punish victims of medical negligence and keeps wrongdoers and their insurers from feeling the sting of accountability for negligence. It is a gift of impunity to insurers, physicians, hospitals, HMOs, nursing homes, pharmaceutical companies, and medical device manufacturers—a gift that will be paid for by patients, their families, voluntary organizations and taxpayers.

H.R. 5 has the following significant problems:

Inflexible $250,000 cap on non-economic damages. Awards for non-economic loss (pain and suffering resulting from injuries such as lost child-bearing ability, disfigurement, and paralysis) compensate for the human tragedy caused by medical negligence and defective medical products. Typically, these damages exceed $250,000 only in cases of NAIC Level 6 injury severity or higher[2]—that is, cases involving permanent significant injuries. Thus, the cap will not affect patients with minor injuries. Instead, it targets only victims of injuries such as deafness, blindness, loss of limb or organ, paraplegia, or severe brain damage. The latest data reported to the National Practitioner Data Bank shows that, the five most severe categories of injury account for 89 percent of the value of malpractice payments, with death getting the largest awards of all.

Since the cap makes no allowance for inflation, its arbitrary limit becomes more unjust each day. That injustice is compounded by there being no exception for the $250,000 ceiling: not for death, nor where multiple medical providers are at fault, nor where multiple victims are harmed (such as the minor children of a catastrophically impaired adult). Limits of this kind are especially prejudicial to small children, stay-at-home moms, seniors and low wage earners for whom non-economic damages are the single most important part of their loss.

Overly broad scope: lets makers of dangerous drugs off the hook. While sponsors say that H.R. 5 is intended to benefit doctors, other special interests are along for the ride. Nursing home operators, pharmaceutical companies, medical device manufacturers, and even HMOs are all covered by the bill's definition of "health care liability claim" and would be insulated from liability to the same extent as doctors and hospitals.

Reckless conduct no longer subject to punitive damages. Punitive damages are rarely awarded, but the threat of punitive damages is important to deter reckless disregard for patient safety by HMOs, nursing homes, and drug and medical device manufacturers. H.R. 5 would reward these special interests with a benefit that even the conservative 104th Congress rejected—a complete ban on punitive damages for reckless conduct.

Moreover, by capping or linking punitive damages to compensatory damages awarded to an injured party this bill injects an economic predictability into the system that enables the manufacturer of a defective product to treat liability simply as a cost of doing business. This is particularly true for large multi-national companies for which a capped punitive damage award is a mere slap on the wrist.

Immunity from punitive damages for drug and medical device manufacturers. H.R. 5 gives blanket protection from punitive damages to pharmaceutical companies, medical device manufacturers and suppliers of products that are FDA approved or generally recognized as safe and effective. Because prescription drugs and medical devices cannot be sold legally without FDA approval, this provision effectively exempts companies from punitive damages entirely—even where Rezulin has resulted in kidney damage, Vioxx has induced a heart attack, or a defectively-designed spinal screw causes permanent back pain. This breathtaking proposal comes on the heels of recent disclosures of ineffective FDA supervision of the drug industry.

Caps plaintiffs' attorneys fees. Conservatives often say that "price controls reduce supply." In H.R. 5 they practice what they preach. By limiting plaintiff attorney fees—while giving defendants a blank check to pay their attorneys whatever they like—proponents of the bill hope to reduce the supply of representation for victims. These price controls will almost certainly succeed—they reduce the potential rewards of litigation that already carries with it high risks in terms of the expenses attorneys must advance and the sympathy that juries have for doctors. By drastically altering the risk/reward formula, H.R. 5 will prevent many victims with meritorious claims from obtaining legal counsel.

Leaves patients holding the bag when a doctor is insolvent. The common law doctrine of joint and several liability says that when two defendants, such as a doctor and a hospital, are both found liable for negligence, a plaintiff may collect the entire award from either of them if necessary. Joint and several liability is good public policy because it ensures that the burden of wrongful acts will fall on those who commit them, rather than those who are hurt by them. H.R. 5 would change this rule, and leave patients with no recovery for the share of damages assigned to an uninsured, underinsured, or bankrupt defendant.

Lets defendants control payouts for future damages. By instituting a "periodic payment rule" for future damages over $50,000, the bill would allow defendants and insurance companies to

string out payments for future damages over the life expectancy of the victim, rather than have to pay up front. This is money the jury has determined rightfully belongs to the plaintiff, yet defendants and insurers would be able to invest and earn interest on the vast majority of a plaintiff's damage award. Victims would be left to cope with unexpected needs or changing medical costs and increased transportation and housing costs. The bill would provide no protection to the victim if his or her needs change, or if the insurance company becomes insolvent.

Shortens statute of limitations to one year after discovery of the injury. This severe limitation will extinguish many meritorious claims. Although in most cases an injury is immediately apparent, a victim may not know until much later whether the injury was caused by malpractice. The law in most states starts the limitation period running from the discovery of the malpractice, not discovery of the injury. Disabled children will be particularly harmed by this provision because if parents fail to seek compensation for childhood injuries within the statute of limitation period, the children are forever out of luck later, even after they reach legal majority.

Abolishes the collateral source rule. "Collateral source benefits" are payments made by third parties to compensate the plaintiff for economic injuries—medical costs and loss of income. These may include life, health and disability insurance, as well as government entitlements such as Social Security disability and workers' compensation. A long-held principle of tort law known as the "collateral source rule" bars defendants from introducing evidence at trial that a plaintiff will recover collateral source benefits. The purpose of the rule is to ensure that defendants are held fully accountable for their wrongful acts. By abolishing this rule, the bill gives a windfall to the negligent defendant's insurance company and shifts the cost of medical care and wage loss from the defendant to the victim, the victim's employer, health care provider and taxpayers. The bill also voids any contractual liens held by private insurance companies that paid hospital costs and other benefits to the victims.

Imposes a federal one-size-fits-all scheme for medical malpractice liability on all 50 states. Traditionally, states, not the federal government, have been responsible for legislating and regulating in this area. The insurance business is regulated by the states. Medical professionals are regulated and disciplined by the states. Attorneys are licensed and disciplined by the states. Each state has developed its own common and statutory laws governing torts. Every state, including the District of Columbia, has enacted some combination of laws to address liability for medical negligence. But H.R. 5 would preempt the decades-long experience that states have in dealing with medical liability issues, unnecessarily intruding upon states' rights to manage their own legal systems.

July 2005

---

[1] See Public Citizen, "Medical Malpractice Payout Trends 1991 ─ 2004: Evidence Shows Lawsuits Haven't Caused Doctors' Insurance Woes," April 2005.
[2] Institute for Legislative Practice, Jury Verdicts in Medical Malpractice Cases and the MICRA Cap (1999); "Jury Awards for Medical Malpractice and Post-verdict Adjustments of Those Awards," 48 DePaul L. Rev. 265 (1998).