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S. 2061: Limiting Medical Malpractice Legislation to Obstetrics Doesn't Make It Better—It Makes It Worse

S. 2061, the “Healthy Mothers and Healthy Babies Access to Care Act of 2003,” is grossly mislabeled. It does nothing to help improve anyone’s health. Its purpose is to propagate the myth that malpractice lawsuits cause doctors to relocate or leave their profession. Instead of reducing the costs of medical negligence, S. 2061 would shift the costs onto the families of profoundly injured children, voluntary organizations, and taxpayers.

There is no evidence that a strong liability system reduces expectant mothers' access to care.

There is no relationship between the AMA's designation of a "malpractice crisis" in a state and the availability of obstetrical care. New Mexico, with stiff restrictions on damages, is described by the AMA as a "state currently OK." Yet New Mexico leads the nation in the percentage of mothers receiving *late or no prenatal care*. Oregon and Washington, which the AMA describes as "crisis states," are #1 and #3 in having the *smallest percentage of children with low birthweights*. Louisiana, another "state currently OK," is #49 in that category. Five of the six states AMA describes as "currently OK" have *above average infant mortality* when controlling for racial disparities. Of the twelve states having the *highest* ratios of obstetricians to female population, six are supposedly experiencing a "malpractice crisis."

Makers of defective birth control products also get a break under S. 2061.

While S. 2061 purports to address malpractice insurance for doctors and hospitals, like the bill rejected last year it would also limit the liability of other special interests such as HMOs, pharmaceutical companies, and medical device manufacturers if a woman’s reproductive health is involved. They would all be covered by the bill’s definition of health care lawsuit: “...any health care liability claim concerning the provision of obstetrical or gynecological goods or services...against a physician or other health care provider who delivers obstetrical or gynecological services, a health care organization (only with respect to obstetrical or gynecological services), or the manufacturer, distributor, supplier, marketer, promoter, or seller of a medical product (only with respect to a medical product used in connection with obstetrical or gynecological services), regardless of the theory of liability on which the claim is based...”

Caps on non-economic damages at \$250,000.

S. 2061 places an arbitrary, one-size-fits-all \$250,000 cap on non-economic damages regardless of the severity of injury or the number of defendants. Non-economic damages compensate for pain and suffering resulting from severe injuries such as brain damage, paralysis, disfigurement, loss of limb, blindness or deafness, and lost child bearing ability. They differ from economic

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damages, which compensate for economically quantifiable damages such as lost earnings and medical care. Typically, pain and suffering damages exceed \$250,000 only in cases involving permanent significant injuries. Thus, the proposed cap discriminates against those patients injured the worst. It would not affect patients with minor injuries. Moreover, singling out mothers for the cap on non-economic damages magnifies the disparate impact such laws have on women. The bill disingenuously states that a mother is eligible to recover unlimited “economic losses”—but a woman whose reproductive system is destroyed by negligent treatment would only have “economic losses” if she served as a surrogate mother for pay. Finally, since the cap makes no allowance for inflation, its arbitrary limits would become more unjust each day.

Reckless doctors and drug companies would be immune from punitive damages.

Punitive damages are awarded in less than one percent of medical malpractice cases, but their availability is an important incentive to physicians, hospitals, HMOs and drug and medical device manufacturers to put patient and product safety first. S. 2061 would change the standard of culpability required for awarding punitive damages from the current “recklessness” standard to one of intentional harm: under the bill a claimant must prove by “clear and convincing evidence” that the defendant “acted with malicious intent to injure the claimant,” or that the defendant “deliberately failed to avoid unnecessary injury that such person knew the claimant was substantially certain to suffer.” In the rare instances that punitive damages could be awarded, they would be limited to \$250,000 or twice the economic damages.

Leaves patients uncompensated when a defendant is insolvent.

S. 2061 would eliminate joint and several liability. This doctrine provides that when two defendants, such as a doctor and a hospital, are both found negligent, a plaintiff may collect the entire award from either of them if necessary. It is based on the idea that the negligent parties, not the innocent victim, should bear the risk of an insolvent defendant. S. 2061 would change this rule by allocating liability according to the degree to which a jury determines each party is negligent. This would 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 equaling or exceeding \$50,000, S. 2061 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. Defendants 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 and changing medical, transportation or housing costs. S. 2061 would provide no protection to the victim if the defendant’s insurance company became insolvent.

Allows credit for collateral source benefits to defendants.

Collateral source benefits refer to any amount paid to the claimant by a third party to compensate a claimant for his or her injury. They include life, health and disability insurance and government programs, including disability and worker’s compensation benefits. Defendants seek to have such third party payments factored in to damage award calculations so that their liability is proportionally reduced. S. 2061 does take into account any payments made to obtain the

collateral source benefits, but only if they were made by the claimant or certain family members – not by employers, as is usually the case.

Shortened statute of limitations would extinguish many meritorious claims.

Although in most cases an injury is immediately apparent, oftentimes it does not materialize for years. Moreover, a victim may not know until much later whether the injury was caused by negligence. S. 2061 would unreasonably shorten the statute of limitations for most claims covered by the bill, setting it at three years from the date of injury or one year from the date of discovery of the injury, whichever occurs *first*.

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