



The Other Terrible Health Care Bill Pending in Congress

By Billy Corriher July 20, 2017

The U.S. House of Representatives passed a bill on June 28 that would erect steep hurdles for injured patients looking to hold health care providers accountable for medical malpractice. Though most states have passed limits on certain types of damages, the House bill would go much further than these state laws and impose draconian limits on injured patients' lawsuits across the country.¹

The bill, H.R. 1215—misleadingly named Protecting Access to Care Act of 2017—would impose a limit of \$250,000 for noneconomic damages such as pain and suffering.² Although supporters of tort reform claim that such limits will prevent so-called frivolous lawsuits, these caps only affect the victims of malpractice who have suffered the most—cases in which the damages exceed the limits. And limits on noneconomic damages affect certain victims more than others: particularly people with severe disabilities, women, the elderly, and children.³

The House bill also includes a draconian statute of limitations for medical malpractice lawsuits. In most cases, the statute would require injured patients to file a lawsuit within one year after they discovered or “should have discovered” the injury.⁴ Joanne Doroshov, executive director of the consumer advocacy group Center for Justice and Democracy, has said that “almost no state has a statute of limitations that severe.”⁵

Within that one-year time period, the bill would require victims of malpractice to jump through certain hoops before they could file a lawsuit. The lawsuit would have to be filed with an affidavit from an expert witness who meets strict requirements.⁶ The bill says that only a doctor practicing or teaching in the same field and in the same state or a neighboring state can testify to a defendant's malpractice.⁷ But it would allow courts to waive these requirements if the “appropriate witnesses otherwise would not be available.”⁸

In a section that is laughably titled “Maximizing Patient Recovery,” the text of the bill sets out limits on the fees that attorneys would be able to collect for representing injured patients.⁹ These limits, along with the cumbersome expert witness requirements, would make it financially difficult for lawyers to justify taking these cases. Ultimately, this would make it much harder for victims of malpractice to find lawyers to represent them.

Slamming the courthouse doors on severely injured patients

In 2011, a doctor and a physician's assistant in a Milwaukee emergency room treated Ascaris Mayo for a high fever and abdominal pain.¹⁰ The physician's assistant recorded an infection as a potential diagnosis, but no one mentioned this possibility to Mayo. Instead, she was told to follow up with her gynecologist about a previous diagnosis.¹¹ The next day, Mayo felt worse and sought treatment at a different emergency room, where she was diagnosed with an untreated septic infection. Mayo went into a coma and was admitted to a hospital. The infection caused nearly all of her organs to fail and led to gangrene in her arms and legs; all four limbs had to be amputated.¹²

Mayo and her family sued her health care providers for medical malpractice and failure to provide informed consent.¹³ The jury heard evidence about her treatment, injuries, and the appropriate standard of medical care and awarded her \$15 million in non-economic damages for her health care providers' failure to provide informed consent about possible treatment.¹⁴

Under the bill pending in Congress, Mayo would only have been able to receive \$250,000 in noneconomic damages—a fraction of the damages awarded by the jury. Her case is an example of how limits on damages have the greatest impact on the most severely injured patients.

The Wisconsin Court of Appeals recently upheld the jury verdict in Mayo's case and overturned the state's \$750,000 cap on noneconomic damages.¹⁵ The court held that the limit violated the equal protection rights of severely injured patients "because Wisconsin's cap ... *always* reduces noneconomic damages *only* for the class of the most severely injured victims."¹⁶ The court found that the limit did not further the legislature's stated goals in creating it.¹⁷

Similar to the bill in Congress, a Texas law caps noneconomic damages at \$250,000.¹⁸ Suits involving wrongful death claims are limited to \$500,000 in "nonmedical" damages.¹⁹ The law also creates similar requirements for expert evidence. For patients like Mayo who were injured in emergency rooms, plaintiffs can only recover damages if they prove that the defendants were "willfully or wantonly negligent," a standard that one court interpreted as meaning that providers must know about the danger but demonstrate that they "did not care."²⁰

In an interview with the Center for American Progress, Patricia Whitman of San Antonio said that she could not find an attorney after an emergency room doctor misdiagnosed a severe heart attack—despite evidence that doctors missed an obvious diagnosis. One attorney wrote her a letter explaining that it would be difficult to meet the extremely high standard for emergency room malpractice under Texas law.²¹

If the bill in Congress passes, patients across America will find themselves in the same place as those in Texas. These steep hurdles to holding health care providers accountable infringe the right to a jury trial, which is protected by state constitutions and the Bill of Rights. The Missouri Supreme Court, in 2012, struck down a \$350,000 limit on noneconomic damages in a lawsuit by a parent whose child suffered brain damage during birth, due to alleged malpractice.²² The Missouri Constitution says “the right of trial by jury ... shall remain inviolate.”²³ The court decreed, “The individual right to trial by jury cannot ‘remain inviolate’ when an injured party is deprived of the jury’s constitutionally assigned role of determining damages according to the particular facts of the case.”²⁴

The Seventh Amendment to the Constitution states that “the right of trial by jury shall be preserved.”²⁵ Commenting on the right to a trial by jury, John Adams said that Americans have “no other indemnification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds.”²⁶

Corporations that don't like being sued bankroll tort reform efforts

The medical and insurance industries launched a movement in the 1980s to limit lawsuits, and the so-called tort reform movement gained momentum when Big Tobacco got involved after facing massive lawsuits for its poisonous, addictive products.²⁷ A 1986 memo from the Tobacco Institute laid out a plan for creating groups that appeared to be grassroots-driven but were actually “coordinated” by Big Tobacco.²⁸

Industries that were facing massive liability for dangerous products created an enormously successful public relations campaign that convinced the public that a “litigation crisis” existed.²⁹ The myth of frivolous lawsuits pervaded the news media and pop culture.³⁰ *Distorting the Law*, a 2004 book by William Haltom and Michael McCann, detailed how news coverage of cases like *Liebeck v. McDonald's Restaurants*, the 1994 lawsuit that came to be known as the McDonald's hot coffee case, skewed the facts in a way that fit the narrative of tort reform advocates. In the *Liebeck* case, coverage downplayed McDonald's misconduct and the severe injuries the plaintiff sustained after spilling scalding-hot coffee on her lap.³¹ Without any statistical evidence to back them up, these narratives helped justify state legislation that limited the amount of damages that injured plaintiffs could recover.³²

In recent decades, state legislatures across the country have passed bills that make it harder for injured people to file lawsuits against those whose negligence injured them.³³ Big business spent millions lobbying for these laws.³⁴ The American Legislative Exchange Council, or ALEC, offers model bills that limit liability.³⁵ The corporate-funded American Tort Reform Association claims that 23 states have limited noneconomic damages. Some of these laws specifically limit noneconomic damages in medical malpractice cases, like the bill pending in Congress, and none have a lower limit than \$250,000.³⁶

As these bills proliferated, many state supreme courts struck them down as unconstitutional,³⁷ citing state constitutional rights that are broader than the Seventh Amendment.³⁸ The same big business interests that spent millions lobbying for these laws then began to spend millions to elect state supreme courts that would uphold the laws.³⁹ A 2013 CAP report noted:

*The only thing standing in the way of limits on corporate liability was the judiciary and those pesky constitutional rights that it protected. Big corporations that did not like being sued began pouring money into tort-reform groups and corporate advocates such as the U.S. Chamber of Commerce. Those groups, in turn, gave money to the campaigns of judges, who then voted to uphold statutory caps on damages and limit citizens' right to sue.*⁴⁰

The Ohio Supreme Court, for example, struck down several tort reform bills in the 1990s, but corporate campaign cash poured in soon after.⁴¹ In 2007, the court upheld a tort reform bill that was very similar to one it had struck down in 1999.⁴² In his dissent, Justice Paul Pfeifer said, “Today is a day of fulfilled expectations for insurance companies and manufacturers of defective, dangerous, or toxic products that cause injury to someone in Ohio. But ... this is a tragic day for Ohioans, who no longer have any assurance that their Constitution protects the rights they cherish.”⁴³ CAP reviewed hundreds of personal injury cases decided by the court and found that from 2007 to 2012 the court voted for corporate defendants in 80 percent of the cases studied.⁴⁴

Legislators in states across the country continue to pass bills that would make it harder for injured patients or workers to hold negligent actors accountable.⁴⁵ The Arkansas legislature has proposed a constitutional amendment that would overturn rulings by the state supreme court that preserve the right to a jury trial.⁴⁶ A new Kentucky law requires a panel of health care providers to approve any medical malpractice lawsuits before they can be filed.⁴⁷ And in Missouri, the governor has signed legislation that specifically limits damages in civil rights lawsuits against employers and landlords.⁴⁸

Libertarians object to federal takeover of state tort law

On June 27, the House Liberty Caucus—members of Congress who see themselves as “dedicated to the principles of limited government, economic freedom, and individual liberty”—issued a public statement criticizing the pending tort reform bill.⁴⁹ In the statement, Matt Weibel, executive director of the caucus, wrote: “The power to ... set rules for lawsuits arising under state law is an essential power reserved to the states.”⁵⁰ Weibel rejected the idea that the bill is an appropriate exercise of federal power merely because it applies to suits involving health care providers that receive federal funding. This exercise of federal authority “opens the door to similarly extreme federal interventions in any area on which the federal government chooses to spend money,” according to the statement.⁵¹

For years, conservatives and libertarians have argued that the Affordable Care Act (ACA) exceeds the federal government’s authority.⁵² The U.S. Supreme Court upheld the ACA’s individual health care insurance mandate in 2012, rejecting arguments from conservatives that the federal government could not regulate health care markets in this way.⁵³ Conservatives criticized the Supreme Court—particularly Chief Justice John Roberts, the author of the opinion—for upholding the mandate.⁵⁴

The House Liberty Caucus’s stand against the federal tort reform bill is consistent with their view that the government should have limited authority over health care. Georgetown University Law Center professor Randy Barnett, the intellectual force behind the legal argument against the ACA, criticized a similar 2012 bill by saying:

*Constitutional law professors have long cynically ridiculed a “fair-weather federalism” that is abandoned whenever it is inconvenient to someone’s policy preferences. If House Republicans ignore their Pledge to America to assess the Constitution themselves, and invade the powers “reserved to the states” as affirmed by the Tenth Amendment, they will prove my colleagues right.*⁵⁵

Conclusion: Making health care less safe

Hundreds of thousands of patients die from medical errors every year.⁵⁶ When doctors cannot be held accountable for malpractice, patients are less safe. Brant Mittler, a cardiologist and attorney in Texas, warned about the effects of Texas limits on malpractice suits: “By giving damages to the individual, the jury is sending a message about safety to the doctors, the nurses, the hospital: ‘Please change your ways. Make health care safer to protect all of us.’”⁵⁷

A 2014 study by Northwestern University examined the effects of damage caps in several states and found that the adoption of caps “is followed by a broad increase in adverse patient safety events”—an increase that averages 10 percent to 15 percent.⁵⁸ In its ruling in Mayo’s lawsuit, the Wisconsin Court of Appeals noted that “the existence of noneconomic damages caps may actually increase the risk to patient safety.”⁵⁹

The vote to approve H.R. 1215 by the GOP-led House shows that these legislators do not care about patients. In addition to insulating negligent health care providers from accountability, Congress is also considering a bill that would take health care insurance away from millions of Americans.⁶⁰

The federal tort reform bill is not the kind of reform that our nation’s health care system needs. The Congressional Budget Office estimated that the bill would reduce government deficits, but this would come at a great cost for severely injured patients.⁶¹ Studies

have shown that limits on damages have little effect on the cost of health care or the cost of medical malpractice insurance.⁶² Even malpractice insurers and tort reform advocates concede that caps do not lower malpractice insurance premiums.⁶³

The Senate should stop this terrible legislation, or injured patients will find that they have no way to recover damages and hold providers accountable when doctors or hospitals provide shoddy care.

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Endnotes

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