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AFFORDABLE CARE ACT "REPLACEMENT" BILLS – BIASED AND UNFAIR LAWSUIT PROVISIONS

Several Affordable Care Act "replacement" bills have been introduced in Congress, which include provisions to strip injured patients of their legal rights.[1] Every "lawsuit" provision in these bills is crafted to favor health care providers over injured patients, varying only in the degree of cruelty.[2]

In addition to preempting state law that protects patients, these bills appear to share two common denominators:

1. They are designed to provide immunity to doctors who follow federally-chosen guidelines to treat medical conditions even though a preventable error may have harmed or killed a patient; and

2. They would allow patients' cases to be decided by medical industry tribunals or panels with little or no input from the patient. Those wanting to have their case heard in court would face nearly impossible obstacles.

In sum, these bills contemplate forcing patients into systems so biased and unfair that legitimate cases would never go forward. They present unwarranted, oppressive and discriminatory burdens on injured patients and the families of those killed by negligent health care. And they directly intrude on the fundamental power of judges and juries to determine law and facts in these kinds of cases.

1. Federal Guidelines

Current bills in Congress would replace clinical decision-making with systems that designate the federal government as the sole arbiter of acceptable medical practice, raising serious concerns about fairness and patient safety.

- These bills would empower the U.S. Secretary of Health and Human Services to select and issue guidelines for particular medical conditions, providing strong legal incentives for physicians to follow such guidelines even though they may result in harming or killing patients.

- By providing physicians with "safe harbor" legal protections for following government guidelines, doctors will end up following clinical guidelines that may be flawed,[3] ineffective, fail to encompass variations in how patients present, harmful to an individual patient who is

other than "average," obsolete, outdated, confusing and/or in conflict with other guidelines since "knowledgeable, respected professional groups can, and often do, come down on opposite sides on a particular treatment issue."[4]

- A few states have attempted to develop and use certain guidelines as legal standards beginning and ending in the 1990s; no programs were renewed, and they were generally considered unpopular failures.[5]

It is fundamentally unfair to force patients to be judged by legal standards created by medical societies and written to exculpate their physicians.

- Guidelines would be written by medical and specialty societies, which are inherently biased in their views about liability.[6] Conflicts of interest and specialty bias in the development of guidelines, already a well-recognized problem,[7] will escalate knowing they are written to exonerate fellow physicians. These bills even allow those with direct conflicts of interest to participate in the development of guidelines, only requiring disclosure of such conflicts.

- These bills would allow physicians to take advantage of guidelines to immunize themselves from liability but would prevent or make it very difficult for patients to use those same guidelines to prove negligence, raising disturbing questions of fairness and constitutionality.[8]

2. Medical Tribunals

Before getting to court, a patient would be forced to comply with an onerous medical screening panel process that tilts the legal playing field heavily in favor of the medical industry.

- An injured patient wishing to sue in court for medical negligence would be prevented from doing so until his/her case is first decided by a medical industry tribunal, the decisions of which would be nearly binding in any subsequent court action.

- Panels or tribunals that make these liability decisions would be *required* to be composed of physicians approved by the very medical societies that wrote the legal standards (guidelines) against which their fellow physicians will be judged. There is nothing "neutral" about the decision-makers envisioned here. The bias is intentional and explicit.

- Injured patients would be forced to pay half the costs of compensating the physicians who are picked for these panels. Such costs will likely be prohibitively expensive for many injured patients, especially for anyone facing economic devastation due to an inability to work and other related medical costs.

- The patient would be prevented from conducting any discovery during this panel process. Yet within a certain number of days, this medical screening panel, which is stacked against the patient, would decide liability, whether a guideline breach led to the patient's injury and compensation. This is not only unfair to the patient but would also lead to careless and poor decision-making.

If the patient decides to reject the tribunal's decision, he or she may sue but the legal obstacles become enormous.

- If a patient loses before the panel and then decides to go forward in court, s/he is further penalized by having to overcome the panel's finding with "clear and convincing evidence" before trial even begins. Unless the patient can develop the evidence s/he needs and meet this exceptionally high burden, the court would be obligated to throw out the patient's case on summary judgment.

- Hospitals, nursing homes and insurance companies face no such process and no such burdens. In fact, even if the panel found that the standard of care were *breached*, these bills *prohibit* a court from finding that breach constituted negligence per se or was conclusive evidence of liability.

- Given the substantial weight the panel's finding is entitled to in court before a trial is allowed to proceed, it is clear that the tribunal process is intended not to assist the courts but rather to entirely usurp the role of unbiased judges and juries.

NOTES

[1] One such bill, H.R. 2300, the "Empowering Patients First Act," is sponsored by a physician, Rep. Tom Price (R-GA), and is similar to legislation first introduced in 2009 and in every subsequent Congress. A newer version, H.R. 2653, the "American Health Care Reform Act of 2015," was introduced by Rep. David Roe (R-TN) on behalf of the Republican Study Committee. Similar provisions can also be found in "stand alone" bills like H.R. 2603, the "Saving Lives, Saving Costs Act."

[2] For example, some bills would allow hospitals, doctors and insurers as well as nursing homes and long-term care facilities – not patients – the power to remove a medical negligence case to federal court. Some bills create two-tiered justice systems by covering only elderly Medicare recipients; elderly, poor and disabled Medicaid recipients; and seemingly anyone who takes advantage of the federal health care law. Some bills add in more traditional tort restrictions, like prohibiting injured patients from receiving lump sum payments, eliminating joint and several liability, facilitating interference with a patient's attorneys fees and changing state statute of limitations laws.

[3] *See*, Steven H. Woolf et al., "Potential benefits, limitations, and harms of clinical guidelines," 318 *BMJ* 527 (February 1999), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1114973/.

[4] Arnold J. Rosoff, "Evidence-Based Medicine and the Law: The Courts Confront Clinical Practice Guidelines," 26 *Journal of Health Politics, Policy and Law* 327 (April 2001), http://archive.ahrq.gov/research/findings/evidence-based-reports/jhppl/rosoff.pdf.

[5] *See*, *e.g.*, FLA. STAT. § 408.02(9)(e) (1999); 24 ME. REV. STAT. tit. 24, § 2975 (repealed in 1999 with expiration).

[6] *See*, *e.g.*, "American Congress of Obstetricians and Gynecologists 2015 Legislative Priorities," http://www.acog.org/Advocacy/ACOG-Legislative-Priorities (viewed June 13, 2015). *See also*, Peggy Peck, "Coalition includes ACOG: specialty societies push tort reform," 29 *OB/GYN News* 1 (March 2004), http://www.thefreelibrary.com/Coalition+includes+ACOG%3A+specialty+societies+push+tort+reform.-a0114521526 (One-million-dollar donors include the Society of Thoracic Surgeons, the American Association of Neurological Surgeons/Congress of Neurological Surgeons, the American College of Emergency Physicians, the American College of Surgeons and the American Academy of Orthopedic Surgeons. The American College of Cardiology has pledged $500,000, the North American Spine Society has pledged $100,000 and the American College of Obstetricians and Gynecologists and the American Academy of Dermatology have joined and agreed to donate undisclosed amounts.)

[7] Institute of Medicine, *Knowing What Works in Health Care: A Roadmap for the Nation* (2008), https://www.iom.edu/Reports/2008/Knowing-What-Works-in-Health-Care-A-Roadmap-for-the-Nation.aspx.

[8] Arnold J. Rosoff, "Evidence-Based Medicine and the Law: The Courts Confront Clinical Practice Guidelines," 26 *Journal of Health Politics, Policy and Law* 327 (April 2001), http://archive.ahrq.gov/research/findings/evidence-based-reports/jhppl/rosoff.pdf.