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THE NEW PATIENT COMPENSATION SYSTEM – GOVERNMENT HARMING PATIENTS

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A new draft bill has been circulating in a few states entitled the "Patient Injury Act" or the "Insurance Costs Reduction Act."[1] Written by health care industry business representatives,[2] this bill proposes to change how patients injured by medical malpractice are compensated. Under the proposed system, juries would be abolished. Their constitutional "fact-finding" role would be turned over to a privileged group of political appointees and professional government bureaucrats pulled directly from the powerful medical and business establishments. And these individuals would award compensation based on predetermined schedules, *i.e.*, so much for an eye, so much for a leg, so much for a deceased child. All patients would be forced into this system with no freedom to opt out.

This group of appointees and bureaucrats would work under the auspices of a new, centralized government agency called the Patient Compensation System. Every aspect of medical malpractice adjudication would be controlled by this new government agency. Physicians' liability standards would be dictated by them. They would be unanswerable to the rule of law already established by centuries of court decisions. And by abolishing local juries, this system would violate many state constitutions, which give exclusive fact-finding authority to juries.[3] In fact, because these systems would remove the entire proceeding from the jury system while giving patients little in return and in some cases harming them, these proposals raise serious constitutional concerns.

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[1] Jeff Segal, "The high cost of defensive medicine, A patient compensation system would reduce the incidence of lawsuits," *Washington Times*, September 8, 2015, http://www.washingtontimes.com/news/2015/sep/8/jeff-segal-patient-compensation-system-would-reduc/.

[2] "Patients for Fair Compensation Leadership," http://www.patientsforfaircompensation.org/about/leadership/ (viewed January 20, 2016).

[3] *See, e.g., Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731 (2010), http://www.aha.org/content/00-10/10325-amicus.pdf

A FAULT-BASED SYSTEM

Under these bills, patients must prove fault or causation, so the burden on patients remains about as difficult as it is in the tort system. The standard for liability varies depending on the proposal, ranging from negligence in some versions to "avoidability" – a fault-based standard close to negligence – in others.[4] However, instead of facing unbiased judges and juries, patients would have to convince political appointees, a majority of whom *by law* must represent the powerful medical and business establishments. And they must do so in systems that remove legal protections, *e.g.*, procedural and substantive rights like the right to know and rebut evidence through discovery, cross-examination and argument, civil rules of procedure and an impartial judge who is guided by substantive law. Few if any patients will find competent attorneys who can properly represent patients who have been forced into such a system.

Losing these legal protections will be devasating for injured patients because in medical malpractice cases the disputing parties are extremely ill-matched. The parents of catastrophically injured children, who are in need of medical care, who are disabled or perhaps in pain and who may have major medical expenses, are in a substantially weaker position than the medical establishment.

One of the more ridiculous elements of this proposal is that the personnel running the Patient Compensation System, who make all liability and compensation decisions, are also given the power to hire an "advocacy director" ostensibly for the patient. This individual is to "determine" if the patient needs an attorney to fight not only the provider but also the government agency itself. Even in the unlikely event this is recommended (and assuming an attorney could be found who would even be qualified), the system still goes forward whether the patient is represented or not. It should be obvious to anyone that this aspect of the system alone presents a major conflict of interest.

COMPENSATION

Under the bills, compensation would be dictated not by what evidence in a case shows the injured patient deserves and the wrongdoer should pay but by undetermined "compensation schedules" written or approved by the same powerful appointees who determine liability. Such schedules eliminate any room for consideration of circumstances for injuries, which local judges and juries – not politicians or bureaucrats – are uniquely qualified to evaluate after hearing all the evidence in a case. As pointed out in 2006 congressional testimony by Duke Law Professor Neil Vidmar, "Even when some leeway is built into compensation schedules, they cannot take into account the number of factors and extreme variability of … damages. That is why these matters have been entrusted to juries. They provide justice on an individualized basis."[5]

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[4] *See* Amy Widman, "Why Health Courts are Unconstitutional," 27 *Pace L. Rev*. 55, 60 et seq. (Fall 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856042.

[5] Testimony of Neil Vidmar, Russell M. Robinson II Professor of Law, Duke Law School, before the U.S. Senate Committee on Health, Education, Labor and Pensions, "Hearing on Medical Liability: New Ideas for Making the System Work Better for Patients," June 22, 2006, at 18 (citations omitted),

Further, the proposed law gives these bureaucrats complete discretion to not only limit certain kinds of damages, but also conceivably, to wipe them out entirely. There are no legislative guidelines for determining allowable medical compensation for future medical care, lost wages, lost earning capacity, non-economic damages and so on, making certain that they will either be capped or, in some cases, completely eliminated.

Compensation is further limited by an overall fiscal cap even though bringing more patients into the system – a social engineering goal outside the free market tort system, which proponents say they want to accomplish – would involve substantial increases in total direct malpractice costs. That only means one thing: dramatic reductions in recoveries for the most seriously injured patients to levels well below their actual losses, likely forcing them into other government health and disability programs such as Medicaid. In other words, the victim and taxpayers will end up paying for the harm caused by the health care provider.

Some advocates of this government system suggest that it is needed because the malpractice system delivers compensation too slowly and is too expensive. Yet when it comes to someone who is catastrophically injured or has a child in this situation, the goals of speed and efficiency could actually have devastating consequences. The future medical needs of someone with serious complications, such as a brain-injured newborn, might not be known for some time. What difference does it make if a child's family obtains predetermined "capped" funds in 30-60 days if it means they will be shortchanged for the next 50 years? Any notion that this proposal contemplates fairness when it comes to compensating such patients is absurd.

Moreover, to anyone who truly is concerned about problems in the current system, it is worth noting that nothing today prevents providers or liability carriers from settling legitimate claims with patients before they file a court case or from paying valid claims expeditiously. In fact, CJ&D and the malpractice victims with whom we work all agree that informal pre-trial settlements, where both parties voluntarily agree to take a case out of the civil justice system, are not only appropriate but currently resolve the vast majority of legitimate medical malpractice claims today.[6]

However, schemes like this, which tilt the legal playing field dramatically in favor of the health care industry, eviscerate the juries' fact-finding role, ignore patients' rights to adequate compensation, disrupt the settlement process[7] and present citizens with no freedom to opt-out,

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http://www.help.senate.gov/imo/media/doc/vidmar.pdf.

[6] In a Harvard closed claims study, 15 percent of claims were decided by trial verdict. David M. Studdert et al., "Claims, Errors, and Compensation Payments in Medical Malpractice Litigation," *New England Journal of Medicine*, May 11, 2006, http://www.nejm.org/doi/full/10.1056/NEJMsa054479. Other research shows that 90 percent of cases are settled without jury trial, with some estimates indicating that the figure is as high as 97 percent. Testimony of Neil Vidmar, Russell M. Robinson II Professor of Law, Duke Law School, before the U.S. Senate Committee on Health, Education, Labor and Pensions, "Hearing on Medical Liability: New Ideas for Making the System Work Better for Patients," June 22, 2006, at 17 (citations omitted), http://www.help.senate.gov/imo/media/doc/vidmar.pdf.

[7] According to Duke Law School Professor Neil Vidmar, "Without question the threat of a jury trial is what forces parties to settle cases. The presence of the jury as an ultimate arbiter provides the incentive to settle but the effects are more subtle than just negotiating around a figure. The threat causes defense lawyers and the

are not the answer. One need only examine other government systems where victims have ceded their right to trial by jury based on some kind of promise of compensation. In every case, that promise has ultimately been broken due to influence-peddling and future budgetary/solvency considerations that no lawmaker today can control. There are many examples of this happening, including: workers' compensation,[8] the fiscal problems of which are typically solved by reducing benefits and increasing obstacles for workers; the federal Vaccine Injury Compensation Program,[9] which tries to reduce costs by fighting parents who try to get in the system; and Virginia's Birth-Related Neurological Injury Compensation Program, the fiscal problems of which have been resolved on the backs of patients.[10]

These programs show that as soon as local judges and juries are removed from the process, compensation decisions become controlled by money and politics. This is why the right to civil

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liability insurers to focus on the acts that led to the claims of negligence. " Testimony of Neil Vidmar, Russell M. Robinson II Professor of Law, Duke Law School, before the U.S. Senate Committee on Health, Education, Labor and Pensions, "Hearing on Medical Liability: New Ideas for Making the System Work Better for Patients," June 22, 2006, at 21, http://www.help.senate.gov/imo/media/doc/vidmar.pdf.

[8] *See*, Michael Grabell, Howard Berkes, "The Demolition of Workers' Comp; Over the past decade, states have slashed workers' compensation benefits, denying injured workers help when they need it most and shifting the costs of workplace accidents to taxpayers," *ProPublic*a and *NPR*, March 4, 2015, https://www.propublica.org/article/the-demolition-of-workers-compensation; "Worker's Comp: Falling Down on the Job," *Consumer Reports* (2000)(discussing the legislative reforms of the 1990s and the resulting profits for workers' compensation insurance providers); Martha T. McCluskey, "The Illusion of Efficiency in Workers' Compensation 'Reform,'" 50 *Rutgers L. Rev*. 657, 699-700, 711 (citations omitted)(1998), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=139583. In sum, having ceded their right to jury trial at a time when the law would have left most of their injuries uncompensated, these workers now face serious disadvantages relative to those with access to the judicial system. *See* Center for Justice & Democracy, *Workers' Compensation – A Cautionary Tale* (2006), https://centerjd.org/content/workers-compensation-cautionary-tale-national.

[9] *See* Amy Widman, "Why Health Courts are Unconstitutional," 27 *Pace L. Rev*. 55 (Fall 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856042 (The Vaccine Injury Compensation Program was created by federal statute in the mid-1980s. National Childhood Vaccine Injury Act of 1986, P.L. 99-660. As originally contemplated, if you or your child receives a covered vaccine and then presents a covered injury from the vaccine, you or your child is entitled to compensation. However, as this law's implementation has been modified by new political forces, extreme problems with access and compensation for victims have developed. Although originally proposed as a no-fault model that would be efficient and provide for quick compensation, many experts say that the program has been co-opted by political forces and turned into a victim's nightmare. *See* Elizabeth C. Scott, "The National Childhood Vaccine Injury Act Turns Fifteen," 56 *Food and Drug L.J*. 351 (2001)(stating that, as of 2001, 75 percent of claims were denied after long and contentious legal battles taking an average of 7 years to resolve). *See also* Statement of National Vaccine Information Center Co-Founder and President Barbara Loe Fisher, House Oversight Hearing, "Compensating Vaccine Injury: Are Reforms Needed?" September 28, 1999 (discussing the unilateral power HHS has to change the burdens of proof and other restrictions); Derry Ridgway, "No-Fault Vaccine Insurance: Lessons from the National Vaccine Injury Compensation Program," 24 *J. Health Pol'y & L*. 59, 69 (1999)(describing how the program originally awarded many more claims, until the Department of Justice decided to aggressively argue against claimants.)

[10] *See*, *e.g*., Bill McKelway, "Decision rejects payments to lawyers for hospital, doctor in birth-injury case," *Richmond-Times Dispatch*, December 20, 2010, http://www.richmond.com/news/article_4732a2b7-e702-55de-9cb0-33ac4869015e.html; Bill McKelway, "Plan could restore financial soundness," *Richmond-Times Dispatch*, September 17, 2007, http://www.richmond.com/entertainment/article_1cd7342d-03fb-5df7-907d-da8bae2b910c.html; Bill McKelway, "Danville Has High Birth-Injury Rate; Critics Say Virginia Law Shields Doctors from Lawsuits," *News Virginian*, June 1, 2003.

jury trial as well as an independent judiciary, established under the doctrine of "separation of powers" and found in virtually all state constitutions, are so important.

SIGNIFICANT COSTS

These systems have a public relations spin attached to them, which, among other things, promise a reduction in costs.[11] However, the provisions themselves expressly contradict these articulated objectives. Their wholesale dismissal of local juries, the creation of an entirely new centralized governmental agency to handle what are a relatively small percentage of cases in our court system[12] and the likely costs of maintaining such a system[13] are why similar proposals have gone nowhere in Congress or in any state in the nation.

In October 2009, the Congressional Budget Office (CBO) scored the impact on health care costs of a number of severe "tort reforms," including a $250,000 cap on non-economic damages. It found that even if the country enacted the entire menu of extreme tort restrictions, it could go no farther than to find an extremely small percentage of health care savings, about 0.5%,[14] "far lower than advocates have estimated."[15]

Indeed, no credible analyst believes removing the relatively few medical malpractice cases that now proceed through the civil justice system and instituting a new government agency to handle them is a money-saver. This is especially true if proponents are taken at their word – in other words, that they seek to achieve a social engineering goal, outside the free market tort system, of compensating more patients. In their book *Medical Injustice: The Case Against Health Courts*, Case Western Reserve Professors Maxwell J. Mehlman and Dale A. Nance quoted the Republican Policy Committee, which admitted that "[t]he health court proposal is not about reducing costs overall (since many more people may be compensated at smaller amounts)."[16] These authors made the following additional observations:

- Health courts "would entail some huge potential increases in total system costs.… If we take health care proponents at their word, their goal is to bring … currently non-claiming people into the process." This, however "would multiply the number of claims involving negligence by a factor between 33 and 50."

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[11] *See* Patients for Fair Compensation, http://www.patientsforfaircompensation.org/.
[12] According to the National Center for State Courts, although high profile medical malpractice and product liability cases "often generate a great deal of attention and criticism, they comprise…less than 1% of the total civil caseload." National Center for State Courts, *The Landscape of Civil Litigation in State Courts* (November 2015), http://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx.
[13] *See*, *e.g.*, Maxwell J. Mehlman and Dale A. Nance, *Medical Injustice: The Case Against Health Courts* (2007) at 72. ("[C]laims involving error account for at least 84 percent of total system costs … so that, even if we assume that only claims involving error are brought into the system, the system costs should increase by a factor of at least 28, all other things (like system efficiency) being equal.")
[14] Congressional Budget Office, "CBO's Analysis of the Effects of Proposals to Limit Costs Related to Medical Malpractice ('Tort Reform')," October 9, 2009, http://www.cbo.gov/publication/41334.
[15] Alexander C. Hart, "Medical malpractice reform savings would be small, report says," *Los Angeles Times*, October 10, 2009, http://articles.latimes.com/2009/oct/10/nation/na-malpractice10.
[16] Maxwell J. Mehlman and Dale A. Nance, *Medical Injustice: The Case Against Health Courts* (2007) at 74.

- "[C]laims involving error account for at least 84 percent of total system costs … so that, even if we assume that only claims involving error are brought into the system, the system costs should increase by a factor of at least 28, all other things (like system efficiency) being equal."

- "[E]ven if we assume that the average per patient damages under a new system embracing all potential claimants (including those who claim under the existing system) would be only 30 percent of the average damages for claims now paid, that still leaves total direct system costs multiplied by a factor of about 8.5, again as a low end estimate."

- Health courts involve the creation of a new judicial or administrative bureaucracy. Costs "would certainly be substantial, vastly more than the public (taxpayer borne) judicial costs currently associated with the adjudication of malpractice claims."[17]

Proponents ignore this reality and instead argue that their system will save money as physicians will stop practicing "defensive medicine," *i.e.*, performing tests and procedures due solely to liability concerns. Yet studies in this area show that when a state strips away a patient's right to sue in court, health care costs not only do not drop – they *increase* as the deterrence function of the tort system is weakened leading to the practice of riskier medicine. This was the alarming recent conclusion from esteemed, longtime academics in the field of medical malpractice, who examined the impact on costs of laws that limit liability exposure, specifically "caps" on damages.[18] They found that such laws "have no significant impact on Medicare Part A (hospital) spending, but lead to 4-5% *higher* Medicare Part B (physician) spending" [emphasis in the original]. The researchers say,

> [O]ne policy conclusion is straightforward: There is no evidence that limiting med mal lawsuits will bend the healthcare cost curve, except perhaps in the wrong direction. Policymakers seeking a way to address rising healthcare spending should look elsewhere.

Other studies have reached similar conclusions. A new study from RAND and the *New England Journal of Medicine,* which the *Washington Post* headlined, "Study: Don't expect big health-care savings from medical malpractice reform,"[19] found "that raising the legal standard for malpractice did not result in less expensive care."[20] The researchers conclude:

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[17] *Id*. at 72-74.
[18] Bernard S. Black, David A. Hyman and Myungho Paik, "Do Doctors Practice Defensive Medicine, Revisited," Northwestern University Law & Economics Research Paper No. 13-20; Illinois Program in Law, Behavior and Social Science Paper No. LBSS14-21 (October 2014) at 2, http://ssrn.com/abstract=2110656.
[19] Jason Milliman, "Study: Don't expect big health-care savings from medical malpractice reform," *Washington Post*, October 15, 2014, https://www.washingtonpost.com/news/wonk/wp/2014/10/15/study-dont-expect-big-health-care-savings-from-medical-malpractice-reform/.
[20] RAND Corporation, "Making It More Difficult to Sue Physicians for Malpractice May Not Reduce 'Defensive Medicine,'" October 15, 2014, http://www.rand.org/news/press/2014/10/15.html, discussing Daniel A. Waxman et al., "The Effect of Malpractice Reform on Emergency Department Care," 371 *N. Engl. J. Med*. 1518, October 16, 2014, http://www.nejm.org/doi/full/10.1056/NEJMsa1313308.

> "Our findings suggest that malpractice reform may have less effect on costs than has been projected by conventional wisdom," said Dr. Daniel A. Waxman, the study's lead author. "Physicians say they order unnecessary tests strictly out of fear of being sued, but our results suggest the story is more complicated. … This study suggests that even when the risk of being sued for malpractice decreases, the path of least resistance still may favor resource-intensive care…."

Indeed, as many studies now show, the real reasons doctors may order extra tests and procedures – if they do it at all[21] – are revenue and workload. A recent review of Medicare data showed that "higher-earning clinicians make more money by ordering more procedures and services per patient rather than by seeing more patients, which may not be in patients' best interest."[22] According to the study's lead author, "These findings suggest that the current health care reimbursement model – fee-for-service – may not be creating the correct incentives for clinicians to keep their patients healthy."[23]

And according to a survey of hospital attending doctors published in *JAMA Internal Medicine*, 22 percent of physicians reported that workload led them to "order potentially unnecessary tests, procedures, consultations, or radiographs due to not having the time to assess the patient adequately in person."[24] In other words, good doctors are trying to get it right under stressful working conditions caused by the U.S. health care system. Even CBO, in its October 2009 analysis, found that even if the country enacted an entire menu of extreme tort restrictions, this would result in only a 0.3 % savings "from slightly less utilization of health care services."[25]

Indeed, in June 2009, Dr. Atul Gawande published an article in the *New Yorker* magazine called "The Cost Conundrum; What a Texas town can teach us about health care," which explored why the town of McAllen, Texas "was the country's most expensive place for health care."[26] The following exchange took place with a group of doctors and Dr. Gawande:

> "It's malpractice," a family physician who had practiced here for thirty-three years said.

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[21] That this is a widespread practice is particularly doubtful since doctors who bill Medicare or Medicaid for tests and procedures done for a personal purpose – *e.g.*, possible lawsuit protection – as opposed to what is medically necessary for a patient, would be committing fraud under federal and state Medicare/Medicaid programs. 42 U.S.C. § 1320c-5(a)(1); 42 U.S.C. § 1395y(a)(1)(A).

[22] Kim Irwin, "Higher-earning physicians make more money by ordering more procedures per patient, says UCLA report," December 11, 2014, http://newsroom.ucla.edu/releases/higher-earning-physicians-make-more-money-by-ordering-more-procedures-per-patient-says-ucla-report, discussing Jonathan Bergman, Mark S. Litwin and Christopher S. Saigal, "Service Intensity and Physician Income: Conclusions From Medicare's Physician Data Release," 175 *JAMA Internal Medicine* 297 (February 2015), http://archinte.jamanetwork.com/article.aspx?articleid=1984245.

[23] Ibid.

[24] Henry J. Michtalik et al., "Impact of Attending Physician Workload on Patient Care: A Survey of Hospitalists," *JAMA Internal Medicine*, March 11, 2013, http://archinte.jamanetwork.com/article.aspx?articleid=1566604#qundefined.

[25] Congressional Budget Office, "CBO's Analysis of the Effects of Proposals to Limit Costs Related to Medical Malpractice ('Tort Reform')," October 9, 2009, http://www.cbo.gov/publication/41334.

[26] Atul Gawande, "The Cost Conundrum," *New Yorker*, June 1, 2009, http://www.newyorker.com/reporting/2009/06/01/090601fa_fact_gawande.

> "McAllen is legal hell," the cardiologist agreed. Doctors order unnecessary tests just to protect themselves, he said. Everyone thought the lawyers here were worse than elsewhere.
>
> That explanation puzzled me. Several years ago, Texas passed a tough malpractice law that capped pain-and-suffering awards at two hundred and fifty thousand dollars. Didn't lawsuits go down?
>
> "Practically to zero," the cardiologist admitted.
>
> "Come on," the general surgeon finally said. "We all know these arguments are bulls#*t. There is overutilization here, pure and simple." Doctors, he said, were racking up charges with extra tests, services, and procedures.

PHYSICIAN SUPPLY

Another claim made by the proponents of this bill is that a centralized government system to compensate injured patients is needed to keep physicians practicing in a state or to recruit new physicians to a state. Yet there are years of studies showing no correlation between where physicians decide to practice and liability laws. The most recent examination of physician supply comes from the same group of esteemed academic researchers who examined states that enacted caps during the last "hard" insurance market (2002 to 2005) and compared these data to other "control" states.[27] They found "no evidence that cap adoption predicts an increase in total patient care physicians, in specialties that face high med mal risk (except plastic surgeons), or in rural physicians." They concluded:

> Physician supply does not seem elastic to med mal risk. Thus, the states that want to attract more physicians should look elsewhere.

Many other studies have reached similar conclusions,[28] including an April 2007 study by Michelle Mello and her colleagues at the Harvard School of Public Health.[29]

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[27] Bernard S. Black, David A. Hyman and Myungho Paik, "Does Medical Malpractice Reform Increase Physician Supply? Evidence from the Third Reform Wave," Northwestern University Law & Economics Research Paper No. 14-11; University of Illinois Program in Law, Behavior and Social Science Research Paper No. LBSS 14-36 (July 2014) at 2, http://ssrn.com/abstract=2470370.

[28] *See*, *e.g.*, David A. Hyman et al., "Does Tort Reform Affect Physician Supply? Evidence from Texas," 42 *Int'l Rev. L. & Econ.* 203 (2015), http://ssrn.com/abstract=2047433; Manhattan Institute's Ted Frank, "Post-tort-reform Texas doctor supply," *PointofLaw.com*, May 4, 2012, http://www.pointoflaw.com/archives/2012/05/post-tort-reform-texas-doctor-supply.php ("I, for one, am going to stop claiming that Texas tort reform increased doctor supply without better data demonstrating that."); Tim Bonfield, "Region Gains Doctors Despite Malpractice Bills," *Cincinnati Enquirer*, October 10, 2004, http://www.enquirer.com/editions/2004/10/10/loc_doctor.day1.html; Katherine Baicker and Amitabh Chandra, "The Effect of Malpractice Liability on the Delivery of Health Care," *NBER Working Paper Series* (August 2004) at 24, http://www.dartmouth.edu/~kbaicker/BaickerChandraMedMal.pdf;.General Accounting Office, *Medical Malpractice: Implications of Rising Premiums on Access to Health Care,* GAO-03-836 (August 2003), http://www.gao.gov/new.items/d03836.pdf; Eleanor D. Kinney, "Malpractice Reform in the 1990s, Past Disappointment, Future Success?" 20 *J. Health Pol. Pol'y & L.* 99, 120 (1996), cited in Marc Galanter, "Real

However, there is one class of physicians that this proposal could attract – incompetent ones who should not be practicing at all. These proposals weaken or eliminate the tort system's linkage between harm done and compensation paid, interfering directly with the tort system's free market deterrence function.[30] Even more dangerous, however, are provisions in some proposals that would keep malpractice payments from being reported to the National Practitioner Data Bank (NPDB), the national databank of physician malpractice and disciplinary records on which hospitals rely in making hiring decisions. The NPDB is one of the most important sources of patient safety information in the nation. The result would be turning a state into a safe harbor for incompetent physicians and an attractive place for such physicians to relocate.

CONSTITUTIONAL PROBLEMS

When a legislature attempts to strip away the right to jury trial and remove a common law cause of action from the civil justice system, the courts insist that those ceding their rights receive something sufficient in return, an adequate "quid pro quo," or trade-off, for losing constitutional rights. Here, the promise is that an alternative system will be even speedier and cheaper (although as noted above, for seriously injured victims whose future medical needs may not be known for months, a quick and cheap resolution of their case via compensation schedules may be extraordinarily harmful to them).

Many state constitutions have struck down "far more subtle" intrusions into the jury system than this proposal,[31] including "caps" on non-economic damages.[32] In examining analogous health court proposals, Professor Amy Widman wrote,

> Proponents of the health court models quickly play down the lack of juries in the new system by citing to worker's compensation. It is not a fair analogy. Worker's compensation is a no-fault scheme. This is the compromise the courts have upheld. If there is no fault to be litigated, then an alternative administrative tribunal is not as troubling. The determination of fault is the quintessential jury function."[33]

World Torts: An Antidote to Anecdote," 55 *Maryland L. Rev*. 1093, 1152 (1996), http://marcgalanter.net/documents/realworldtortsananditotoanecdote.pdf;.Eleanor D. Kinney and William P. Gronfein, "Indiana's Malpractice System: No-Fault by Accident," 54 *Law & Contemp. Probs*. 169, 188 (1991), cited in Marc Galanter, "Real World Torts: An Antidote to Anecdote," 55 *Maryland L. Rev*. 1093, 1152-1153 (1996),http://marcgalanter.net/documents/realworldtortsananditotoanecdote.pdf.

[29] "Malpractice Premium Spike In Pennsylvania Did Not Decrease Physician Supply," *Health Affairs,* April 24, 2007, http://www.healthaffairs.org/press/marapr0707.htm.

[30] The tort system's economic function is deterrence of non cost-justified accidents, with the tort system creating economic incentives for "allocation of resources to safety." *See*, *e.g*., William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law*. Cambridge, MA: Harvard University Press (1987).

[31] Amy Widman, "Why Health Courts are Unconstitutional," 27 *Pace L. Rev*. 55, 74 (citations omitted)(Fall 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856042.

[32] *See, e.g*., Center for Justice & Democracy, "Fact Sheet: Cases Where 'Tort Reforms' Have Been Held Unconstitutional," December 22, 2014, https://centerjd.org/content/fact-sheet-cases-where-tort-reforms-have-been-held-unconstitutional.

[33] Amy Widman, "Why Health Courts are Unconstitutional," 27 *Pace L. Rev*. 55, 64 (citations omitted)(Fall

In other words, in other systems, "the trade-off is clear: remove the dispute from the jury but relieve the plaintiff of the burden of proving fault. The plaintiff is left with guaranteed compensation if certain conditions are met."[34] None of that is true here. Notes Widman,

> [T]he fault standard means that there is no reasonably just substitute for removing the common law claims from civil courts with juries. The token benefits being offered to offset the serious breach of individual liberty are neither factually nor legally sufficient.[35]

Given the magnitude of what would be taken away by this bill – rights firmly established in virtually every state constitution in the nation – patients are clearly getting little in return and many will be worse off. This proposal is plainly unconstitutional.

CONCLUSION

Over the years, states and Congress have occasionally considered proposals that require or pressure wrongly injured persons to have their disputes resolved outside the court system and/or force them to obtain compensation from a newly-created state governmental agency. It would be one thing if any of these systems succeeded and could be considered appropriate models. But none has. This is due not to poor legislative construction or elements that can be fixed. Rather, it is because of inherent flaws that infect all such systems.

Specifically, once local juries, who represent the community and are the essence of local government, are banned from deciding compensation, and their role is taken over by a centralized government agency, the system becomes rigid, unaccountable and not to be trusted. Forcing patients into such a system violates our constitutional rights as citizens. Juries are essential to protect our rights and freedom. Proponents of this proposal are misguided and their proposal should be rejected as bad public policy.

2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856042.

[34] *Id*. at 75 (citations omitted).

[35] Ibid.