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The “HEALTH” Act of 2004 (H.R. 4280): Congress Should Act to Reduce Medical Errors, Not Reduce Compensation to Injured Patients

(This critique is based on the contents of HR 5, which passed in 2003; the final content of the bill is not available.)

According to the Institute of Medicine, “At least 44,000 and perhaps as many as 98,000 Americans die in hospitals each year as a result of medical errors. Deaths due to preventable adverse events exceed the deaths attributable to motor vehicle accidents (43,458), breast cancer (42,297) or AIDS (16,516).”ⁱ The IOM estimates annual costs to the economy of medical errors between \$17 billion and \$29 billion. Congress would better serve the public with legislation that promotes patient safety, rather than overriding state-law deterrents that help prevent patient deaths and injuries.

Instead of reducing the costs of medical malpractice and defective products, The House Republicans’ proposals would shift costs onto injured individuals, their families, voluntary organizations and taxpayers. Not only are the provisions unfair to victims, they also sacrifice the principles of market economics and private property long professed by the bill’s conservative advocates. The Republican leaderships’ proposals include these unfair elements:

Broad scope: not just doctors are let off the hook. While sponsors say that their bills are meant to help doctors, other special interests are along for the ride. Nursing home operators, medical device manufacturers, pharmaceutical companies, hospitals, and even HMOs have been covered by these bills’ definition of “health care liability claim” and would be equally insulated from liability.

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

\$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 suffering caused by medical negligence and defective medical products. These damages generally account for 35 to 40 percent of a jury’s award. Typically, such damages exceed \$250,000 only in cases of NAIC Level 6 injury severity or higherⁱⁱ—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. Since the cap makes no allowance for inflation, its arbitrary limits become more unjust as each day passes.

Caps on attorney fees. Conservatives often say that “price controls reduce supply.” Here they practice what they preach. By limiting attorney fees, the sponsors 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, these provisions would prevent many victims from obtaining legal counsel.

Leaves patients holding the bag when a doctor is insolvent. The 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. Republican proposals 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. Instituting a “periodic payment rule” for future damages over \$100,000 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. This provision leaves no protection to the victim if his or her needs change, or if the insurance company becomes insolvent.

Shortened 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.

ⁱ Institute of Medicine, To Err is Human: Building a Safer Health System (1999) p.26.

ⁱⁱ 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)