CENTER FOR JUSTICE & DEMOCRACY
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IMPACT

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

CENTER FOR JUSTICE & DEMOCRACY **NEWS**

Dear Friend,

Seems like we are having a little problem with our new "change" President on the liability front these days.

On June 15, with our help, 64 survivors of medical malpractice from 21 states sent a letter to the President expressing concern that the rights of medical malpractice victims may have become a "political bargaining chip" in the President's efforts to sell his health care plan. Some reports indicate that the President, while not supporting "caps" on damages, does support measures that could allow biased medical societies or politicians to make liability decisions.

At the same time, it seems the Treasury Department has pushed for a result in the Chrysler and GM bankruptcies that would extinguish the product liability rights of consumers injured by defective cars. After much political push-back, consumers are making some headway in changing that morally reprehensible result. But the Administration seems completely unsympathetic!

Whatever is behind this, CJ&D is poised to fight back and we are. Check out our web site to see all the great new materials we have produced on both issues. Thanks, as always, for your support.

Sincerely,
Joanne Dorordshow
Executive Director

IN THIS ISSUE: HEALTH COURTS

THE LATEST VARIATION

Over the years, mostly under pressure from insurers, 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 an administrative system. It would be one thing if any of these systems succeeded and could be considered appropriate models. But none have. This is due not to poor legislative construction or elements that can be fixed. Rather, it is because of one inherent flaw that infects all such systems; namely, once an area of law is removed from the civil justice system and is codified by statute, it is immediately and forever vulnerable to manipulation by political forces and turns into a nightmare for those it was originally meant to help.

In fact, never in the history of this country has an administrative system turned out ultimately better for victims who ceded their right to trial by jury. Even if a system starts with good intentions, taking any compensation decision out of courts subjects it eventually to influence-peddling and future budgetary/solvency considerations that no lawmaker today can control. These problems are always resolved on the backs of more powerless victims, who gave up their legal rights with vague and unenforceable promises that are ultimately broken.

One of the more talked about recent proposals is one supported by a "tort reform" group called "Common Good" founded by corporate lawyer Phil Howard, that would cover all medical malpractice claims. Common Good's health court proposal has had the following characteristics: elimination of the right to jury trial; decision-making authority put in the hands of either the hospital or insurer involved, or "experts" appointed and commissioned by a panel heavily weighted toward health industry representatives; compensation for injuries determined by a "schedule" developed by political appointees (e.g., a certain amount for a lost eye or severed limb) instead of decided on a case-by-case basis by a jury; mandatory with limited rights to appeal.

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LEGISLATIVE UPDATE

On November 12, 2008, Senator Max Baucus (D-Mont.) released a white paper calling on Congress to reform the nation's health care system. Among his proposals: have states use federal money to create administrative bureaucracies that take medical malpractice compensation judgments away from juries.

Baucus's call for blocking injured patients' access to the civil justice system is not surprising given his record. In the Senate, he previously sponsored legislation twice which would have authorized and funded state pilot projects that forced med mal victims into alternative systems without juries, without accountability mechanisms, without procedural safeguards and without any meaningful appeals process. This push to institute unfair compensation structures is particularly troubling since Baucus is a chief architect of the Democrats' health care reform plan, slated for the Senate floor in July 2009.

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To date, health courts have generally gone nowhere fast. The last Congress held hearings on the concept but so far, the new Congress has shown little interest. Even U.S. Senator Max Baucus (D-MT), responsible for writing Congress' health insurance plan and a health court proponent, has, to date, kept this concept out of his proposals.

States have also not rushed to adopt these radical, expensive and likely unconstitutional proposals. By their own admission, Common Good now seems to believe that their health court model is too radical, creating wariness among some legislators about enacting the original plan in its entirety. It now appears that Common Good has shifted somewhat its strategy to deal with this political reality. But there continues to be considerable reason for concern.

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In a 2006 policy guide, Common Good encouraged states to create pilot programs modeled on health courts, but without the more controversial elements. Most notably, in this policy guide Common Good all but stopped advocating the elimination of juries, even noting constitutional problems inherent in this radical idea. (Notably, it still advocated "judges making decisions about the standard of care," which essentially means the same thing as eliminating juries.) But it changed terminology and focus away from:

- a purely administrative system
- removal of juries
- immediate caps on damages
- restricted rights to appeal

The new strategy encourages states to establish specialized trial courts or case management programs with the following elements:

- taking civil court judges and sending them to "medico-legal school";
- separating medical malpractice claims and directing them to these judges;
- creating a bank of "neutral experts" vetted by both sides and with strict criteria (must practice currently and be board certified in the specific area of dispute, etc.);
- voluntary participation;
- establishing a "working group" to "develop the outline of a workable non-economic damages schedule".

However, it is also clear that the group sees incremental changes as a way to bring about radical change. In fact, their 2006 policy guide repeatedly mentioned that these incremental changes would hopefully start the move toward the more radical change, on a state and federal level. In fact, once any system is codified by statute, politicians can continue to make changes to it down the road.

State legislators need to understand the larger picture here when presented with such "benign" pilot programs. For example, in 2007 a bill was introduced in New York that was seemingly written straight from the Common Good policy guide for lawmakers. This bill envisioned taking civil court judges and sending them to classes on medical issues, embedding them in the medical system by having them shadow doctors, and then giving these judges and their specialized courts exclusive jurisdiction over medical, dental and podiatric malpractice claims. The bill also heightened the standard for medical experts, required active clinical or teaching practice and board certification in the same area as the issue at hand. Those experts who qualified would be court appointed at the judge's discretion and compensated equally by the plaintiff and defendant. Nothing in the bill changed the standard of appeal, amount of damages, or the right to a jury as fact finder.

Reading this bill in conjunction with Common Good's policy guide showed a clear strategy to place medical malpractice claims into a separate parallel system first and then slowly march toward the ultimate goal, that is, removal of juries, an administrative rather than judicial administration, change in the standard of liability, caps on damages, and restricted appeals. The ultimate goal would be a radical and unconstitutional one. These first steps also would do nothing for patient safety or efficiency, and create more bureaucracy and expense with no perceivable gain.

It is the lesson of history that alternative compensation funds, like health courts, hurt patients. They are sold to the public with slick but ultimately groundless promises. Establishing such a system would place the burden of solving patient safety problems on the backs of sick and injured people and their families. It is terrible policy and has no place in a worthwhile attempt to reform health care in America.

HEALTH COURT COST - WHAT THE EXPERTS SAY

In their book *Medical Injustice: The Case Against Health Courts*, Case Western Reserve professors Maxwell J. Mehlman and Dale A. Nance, made the following 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."
- Costs "would certainly be substantial, vastly more than the public (taxpayer borne) judicial costs currently associated with the adjudication of malpractice claims.
- "Some health court advocates concede that, if the system actually compensated substantially more patients, it might not be cheaper than the tort system. The Republican Policy Committee states, for example: 'The health court proposal is not about reducing costs overall (since many more people may be compensated at smaller amounts).'"
- "[O]ther pressures can be expected as well. …[A] number of processes can be expected to be implemented, processes that suppress the levels of patient recoveries below any fair measure of actual losses sustained.

Finally, Mehlman and Nance sum it up this way, in an analysis that is apropos for all alternative compensation systems:

> "[I]n one of the most telling objections to the health court concept, [David A. Hyman, Professor of Law and Medicine at the University of Illinois College of Law, and Charles Silver of the University of Texas at Austin School of Law] point out that it is completely disingenuous for health court [or no-fault] proponents to criticize the current system for failing to compen-

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LEGISLATIVE UPDATE

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Fortunately, to date, heath courts have not made it into Baucus' health care proposal. But other certain federal and state lawmakers continue to advocate for alternative compensation schemes that would be devastating for many patients, especially the most severely injured. Below are some recent examples.

Federal Legislation (2009)

Medical Liability Procedural Reform Act of 2009 (H.R. 2787). This June, Congressman Mac Thornberry (R-Tex.) proposed legislation authorizing the Attorney General to provide grants to seven states "for the development, implementation, and evaluation of health care tribunals."

Patients' Choice Act of 2009 (S. 1099, H.R. 2520). Sens. Tom Coburn (R-Okla.) and Richard Burr (R-N.Car.) and Reps. Paul Ryan (R-Wis.) and Devin Nunes (R-Cal.) introduced bills in May that would grant states federal money to develop alternative medical malpractice compensation systems, such as expert medical panels, health courts or a combination of both.

State Legislation (2009)

Colorado. The corporate-funded "tort reform" group, Common Good, and its Colorado affiliate have been working to bring a mandatory birth injury program to the state. Colorado is particularly vulnerable since the state is without a constitutional right to jury trial.

Hawaii. The House is considering a bill that would create a working group to "study the concept of health courts as a preferable alternative to the existing litigation oriented system."

Maryland. Legislation authorizing a task force on administrative compensation for birth-related neurological injuries was introduced in the House in January. Three months later, the bill received an unfavorable report from a House committee; no further action has been taken.

Massachusetts. The Senate is examining legislation that would create a commission to study issues of medical liability and "award demonstration grants to hospitals and their affiliated physicians for the development, implementation

and evaluation of alternatives" to medical malpractice litigation. Under the bill, an "independent administrator" chosen by the participating health care provider would oversee the pilot compensation system. Another provision of concern: patients opt into the program by accepting a written agreement prior to or at the point of care, and consenting to the agreement means agreeing to accept a panel's malpractice determination, which is "final, legally binding and enforceable in court."

New Mexico. H.B. 148, introduced in January, would have authorized the state's Health Policy Commission to devise an obstetrics administrative compensation system for birth-injury cases. The bill died.

New York. In March, Assemblyman Darryl Towns (D-54th Dist.) proposed legislation to set up pilot projects for "medical courts" with trained judges and independent experts adjudicating medical malpractice claims.

HEALTH COURT COST - WHAT THE EXPERTS SAY

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sate more patients more quickly at lower cost when providers and insurers could do this under the tort system if they wanted to:

> Providers, insurers, and tort reformers often criticize the malpractice system for delivering compensation to only a minority of patients who deserve it, and for taking too long to process valid claims. This argument strikes us as an example of the 'chutzpah defense,' best exemplified by the individual who killed his parents, and then threw himself on the mercy of the court because he was an orphan. Nothing prevents providers or liability carriers from offering payments before patients sue or from paying valid claims expeditiously.... A few hospitals and insurers have implemented a pro-active approach on which they reach out to patients as soon as possible, and its widespread use would surely enable the malpractice system to operate more accurately, more quickly, and with smaller transaction costs."

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