CENTER FOR JUSTICE & DEMOCRACY
CJ&D

IMPACT

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...news, views and reviews from the Center for Justice & Democracy

CENTER FOR JUSTICE & DEMOCRACY **NEWS**

Dear Friends,

On April 6, for the second time in three months, I testified in Congress against legislation to impose nationwide "caps" on damages in medical malpractice cases. This fantastically-overbroad legislation, covering drug cases as well, will likely pass the U.S. House of Representatives this year. It will no doubt be stopped in the Senate – this year, at least.

No matter how many immunities the medical industry gets, they never stop asking for more. New Yorkers just went through a six week bruising battle to keep a $250,000 cap out of the state budget. States from North Carolina to Florida to Tennessee to Arizona are facing battles, as well.

Meanwhile, medical errors are up, claim are down, and medical malpractice insurance for doctors is stable.

We hope that this movement to strip away the rights of sick and injured children ends. In the meantime, CJ&D is on the front lines of this fight, doing everything we can at the state and federal level to help. We appreciate your support!

Sincerely,
Joanne Doroshow
Executive Director

IN THIS ISSUE: MEDICAL MALPRACTICE

GOVERNORS ATTACKING PATIENTS

In 2011, the Virginia Hospital & Healthcare Association, the Medical Society of Virginia and the Virginia Trial Lawyers Association reached an historic agreement to increase Virginia's inhumane $2 million overall cap on medical malpractice awards. Unlike most state "caps" on damages, Virginia' cap applies to all compensation in a malpractice case, even for child's lifetime of care. Incredibly, Virginia Governor Bob McDonnell vetoed this bill although supporters are working hard to override it.

One of Wisconsin Governor Scott Walker's first acts in office was to push through legislation to make sure that if someone's mom or grandma is abused or neglected in a nursing home, their ability to be compensated is severely limited and the nursing home is less accountable.

Limiting the rights of injured patients is something one might expect from a conservative Governor. But unfortunately, this movement is not limited to them.

In early 2011, New York Governor Andrew Cuomo appointed a Medicaid Redesign Team (MRT), dominated by industry lobbyists and hospital executives, allowing it to craft a proposal which included a $250,000 non-economic damages "cap" for injured patients, as well as a measure to force parents of brain-damaged babies into a burdensome and discriminatory claims reimbursement system. Not only that, these measures were hardwired into Cuomo's budget plan for 2011-2012, making it almost impossible to remove. The outcry from victims was unmistakable.

(continued on page 2)

CONGRESS TOO!

Congress is considering legislation that would limit the legal rights of injured patients and the families of those killed or hurt by negligent health care. This includes cases involving negligent doctors, unsafe drugs and medical devices and nursing home abuse and neglect. CJ&D's Executive Director Joanne Doroshow has testified in Congress twice in three months objecting to this bill, H.R. 5, the so-called "Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011". Among its provisions are:

Cap on Non-Economic Damages. There would be an arbitrary ceiling — $250,000 — on the amount an injured patient can receive in non-economic damages, no matter how egregious the misconduct or devastating the injury. This cap applies even in cases where patients suffer great non-economic harm, such as infertility, permanent disability, disfigurement, blindness, pain and suffering, loss of a limb or other physical impairment.

Restrictive Statute of Limitations. Adult med mal victims would have to file lawsuits no later than one year from the date the injury was discovered or should have

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On March 4, 2011, medical malpractice survivors from New York, joined by CJ&D, protested the proposal outside New York's Regency Hotel, where a secret gathering of lawmakers was to take place. "We are outraged that malpractice victims are being used as a bargaining chip to strike a budget deal, and that through the back door a group of hospital executives and business interests seek to leverage their mammoth influence and power to eliminate our legal right to sue and recover for even the most horrific medical injuries," said Leslie Lewis. Leslie's son Miles died of AIDS five years after being given HIV-tainted plasma after birth, and his twin brother Chris was left permanently blind in one eye and nearly blind in the other due to a correctible eye condition detected by a doctor but never treated or discussed with his parents. "Much of health care delivery and economics in this state and country needs fixing, but not on the backs of medical malpractice victims," she added.

The NYS Bar also blasted the MRT recommendations as lacking "the balanced representation and input of all stake holders," namely patient safety organizations and the public. In a February 2011 memo endorsed by the bar's executive committee, the bar's Committee on the Tort System called the cap "anathema with respect to equal protection/access to justice" and the neurologically-impaired infant fund a proposal with "profound and far-reaching changes to the civil justice system" that "will abridge several rights that New Yorkers currently enjoy."

The MRT proposal prompted similar concerns in the State Assembly. "In our debates on the budget, I would say the vast majority of my Democratic colleagues were adamantly opposed to it and saw it as a real denial of the rights of people who were seriously injured," explained Richard Gottfried, Chairman of the Assembly's Health Committee. State Assembly Speaker Sheldon Silver echoed this sentiment, telling the New York Post in February, "I just believe people are entitled to their day in court."

The proposals led the *New York Times* to object, as well. As a March 14th NYT editorial put it, a $250,000 non-economic damages limit "is the wrong way to go" and "hardly seems enough for patients who might face a greatly diminished quality of life because a negligent hospital or doctor left them blinded, paraplegic, brain damaged or gravely disfigured for life. …The best solution is to greatly reduce the errors and bad outcomes that can lead to malpractice suits."

Consumer groups also vigorously opposed this legislation, chief among them CJ&D. For example, on March 8th, CJ&D filed an ethics complaint with New York's Commission on Public Integrity, asking them to investigate several key individuals on the Medicaid Redesign Team who had a conflict when the board capped medical malpractice awards. As the complaint notes, the employers of these individuals — hospitals — "will receive a substantial financial benefit from MRT Proposal 131, a proposal that limits the liability of negligent hospitals and health care providers and which has been made part of the Governor's Budget." The Commission refused to investigate, for now at least.

Two weeks later, CJ&D released a report showing that New York State could save more money capping hospital executive salaries than capping funds to brain-damaged babies. Specifically, the analysis found that if such salaries were capped at $250,000, hospitals would save over $213 million.

And on March 23rd, Americans for Insurance Reform (AIR), a project of CJ&D, released a comprehensive new study of medical malpractice insurance in New York State that refuted the insurance industry's basis for the MRT measures. According to the report, "inflation-adjusted payouts per doctor in New York State have been stable, have failed to increase in recent years and are comparable to what they were in the early 1980s." Moreover, "inflation-adjusted premiums per doctor in New York State are among the lowest they have been in over 30 years, comparable to what they were in the mid-1970s." As CJ&D Executive Director and AIR co-founder Joanne Doroshow explained, "The notion that either claims or premiums in New York State are out of control is the most sensationalized fiction driving these horrendous medical malpractice proposals. AIR's study refutes the principal basis for the argument that a $250,000 'cap' on damages for injured patients will result in massive insurance 'savings' for doctors and hospitals, an argument whose only public justification is a one-line sentence in the Governor's Medicaid Redesign Team's Proposal 131, referencing Milliman, an insurance industry consulting firm that we and others have discredited in the past."

Enough outside pressure was brought to bear so that luckily for all New Yorkers, the "cap" was removed from the budget. But the baby fund was not. This law raises fundamental Constitutional, fairness and patient safety concerns. These Governors must stop trying to solve short-term budget problem on the backs of sick and injured children and their families. It is terrible policy.

MEDICAL MALPRACTICE STATISTICS

Recent studies confirm that our nation's medical malpractice "crisis" is not a lawsuit crisis — it's the amount of medical malpractice itself.

Alarming and Costly Medical Errors. According to a November 2010 study by the Office of Inspector General of the U.S. Department of Health and Human Services about 1 in 7 hospital patients experience a medical error, 44 percent of which are preventable. These errors cost Medicare $4.4 billion a year. Moreover, "[t]hese Medicare cost estimates do not include additional costs required for follow-up care after the sample hospitalizations." The study concludes, "Because many adverse events we identified were preventable, our study confirms the need and opportunity for hospitals to significantly reduce the incidence of events."

Also in November 2010, a statewide study of 10 North Carolina hospitals, published in the *New England Journal of Medicine*, found that "harm resulting from medical care was common, with little evidence that the rate of harm had decreased substantially over a 6-year period ending in December 2007." This is considered significant nationally because North Carolina is touted as a leader in efforts to improve safety.

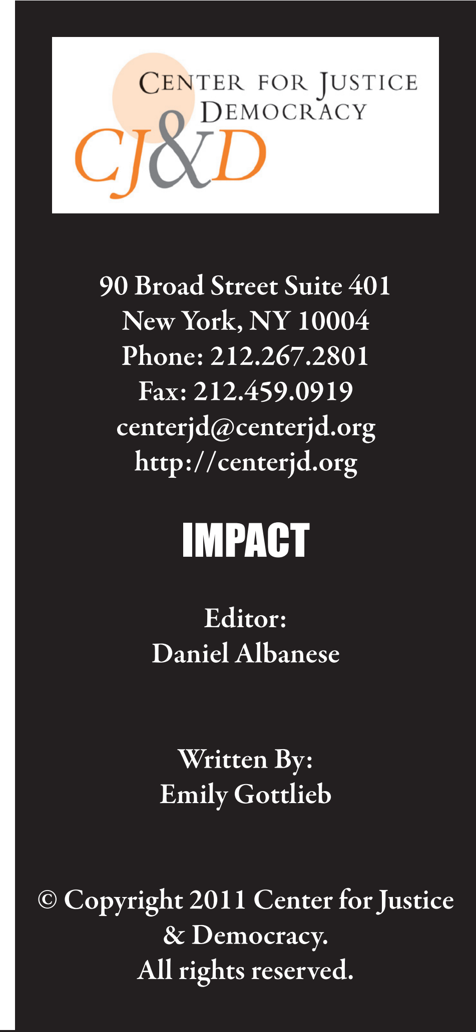
According to a 2009 Hearst Newspapers investigation, the situation is probably even worse because "[t]wenty-three states have no medical-error detection program, and even those with mandatory programs miss a majority of the harm." As explained in the North Carolina study, "Most medical centers continue to depend on voluntary reporting to track institutional safety, despite repeated studies showing the inadequacy of such reporting."

"1 in 7 hospital patients experience a medical error, 44 percent of which are preventable."

State Medical Boards Fail to Protect Patients from Dangerous Doctors. A March 2011 Public Citizen analysis of National Practitioner Data Bank (NPDB) data shows that "[s]tate medical boards have failed to discipline 55 percent of the nation's doctors who either lost their clinical privileges or had them restricted by the hospitals where they worked." According to the study, given that a physician must exhibit serious deviations of behavior or performance to warrant hospital disciplinary action (*e.g.*, incompetence, negligence, malpractice, immediate threat to health or safety), the failure of state medical boards to take subsequent action has serious public safety implications. "One of two things is happening, and either is alarming," said Dr. Sidney Wolfe, director of Public Citizen's Health Research Group and overseer of the study. "Either state medical boards are receiving this disturbing information from hospitals but not acting upon it, or much less likely, they are not receiving the information at all. Something is broken and needs to be fixed."

Claims and Lawsuits Continue To Drop. According to the National Center for State Courts, medical malpractice claims are in steep decline, down 15 percent from 1999 to 2008. The NCSC says rarely does a medical malpractice caseload exceed a few hundred cases in any one state in one year.

In 2009, CJ&D's Americans for Insurance Reform (AIR) took a look at medical malpractice insurance claims, premiums and profits in the country at that time and for 30 years prior. In this report, *True Risk,* AIR found that medical malpractice claims, inflation-adjusted, are dropping like a rock, down 45 percent since 2000. As A.M. Best put it, "Overall, the most significant trend in [medical professional liability insurance] results over the five years through 2008 is the ongoing downward slope in the frequency of claims.…" The study also showed that the amount insurers are paying out in claims has been steadily dropping. In sum, these data confirm that neither jury verdicts nor any other factor affecting total claims paid by insurance companies that write medical malpractice have had much impact on the system's overall costs.



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CONGRESS TOO! continuted...

been discovered, but in no case later than three years after the "manifestation" of the injury. Injured children would have to file claims within three years of the "manifestation" of the injury, with some exceptions if the child is under 6 years. All aforementioned limits are much more restrictive than many state rules and would arbitrarily cut off meritorious claims involving diseases or injuries with long incubation periods that may be difficult to identify.

Eliminating Joint and Several Liability. Defendants found fully responsible for causing an entire injury would no longer have to pick up the tab for a fellow defendant who is insolvent or unable to pay compensation. Striking this rule is not only unfair to injured patients but also undoes part of centuries-old common law.

Attorney Fee Limits. Courts would have the power to restrict plaintiff's attorney fees regardless of whether recovery is by judgment, settlement or any form of alternative dispute resolution. In addition, contingent fees, regardless of the number of plaintiffs, would not exceed: (1) 40 percent of the first $50,000 recovered; (2) 33 1/3 percent of the next $50,000 recovered; (3) 25 percent of the next $500,000 recovered; and (4) 15 percent of any recovery in excess of $600,000. Such limits deny injured victims who could not otherwise afford legal representation access to the courts and effectively immunize wrongdoers by making it less likely that attorneys will be able to afford to risk bringing many cases, particularly the more costly and complex ones.

Repeal of Collateral Source Rule. Negligent hospitals and other wrongdoers would be able to reduce their financial responsibility for the injuries they cause by the amount an injured party receives (or could later receive) from outside sources. Payments from outside sources are those unrelated to the wrongdoer, such as health or disability insurance, for which the injured party has already paid premiums or taxes.

Restrictions on Punitive Damages. Punitive damages would only be awarded if the plaintiff proves by a heightened standard of clear and convincing evidence that: (1) the defendant acted with malicious intent to injure the plaintiff; or (2) the defendant understood the plaintiff was substantially certain to suffer unnecessary injury yet deliberately failed to avoid such injury. And even if punitive damages are assessed, they are limited to two times the amount of economic damages or $250,000, whichever is greater.

In addition, punitive damages would be eliminated against manufacturers of drugs and medical devices approved by the FDA as well as those not FDA-approved yet "generally recognized as safe and effective." Manufacturers and sellers of drugs would also be immunized from punitive damages for packaging or labeling defects.

Structured Settlements. All future damages over $50,000 would be paid periodically, leaving those injured by malpractice and unsafe products vulnerable and under-compensated while large insurance companies earn interest off the plaintiff's jury award. This provision increases the hardships of the most seriously injured patients who are hit soon after an injury with large medical costs and must make adjustments in transportation and housing.

One-Way Preemption. State med mal and products liability laws would trump the HEALTH Act only if they placed more restrictions on patients' rights. This would authorize major interference with the traditional authority of state court judges and juries in med mal and products cases.

OTHER STATES TARGETING MEDICAL MALPRACTICE VICTIMS

Arizona
Lawmakers are considering legislation that raises the burden of proof to "clear and convincing evidence" in med mal cases against all physicians. A bill shielding medical students from liability for injuries has also been introduced.

Florida
Proposals being considered by state lawmakers include: (1) shielding hospitals from malpractice lawsuits if they contract with doctors whose errors harm patients; (2) providing legal protections to doctors who treat Medicaid patients and to emergency-room workers; (3) making it harder to prove that doctors erred by not ordering or performing "supplemental" diagnostic tests; and (4) forcing out-of-state expert witnesses to go through a state certification process.

North Carolina
The Senate passed legislation that would give near immunity to health workers for malpractice in the emergency room by requiring victims to prove "gross negligence, wanton conduct or intentional wrongdoing" in order to prevail at trial. The bill also caps non-economic damages in med mal cases at $500,000.

Pennsylvania
A bill passed in the House would prohibit victims from using doctors' expressions of apology in med mal lawsuits.

Tennessee
Gov. Haslam's legislative package limits non-economic damages in med mal and other personal injury actions to $750,000.