



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

S. 354: Restricting Patients' Rights and Shielding Special Interests from Liability Will Not Stop the Spike in Medical Malpractice Insurance Rates

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. It has been caused by the economics of the insurance cycle, not by lawsuits and the legal system. Limiting patients legal rights will not fix this problem. The second “crisis” is the huge number of preventable medical errors that kill and injure hundreds of thousands of Americans each year.

S. 354, the “Health Act of 2005,” does nothing to reduce preventable medical errors nor can it address the sudden, dramatic malpractice premium increases that insurers periodically impose on health care providers. In fact, if it were to become law it would jeopardize patient safety even more by shielding medical providers and their insurers from legal and financial accountability for errors and negligence.

Overly broad scope: lets even makers of dangerous drugs off the hook.

Although S. 354 purports to increase access to health care by lowering the cost of medical malpractice insurance for doctors and other medical service providers, the bill’s overly broad language also extends liability limits to special interest groups, including pharmaceutical companies, medical device manufacturers, nursing homes and HMOs. These are just some of the entities whose legal responsibility for wrongdoing would be greatly minimized—no matter how much harm they cause—under the bill’s expansive definition of health care lawsuit: “...any health care liability claim concerning the provision of health care goods or services...brought in a State or Federal court or pursuant to an alternative dispute resolution system, against a health care provider, a health care organization, or the manufacturer, distributor, supplier, marketer, promoter, or seller of a medical product, regardless of the theory upon which the claim is based...” Letting corporate and institutional bad actors off the hook is both unfair and poor public policy—especially since their actions are driven by a financial calculation that weighs the potential cost to the company (in damages) of injury or fatality, against the probability that someone will be hurt.

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

S. 354 places an arbitrary, one-size-fits-all \$250,000 limit on non-economic damages, regardless of the severity of injury or the number of defendants. And since the cap makes no allowance for inflation, its arbitrary limits would become more unjust each day. Non-economic damages compensate for the pain and suffering of enduring catastrophic injuries such as brain damage, paralysis, disfigurement, loss of limb, blindness or deafness, and lost child-bearing ability. They

differ from economic damages, which compensate for monetarily-quantifiable losses such as lost earnings and medical care. Typically, pain and suffering damages exceed \$250,000 only in cases involving significant, life-altering injuries. Thus, the proposed cap discriminates against those harmed the most; it would not affect patients with minor injuries. Worse still, a cap on non-economic damages has a disproportionate impact on stay-at-home mothers, children, the elderly, and low wage earners, who may have little if any economic damages. Women would be particularly hard hit because gynecological malpractice generally has few economic consequences, e.g., loss of income potential, although it can have a devastating effect on women's lives.

Punitive damages would rarely be awarded, and would be capped.

Punitive damages are awarded to punish particularly egregious behavior. Although they are granted in fewer than one percent of all medical malpractice cases, their availability is an important incentive to physicians, hospitals, HMOs, nursing homes and drug and medical device manufacturers to put patient safety first. S. 354 would heighten the standard of culpability required for awarding punitive damages from the current "recklessness" to intentional harm. Recklessness is behavior that the actor knows or should know is likely to cause harm because it constitutes a gross deviation from the standard of care a reasonable person would exercise in like circumstances. When a doctor neglects to ensure that he is operating on the correct organ and as a result erroneously removes a healthy instead of a diseased lung, leaving the patient permanently and severely disabled, that is recklessness. When a blood bank fails to follow standards for donor screening and blood testing, and so infects a patient (who in turn infects his wife) with HIV, that is recklessness. The rationale for assessing punitive damages in these real-life examples is both to punish the flagrantly negligent perpetrator and to discourage similar conduct by others in the future. Changing the standard for awarding punitive damages to "malicious intent to injure," as S. 354 proposes, means that cases of recklessness such as these would go unpunished. Instead, only a health care provider who *deliberately* injured or tried to injure a patient, or who was substantially certain that injury would occur as a consequence of his or her act would pay punitive damages—and then, only if a claimant could prove the defendant's intent by "clear and convincing evidence," a level of proof approaching the standard for criminal convictions.

Finally, S. 354 would bar claimants from asking for punitive damages at the outset of a lawsuit. First they would have to convince the judge that they were substantially likely to prevail, and only then would they be allowed—at the judge's discretion—to make their case before a jury. This new double hurdle would increase court costs and attorney fees both for plaintiff and defendant, and further delay the resolution of a claim. In the rare instances that punitive damages could be awarded under this onerous regime, they would be limited to \$250,000 or twice the economic damages—whichever is greater.

Leaves victims uncompensated when a defendant is insolvent.

S. 354 would eliminate joint liability, even where this is the rule under state law. The doctrine of joint liability provides that when two or more defendants are found negligent, a plaintiff may collect the entire award from any one of them if necessary. It is based on the idea that the negligent parties—not the victim—should bear the risk of one or another defendant becoming insolvent because the injury or death would not have occurred but for their actions. S. 354 would

change this rule by allocating liability according to the degree to which a jury determines each party is responsible. This would leave victims 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, S. 354 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 would leave victims unable to cope with unexpected needs and changing medical, transportation or housing costs. Moreover, S. 354 provides that payments would be made under the scheme established by the Uniform Periodic Payment of Judgments Act, a model statute prepared by the National Conference of Commissioners on Uniform State Laws in 1990. In its 15 years of existence, the statute has not been adopted by a single state. Enactment of S. 354 would essentially impose legislation upon the states that their own legislatures have rejected.

Relieves defendants of fully paying for their wrongdoing and shifts the costs to others.

S. 354 reduces the damages a defendant has to pay by the amount of collateral source benefits that a plaintiff receives. “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. But S. 354 would eliminate the rule in medical malpractice cases and instead require that third party payments to plaintiffs be factored into damage award calculations, thereby reducing defendants’ liability proportionately. Not only would defendants be able to escape some responsibility for their wrongdoing, but the cost of the harm they committed would be shifted to taxpayers (in the case of plaintiffs who receive public benefits) or consumers (in the case of plaintiffs who have private insurance). Thus, S. 354 would grant financial offsets to the wrongdoer, shift part of the cost of medical malpractice to innocent taxpayers and consumers, and minimize the deterrent value of penalizing negligent conduct.

Extinguishes many meritorious claims by shortening the statute of limitations.

S. 354 would shorten the statute of limitations—the deadline by which a lawsuit must be filed—to one year from the date the injury was discovered or should have been discovered, or three years from the date of manifestation of injury, whichever occurs first. Although in most cases an injury is immediately apparent, often it does not materialize for years, as in the case of a blood transfusion tainted with HIV. Moreover, a victim may not know until much later whether the injury was caused by negligence. Reducing the time limit for filing a lawsuit will preclude many victims with otherwise valid claims from seeking redress for their injuries.

Makes it harder for victims to find legal representation by capping attorney fees.

Malpractice attorneys represent plaintiffs on a contingency fee basis: they pay all the litigation expenses up front in return for a percentage of the damage award, typically one-third, if their clients prevail. This arrangement benefits plaintiffs, most of whom could not afford to advance

costs or hire an attorney on an hourly basis, by enabling even the poorest victims to obtain high quality legal representation to pursue their claims in court. The prospect of a substantial payout if they succeed gives attorneys an incentive to assume the significant risk of financing medical malpractice lawsuits, which often are very expensive to pursue and difficult to win. S. 354, however, undermines this system by strictly limiting the percentage of a damage award that a plaintiff can pay to an attorney. The bill's limit on attorney fees is so restrictive that it will discourage plaintiffs' attorneys from taking any but the most potentially lucrative cases: those involving higher-income victims who have suffered severe permanent injury or death. Low-income plaintiffs will be unable to find attorneys to pursue their otherwise meritorious claims in court. Defendants, however, will not be similarly burdened: S. 354 places no limit on defense attorney earnings, tilting still further the scales of justice already weighted in favor of resource-rich defendants.

Preempts state law so as to benefit defendants—at the expense of plaintiffs.

S. 354 would preempt state laws that now protect victims of medical malpractice—in most cases, imposing more stringent restrictions on victims' rights than those adopted by any state legislature. Not only will the ceiling on damages be lowered in states where caps already exist, but caps will be implemented in states whose supreme courts have determined that placing any limit on damages in a health care lawsuit violates the state constitution. The same applies to state laws governing joint and several liability, collateral sources, attorneys' fees and periodic payments. On the other hand, the bill *would not* preempt state laws that shield pharmaceutical manufacturers, insurance companies or HMOs from liability, nor would it preempt any state defenses available to health care providers.

May 2005