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BEFORE THE PUBLIC HEALTH COMMITTEE

H.B. NO. 6600 - AN ACT CONCERNING THE ESTABLISHMENT OF THE SUSTINET PLAN

March 2, 2009

Thank you for the opportunity to address the committee about H.B. No. 6600 - an Act Concerning The Establishment Of The SustiNet Plan. I am Joanne Doroshow, President and Executive Director of the Center for Justice & Democracy, a national public interest organization that is dedicated to educating the public about the importance of the civil justice system. I also co-founded Americans for Insurance Reform, a coalition of over 100 public interest groups, including the Connecticut Center for Patient Safety. I also served on a New York State medical malpractice task force in 2007 and 2008, which among other things, discussed and rejected a proposal to establish a no-fault compensation system for brain-damaged babies. I appreciate the opportunity to address this important legislation.

The section that I will be discussing today is Section 7, which states, in relevant part:

> (c) Notwithstanding any provision of the general statutes, there shall be no monetary liability on the part of, and no cause of action for damages shall arise against, a participating provider for a SustiNet Plan member's injury caused by such provider's provision of care when such care was consistent with guidelines approved by the board. The board shall establish and implement a process for providing a member with no-fault compensation for injuries sustained by such member notwithstanding the fact that the provider's provision of care was consistent with guidelines approved by the board. Exemption from liability shall not apply to injuries that result from: (1) A mistaken determination by the provider that a particular guideline applied to a particular patient, where such mistaken determination is caused by the provider's negligence or intentional misconduct, or (2) a failure to properly follow a particular guideline where such failure is caused by the provider's negligence or intentional misconduct.

We are very much in favor of guarantees of health insurance coverage to help anyone in need of medical care, as well as this bill's important attempt to improve patient safety. However, the provision of such medical care should never be accomplished by taking away the right to trial by

jury for someone who was injured through no fault of their own, or reducing the accountability of anyone who commits wrongdoing, which will only lead less safe medical care.

This bill would eliminate the right to trial by jury for anyone injured by medical malpractice so long as the provider complies with standards of care consistent with guidelines approved by the board. This board would consist mostly of political appointees and would come from the medical and business establishment. In other words, decision-makers who would ultimately determine whether to take away the right to jury trial for an injured patient, would likely be largely connected to the medical industry or business community, both of which have a conflicting financial interest in rejecting or reducing compensation for individual claims.

We are somewhat hampered in our current analysis of this bill because certain important details are not spelled out, including what the fund would look like, what it would cost and who would be on the hook to pay for it currently and for years into the future. Details that we do not know yet include the types of outcomes covered, the level of compensation benefits that would be available, the burdens that any family would face obtaining compensation under this fund, the types of compensation that would be prohibited, and the amount of windfall that the property/casualty insurance industry would receive once benefit levels are cut, which they most certainly would be because of the costs of such a system.

In addition, even though this is ostensibly a no-fault system, to obtain no-fault benefits, all patients would still be faced with the burden of proving causation, which is not all that different from a negligence standard. However, they would have none of the protections that the legal system provides. Certainly patients would find it hard to get an attorney to assist them. This is not a minor point. As the Harvard School of Public Health, which studied this country's medical malpractice system, found, "our findings underscore how difficult it may be for plaintiffs and their attorneys to discern what has happened before the initiation of a claim and the acquisition of knowledge that comes from the investigations, consultation with experts, and sharing of information that litigation triggers."[1]

And they would have to do so before this board or whatever administrative structure this board establishes, making the situation intolerably unfair to patients. Initial decision-makers would be heavily weighted toward health industry or business representatives, replacing an unbiased judge and jury. Presumably, even patients with catastrophic injuries, including the families of brain-damaged babies, would have to fight a "causation" battle to obtain compensation for a potential lifetime of care from this new fund. And for those able to do that, this bill could turn compensation for patients into a vast new social program to cover all similar outcomes whether or not malpractice was involved. Many of these are cases not currently within the medical malpractice insurance system. Obviously, this proposal not only goes far beyond immediate health insurance coverage problems. It is apparently motivated by other considerations.

Moreover, if this system were anything like workers' compensation, restitution for injuries would be determined by a "schedule" approved, again, by representatives of the medical and business establishment. There may be no room for consideration of circumstances for these

[1] David M. Studdert, Michelle Mello, et al., "Claims, Errors, and Compensation Payments in Medical Malpractice Litigation," *New England Journal of Medicine,* May 11, 2006.

types of injuries. As pointed out in 2006 congressional testimony by Neil Vidmar, "Even when some leeway is built into compensation schedules, they cannot take into account the number of factors and extreme variability of pain and suffering, physical impairment, mental anguish, loss of society and companionship, and other elements of damages that fall under the rubric of non-economic damages. That is why these matters have been entrusted to juries. They provide justice on an individualized basis."[2]

This bill infringes directly on the third branch of government, which is not represented anywhere in the development or implementation of this process. This is of tremendous concern because of the fundamental nature of the right to trial by jury that would be eliminated by this legislation. Even assuming such a bill is constitutional, which we doubt (see later discussion of the constitutional problems), these rights are priceless and should not be casually eliminated. There are fundamental democratic principles at stake with legislation like this. As Justice Rehnquist has stated:

> The guarantees of the Seventh Amendment will prove burdensome in some instances; the civil jury surely was a burden to the English governors who, in its stead, substituted the vice-admiralty court. But, as with other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the rights secured by the Amendment.[3]

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 for the proposal considered here. 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.

Moreover, as Tom Baker, Connecticut Mutual Professor of Law and Director of the Insurance Law Center at the University of Connecticut School of Law, wrote in a recent book on medical malpractice,

> Lawsuits make people work through the system, not against it. Lawsuits take place in the open. Lawsuits provide procedural protections for everyone involved. To win a lawsuit you have to be right. It is not enough just to be angry….
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> Responsibility lies at the heart of tort law. A tort lawsuit is a public statement that a defendant has not accepted responsibility, coupled with the demand to do so. Malpractice lawsuits ask doctors and hospitals to take responsibility for their mistakes,

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[2] Testimony of Neil Vidmar, Russell M. Robinson, II Professor of Law, Duke Law School before The 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).

[3] *Parklane Hosiery Co. Inc. v. Shore,* 439 U.S. 322 (1979) (Rehnquist dissenting).

not just prevent future mistakes or to compensate the patient, but also because taking responsibility is the morally proper thing to do.[4]

WHAT HAPPENS TO PEOPLE WHEN THE RIGHT TO CIVIL JURY TRIAL IS TAKEN AWAY – SYSTEMIC PROBLEMS WITH ALL ALTERNATIVE SYSTEMS.

It is important to immediately dispose of the notion that under this no-fault fund, there will not be a reduction in benefits for children and others whose injury was the result of negligence or wrongdoing, but with which this one-sided board may not agree. We can say this with complete confidence even without knowing the details of the plan under consideration. In fact, we would venture to say that 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.

There are many examples of this occurring, including workers' compensation,[5] whose fiscal problems are typically solved by reducing benefits and increasing obstacles for workers, and the federal Vaccine Injury Compensation Program, which tries to reduce costs by fighting parents who try to get in the system.[6] These programs' slow political capture, fiscal problems and

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[4] Tom Baker, *The Medical Malpractice Myth* (2005) at 112, 113.

[5] Without belaboring in extreme detail the problems pervading workers' compensation systems, it is widely accepted that this system works poorly for the permanently disabled, most analogous to this fund's participants. Permanently disabled workers do not receive enough compensation and the compensation duration is too short as states chip away at these benefits in direct response to pressure from insurance carriers and businesses. In many states, the process workers must go through to make claims and receive compensation has become longer, less efficient, and ultimately less successful in terms of its original goals. See "Worker's Comp: Falling Down on the Job," *Consumer Reports*, 2000 (discussing the legislative reforms of the 1990s and the resulting profits for worker's compensation insurance providers); Rand Research Brief, "Compensating Permanent Workplace Injuries," 1998. According to one legal scholar who studied workers' compensation, "injured workers often face denials and delays of apparently legitimate claims, high litigation costs, discrimination, and harassment by employers and coworkers.… [M]any reports suggest that recent reforms have substantially increased injured workers' financial burdens." McCluskey, Martha T., "The Illusion of Efficiency in Workers' Compensation "Reform," 50 Rutgers L. Rev 657, 670-671, n. 34, 35 (1998). 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*. http://centerjd.org/lib/Workers'Comp(NY).pdf.

[6] 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 & 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 the National Vaccine Information Center Co-Founder & President Barbara Loe Fisher, September 28, 1999, House Oversight Hearing, "*Compensating Vaccine Injury: Are Reforms Needed?*" (discussing the unilateral power HHS has to change the

subsequent demise as adequate alternatives for victims should serve as a loud warning with respect to the vulnerability of alternative systems to address catastrophically-injured newborns. No example is more analogous than Virginia's Birth-Related Neurological Injury Compensation Program, a program that has been in place for 19 years. Except for Florida's quite different program enacted one year later, no state has attempted to replicate these disastrous programs.

The Virginia program was established in the mid-1980s, during this country's last so-called "insurance crisis." It was enacted not as a liberal social program, but rather under an extortionate threat by insurance companies. The state's main insurance provider stopped providing obstetrical insurance. When asked what would be needed to make them provide insurance again, the provider responded that "if the legislature passes legislation which takes the 'birth-related neurological injury' out of the tort system, we will lift the moratorium."[7]

The program was set up as an injury compensation system for catastrophically injured newborns. It is the exclusive remedy for children delivered by a participating OB/GYNs and hospital. All claims go before an administrative panel, established within the workers' compensation system. The panel is "aided" by an "expert" panel of three doctors who determine if the injury is a covered birth-related neurological injury.

This program has been a tremendous failure on every level. Virginia's Joint Legislative Audit and Review Commission suggested "abandoning or overhauling" the program[8] and "ridding the board of its heavy presence of medical professionals," [9] and has found that the program could not be made fiscally sound.[10] In testimony before the Virginia Legislature, one parent called the program "a generous system of care gone awry, of state-sanctioned impunity for doctors and hospitals, and of the struggle families face caring for society's weakest children."[11]

To begin, the program has been in fiscal crisis for years. This is so even though the child's non-economic damages (for pain, disfigurement, trauma, loss of a limb, blindness etc.) are not simply capped – but entirely eliminated. The fund is close to $130 million short of cash and it now looks like the legislature will decide to fix the problem on the backs of the victims and their families even further, in complete contradiction to the law's original intent, i.e., "by giving up

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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.)

[7] See David G. Duff, "*Compensation for Neurologically Impaired Infants: Medical No-Fault in Virginia*," 27 HARV. J. on LEGIS. 391, 405-407, fn. 110 (1990)(citing Letter from Gordon D. McLean, Executive Vice-President, The Virginia Insurance Reciprocal to Ronald K. Davis, Virginia Surgical Associates, (chairman of MSV's Professional Liability Committee) Jan. 13, 1987 (on file at the Harv. J. on Legis.).

[8] Bill McKelway, "Study Faults Program for Brain-Injured; Shortcomings Found in Care for Children," *Richmond Times Dispatch*, Nov. 13, 2002; Liz Szabo & Elizabeth Simpson, "Birth Injuries Get 'Minimal Review; State Report Says Board Must Hold Doctors Accountable," *Virginian-Pilot*, Nov. 15, 2002.

[9] Bill McKelway, "Brain-Injury Program's Outlook Dim; Cost Savings for Doctors Meant Less for Children," *Richmond Times Dispatch*, Nov. 16, 2002.

[10] *Ibid*.

[11] Bill McKelway, "Danville Has High Birth-Injury Rate; Critics Say Virginia Law Shields Doctors from Lawsuits," *News Virginian*, June 1, 2003.

their right to bring suit, families were promised lifelong medical care for eligible children."[12] As recently reported in the *Richmond Post-Dispatch*, "documents obtained by *The Times-Dispatch* show that the [legislative] plan would erase as much as half the shortage, about $70.3 million, by capping benefit payments to children and through accounting adjustments that lessen cash obligations by some $44 million."[13]

The following are some of the more notable problems for families:

- **Prevents patients from receiving adequate compensation and understanding the medical errors and negligence responsible**: "Children born in Virginia with catastrophic neurological injuries are promised lifetime medical care by the birth-injury program. But these children and their families also have been forced to absorb stunning disparities in program benefits because of shifting priorities and cost reductions over which they had no control or voice. . . . 'The program can end up providing very little,' said Christina Rigney, referring to the minimal benefits her family received in the face of her son's traumatic birth and brief life. 'We believed there was negligence involved, but nothing ever came of it.'" Her son died three years after he was severely injured due to oxygen loss during birth. Because of the birth injury law, the family couldn't file a malpractice suit, the obstetrician was never even asked to explain what happened, and the family could learn nothing from illegible notes that failed to account for long periods of time. Families of two other brain-injured infants he delivered faced the same limits on their ability to learn what happened, or seek to show he was negligent. He is facing a lawsuit, however, for a fourth case in which a woman giving birth bled to death after delivering a healthy baby. [14] (See below on how this program shields bad doctors)
- **Cannot adjust to new medical research:** The program has been unable to adjust to current medical understanding because definitions of which injuries are covered have not changed in 15 years, despite important advances in understanding the causes of brain damage in babies. The program has rejected claims because it used outdated criteria for assessing birth injuries. "Decisions in the [Virginia program's] cases can mean the difference between a lifetime care for some of society's most-disabled children and no guarantees that medical expenses will be covered. Many families have had to opt for institutionalizing their children."[15]
- **Families of infants who died minutes after birth denied any compensation:** Until recently, the program provided for lifetime care but nothing for wrongful death (a new provision to provide up to $100,000 to deceased children went into effect in July 2003). That led to perverse situations such as a recent case where the obstetrician and hospital successfully argued before the administrative body that an infant who lived only minutes qualified for the program, protecting them from any liability other than the care provided during the deceased infant's 30-minute lifetime.[16]

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[12] Bill McKelway, "Plan could restore financial soundness," *Richmond Times Dispatch*, September 17, 2007.
[13] *Ibid*.
[14] Bill McKelway, "Danville Has High Birth-Injury Rate; Critics Say Virginia Law Shields Doctors from Lawsuits," *News Virginian*, June 1, 2003.
[15] Bill McKelway, "Old Rules Deny New Benefits; Children Rejected for Brain-Injury Program," *Richmond Times Dispatch*, June 5, 2003
[16] Bill McKelway, "Deceased Infant Put into Program; Ruling Blocks Suits Over Death of Baby," *Richmond Times Dispatch*, June 27, 2003.

Florida enacted its Birth-Related Neurological Injury Compensation Act (NICA) in 1988. However, it has been extremely underutilized and therefore difficult to compare because this law has an important procedural safeguard: it allows claimants to opt-out of the administrative scheme and proceed in civil court under normal litigation rules. This in itself provides empirical proof that, from the wrongly injured families' point of view, the civil justice system is a better process.[17]

THE COSTS OF ALTERNATIVE SYSTEMS ARE SIGNIFICANT, ESPECIALLLY WHEN INCLUDING NON-NEGLIGENCE CLAIMS

In their book *Medical Injustice: The Case Against Health Courts* (2007), a system that has some similarities to what is proposed here, Case Western Reserve professors Maxwell J. Mehlman and Dale A. Nance, made the following observations:

- Alternative systems "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."[18]
- "[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."[19]
- "[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."[20]
- Alternative systems all 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.[21]
- "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).'"[22]
- "[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.[23]

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[17] See generally, Florida's Birth-Related Neurological Injury Compensation Act, Fla. Stat. §§ 766.301-766.316.
[18] Maxwell J. Mehlman and Dale A. Nance, *Medical Injustice: The Case Against Health Courts* (2007) at 72.
[19] *Ibid*.
[20] *Ibid*.
[21] *Id*. at 73.
[22] *Id*. at 74.
[23] *Id*. at 75.

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 compensate more patients more quickly at lower cost when providers and insurers could do this under the tort system if they wanted to:
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> > 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."[24]

FAR FROM BEING "BROKEN," THE CURRENT MEDICAL MALPRACTICE SYSTEM WORKS WELL.

The Harvard School of Public Health recently found that the current medical malpractice system works: legitimate claims are being paid, non-legitimate claims are generally *not* being paid, and "portraits of a malpractice system that is stricken with frivolous litigation are overblown."[25] The authors found:

- Sixty-three percent of the injuries were judged to be the result of error and most of those claims received compensation; on the other hand, most individuals whose claims did not involve errors or injuries received nothing.
- Eighty percent of claims involved injuries that caused significant or major disability or death.
- "The profile of non-error claims we observed does not square with the notion of opportunistic trial lawyers pursuing questionable lawsuits in circumstances in which their chances of winning are reasonable and prospective returns in the event of a win are high. Rather, our findings underscore how difficult it may be for plaintiffs and their attorneys to discern what has happened before the initiation of a claim and the acquisition of

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[24] *Id*. at 97, citing David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 Vand. L. Rev. 1085, 1122 (2006).

[25] David M. Studdert, Michelle Mello, et al., "Claims, Errors, and Compensation Payments in Medical Malpractice Litigation," *New England Journal of Medicine,* May 11, 2006.

knowledge that comes from the investigations, consultation with experts, and sharing of information that litigation triggers."

- **"**Disputing and paying for errors account for the lion's share of malpractice costs."
- **"**Previous research has established that the great majority of patients who sustain a medical injury as a result of negligence do not sue.… [F]ailure to pay claims involving error adds to a larger phenomenon of underpayment generated by the vast number of negligent injuries that never surface as claims."

Moreover, Public Citizen's analysis of National Practitioner Data Bank statistics shows that payments usually correspond with injury severity. In 2005, more than 64 percent of payments involved death or significant injury, less than one-third were for insignificant injury, and less than three percent were for million-dollar verdicts.[26]

As Duke Law professor Neil Vidmar, who has extensively studied medical malpractice litigation, testified in the U.S. Senate in 2006, "the magnitude of jury awards in medical malpractice tort cases positively correlated with the severity of the plaintiffs' injuries, except that injuries resulting in death tended to result in awards substantially lower than injuries resulting in severe permanent injury, such as quadriplegia. I and two colleagues conducted a study of malpractice verdicts in New York, Florida, and California. We also found that jury awards of prevailing plaintiffs in malpractice cases were correlated with the severity of the injury."[27]

It should also be noted that medical malpractice claims and premiums are a tiny percentage of the total costs of health care in this country.

- Medical malpractice payouts are less than one percent of total U.S. health care costs. All "losses" (verdicts, settlements, legal fees, etc.) have stayed under one percent for the last 18 years. Moreover, medical malpractice premiums are less than one percent of total U.S. health care costs as well. Dropping for nearly two decades, malpractice premiums have stayed below one percent of health care costs.[28]
- The Congressional Budget Office found that "Malpractice costs account for less than 2 percent of [health care] spending."[29]

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[26] Public Citizen, Congress Watch, *The Great Medical Malpractice Hoax: NPDB Data Continue to Show Medical Liability System Produces Rational Outcomes,* (January 2007) at 2.

[27] Testimony of Neil Vidmar, Russell M. Robinson, II Professor of Law, Duke Law School before The 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 10.

[28] *See,* Americans for Insurance Reform, "Think Malpractice is Driving Up Health Care Costs? Think Again," http://www.insurance-reform.org/pr/AIRhealthcosts.pdf

[29] Congressional Budget Office, *Limiting Tort Liability for Medical Malpractice* 1, 6 (Jan. 8, 2004).

JURIES PROVIDE THE INCENTIVE FOR THE VAST MAJORITY OF TRUE MEDICAL MALPRACTICE CASES TO SETTLE; "FRIVOLOUS" CASES DO NOT SETTLE.

- In the Harvard closed claims study, referenced above, 15 percent of claims were decided by trial verdict.[30] 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.[31]
- According to Vidmar, "Research on why insurers actually settle cases indicates that the driving force in most instances is whether the insurance company and their lawyers conclude, on the basis of their own internal review, that the medical provider was negligent.…. An earlier study by Rosenblatt and Hurst examined 54 obstetric malpractice claims for negligence. For cases in which settlement payments were made there was general consensus among insurance company staff, medical experts and defense attorneys that some lapse in the standard of care had occurred. No payments were made in the cases in which these various reviewers decided there was no lapse in the standard of care."[32]
- Vidmar testified, "In interviews with liability insurers that I undertook in North Carolina and other states, the most consistent theme from them was: 'We do not settle frivolous cases!' The insurers indicated that there are minor exceptions, but their policy on frivolous cases was based on the belief that if they ever begin to settle cases just to make them go away, their credibility will be destroyed and this will encourage more litigation."[33]
- Vidmar further testified, "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 liability insurers to focus on the acts that led to the claims of negligence.[34]

CONSTITUTIONAL PROBLEMS

Some may argue that a no-fault fund will likely provide reduced compensation to some malpractice victims, but will compensate more people, including those whose conditions are not caused by others' negligence or wrongdoing. They say that a goal of such a fund is not to ensure justice for those who have been harmed, but to ensure equality in treatment for those who suffer a particular medical problem. However, "inequality" is not eliminated by this program; it is simply transferred to another class of people and in a constitutionally-suspect manner.

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[30] David M. Studdert, Michelle Mello, et al., "Claims, Errors, and Compensation Payments in Medical Malpractice Litigation," *New England Journal of Medicine,* May 11, 2006.
[31] Testimony of Neil Vidmar, Russell M. Robinson, II Professor of Law, Duke Law School before The 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).
[32] *Ibid*. at 17-18, 22.
[33] *Ibid*. at 23.
[34] *Ibid*. at 21.

Medical malpractice is not a separate body of law; it is part and parcel of ordinary tort law that has been enshrined in the common law since the beginning of our civil justice system. It has several purposes, one of which is to provide recourse for injury caused by negligent or reckless practices. Despite much rhetoric to the contrary from health care providers and insurance companies, the civil justice system currently accomplishes this quite well in medical malpractice cases, as noted above.

This bill contemplates eliminating or restricting longstanding common law state rights for patients, when representatives of the health care industry and business establishment say so. Some victims of malpractice would lose their ability to obtain the same level of compensation that those with access to the legal system, with a impartial judge or jury, listening to the facts of each individual case, might assess. They would lose the right to seek any accountability from those responsible.

The constitutional problems with alternatives compensation schemes that eliminate the right to civil jury trial, are substantial.[35] It should be noted that courts have struck down far less intrusive measures, like caps, in many states on many different grounds, including infringing on the right to jury trial, the right to recourse, and equal protection, i.e., unequal treatment of malpractice victims, especially when the laws under scrutiny are not responsive to an actual problem, but rather serve only to disadvantage some population unreasonably.[36]

WEAKENING THE TORT SYSTEM WILL INCREASE ERRORS

When regulation fails, as is clearly true when it comes to medical malpractice, litigation becomes the last line of defense to protect patients. Numerous medical practices have been made safer only after the families of sick and injured patients filed lawsuits against those responsible. In addition to anesthesia procedures, these include catheter placements, drug prescriptions, hospital staffing levels, infection control, nursing home care and trauma care.[37] As a result of such lawsuits, the lives of countless other patients have been saved.

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[35] See, e.g, Amy Widman, "Why Health Courts are Unconstitutional," 27 Pace L. Rev. 55 (Fall 2006). It should be noted that neither Virginia's nor Florida's brain damaged baby program have ever been challenged on constitutional grounds. But see, e.g., Epstein, "*Market and Regulatory Approaches to Medical Malpractice: The Virginia No-Fault Statute*," 74 VA. L. REV. 1451 (1988); see also Comment, supra note 42; see also Bill McElway, "*Study Faults Program for Brain-Injured; Shortcomings Found in Care for Children," Richmond Times Dispatch*, Nov. 13, 2002 (citing study by the Joint Legislative Audit and Review Commission criticizing many aspects of the program, including the lack of accountability. "Because there is no oversight of this program, at a minimum it presents the appearance that the program and board do not have to account for their actions."). Although the Florida program has never been challenged, the fact of its opt-out provision would clearly play a large determinative role in assessing its constitutionality.

[36] See, e.g., *Ferndon v. Wisconsin Patients Compensation Fund,* 682 N.W.2d 866 (Wisc. 2005); *Boucher v. Sayeed,* 459 A.2d 87, (R.I. 1983); *Hoem v. State,* 756 P.2d 780 (Wyo. 1988). The Wyoming court went even further, stating "[t]he continued availability and vitality of *** causes of action [against health care providers] serve an important public policy – the preservation of quality health care for the citizens of this state. . . [and] [c]onstitutional protections exist for litigants regardless of market conditions for insurance companies and the medical industry; concerns about the latter cannot be allowed to overrun the former at the expense of those *** injured by malpractice."

[37] Meghan Mulligan & Emily Gottlieb, *Lifesavers: CJ&D's Guide to Lawsuits that Protect Us All,* Center for Justice & Democracy (2002), Hospital and Medical Procedures, A-36 *et seq.*, B-12 *et seq*.

The academic literature confirms this. 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, have researched and written extensively about medical malpractice. They confirm, "No study has shown that liability exposure causes health care quality to decline overall. Instead, the best available evidence shows that liability makes a modest positive contribution to patient safety despite the definitive and unqualified claims to the contrary...."[38] The field of surgical anesthesia, where anesthesiologists adopted practice guidelines to reduce deaths, injuries, claims and lawsuits, is a strong case in point. Hyman and Silver write,

- "[T]wo major factors forced their hand: malpractice claims and negative publicity.… Anesthesiology [malpractice] premiums were ... among the very highest—in many areas, two to three times the average cost for all physicians. By the early 1980s, anesthesiologists recognized that something drastic had to be done if they were going to be able to continue to be insured.… Anesthesiologists worked hard to protect patients *because* of malpractice exposure, not in spite of it."[39]
- "The authors of the Harvard [Medical Practice Study] study acknowledged this themselves: '[T]he litigation system seems to protect many patients from being injured in the first place. And since prevention before the fact is generally preferable to compensation after the fact, the apparent injury prevention effect must be an important factor in the debate about the future of the malpractice litigation system.'"[40] The *New England Journal of Medicine* published a recent article confirming this point: that litigation against hospitals improves the quality of care for patients, and that "more liability suits against hospitals may be necessary to motivate hospital boards to take patient safety more seriously."[41]

"As Hyman and Silver explain, the reason why tort liability promotes patient safety is obvious. As the title of their most recent article says, 'it's the incentives, stupid': Providers are rational. When injuring patients becomes more expensive than not injuring them, providers will stop injuring patients.…. In short, the notion that errors would decline if tort liability diminished is ridiculous."[42]

No one said this better than Dr. Wayne Cohen, then-medical director of the Bronx Municipal Hospital, who said, "The city was spending so much money defending obstetrics suits, they just

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[38] David A Hyman and Charles Silver, "The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?," 90 Cornell L. Rev. 893, 917 (2005).
[39] *Ibid* at 920, 921.
[40] Maxwell J. Mehlman and Dale A. Nance, *Medical Injustice: The Case Against Health Courts* (2007) at 47, citing Paul C. Weiler, Joseph P. Newhouse, & Howard H. Hiatt, A Measure Of Malpractice: Medical Injury, Malpractice Litigation, And Patient Compensation 133 (1993).
[41] George J. Annas, J.D., M.P.H., "The Patient's Right to Safety – Improving the Quality of Care through Litigation against Hospitals," *New England Journal of Medicine*, May 11, 2006.
[42] Maxwell J. Mehlman and Dale A. Nance, *Medical Injustice: The Case Against Health Courts* (2007) at 47, citing David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 Vand. L. Rev. 1085, 1131 (2006).

made a decision that it would be cheaper to hire people who knew what they were doing."[43]

PATIENT SAFETY IS THE ANSWER, ESPECIALLY FOR HIGH-COST OBSTETRICAL INJURIES

I served on a New York State medical malpractice task force in 2007 and 2008, which among other things, discussed ways to improve patient safety as the best way to reduce injuries, claims, lawsuits and costs to the system. The presentation by Dr. Ronald Marcus Director of Clinical Operations, Department of Ob/Gyn at Beth Israel Deaconess Medical Center and Assistant Professor of the Harvard Medical School, was instructive. His presentation not only acknowledged the extent of birth injuries caused by OB error, but discussed the reasons for this and proven methods to correct the situation.

Dr. Marcus specifically discussed the concept of team training or crew resource management that was developed by NASA to deal with pilot error. Dr. Marcus found that with crisis management training in OB emergencies, patient outcomes dramatically improved, with a 50 percent decrease in low Apgars, neonatal encephalopathy. With crew resource management in place, he has seen a 23 percent decrease in frequency and 13 percent decrease in severity of adverse events, and a 50 percent decrease in OB malpractice cases. It should be noted that if medical errors were not the cause of a certain birth-related injuries, as some doctors insist, clearly these kinds of statistics would not exist.[44]

ANOTHER IMPORTANT PATIENT SAFETY SOLUTION: REMOVE OR SANCTION THE SMALL NUMBER OF BAD DOCTORS COMMITTING MOST MALPRACTICE

A few years ago, I met Herman Cole of Bridgeport. Herman's wife, Sadie, checked into the hospital in 1998 to undergo tubal ligation. Her blood pressure dropped dangerously and damagingly low during the procedure but, according to the anesthesiologist's own testimony, he had turned off all the audible alarms. Then, he proceeded to remove the monitors altogether, even though Sadie was unresponsive. By the time medical staff realized she wasn't breathing, Sadie had already suffered severe, irreversible brain damage. Sadie slipped into a coma and was in vegetative state when I met Herman.

The hospital and anesthesiologist settled with the family, but the doctor remained on the hospital's staff. In 2003, while Sadie's case was still pending, the same doctor was involved in another similar incident which left another young woman with permanent, severe brain damage.

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[43] Dean Baquet and Jane Fritsch, "New York's Public Hospitals Fail, and Babies Are the Victims," *New York Times,* March 5, 1995.

[44] See also, Testimony of Neil Vidmar, Russell M. Robinson, II Professor of Law, Duke Law School before The 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 (An earlier study by Rosenblatt and Hurst examined 54 obstetric malpractice claims for negligence. For cases in which settlement payments were made there was general consensus among insurance company staff, medical experts and defense attorneys that some lapse in the standard of care had occurred. No payments were made in the cases in which these various reviewers decided there was no lapse in the standard of care.").

Although never disciplined regarding Sadie's injuries, the doctor's license was suspended and then surrendered after a state investigation of the 2003 incident found he disconnected monitor alarms and failed to monitor the patient's respiration. Years earlier, he had been permitted to practice in Massachusetts under a probationary agreement that required close supervision and monitoring of prescription drug use, because of earlier abuse of tranquilizers, but when he moved to Connecticut, he was granted a full license without restriction.

Connecticut, like all states, must do more to weed out the small number of bad doctors, especially repeat offenders, who should not be practicing at all. The *New York Times* reported in 2005,

> Experts retained by the Bush administration said on Tuesday that more effective disciplining of incompetent doctors could significantly alleviate the problem of medical malpractice litigation.
>
> As President Bush prepared to head to Illinois on Wednesday to campaign for limits on malpractice lawsuits, the experts said that states should first identify those doctors most likely to make mistakes that injure patients and lead to lawsuits.
>
> The administration recently commissioned a study by the University of Iowa and the Urban Institute to help state boards of medical examiners in disciplining doctors.
>
> "There's a need to protect the public from substandard performance by physicians," said Josephine Gittler, a law professor at Iowa who supervised part of the study. "If you had more aggressive policing of incompetent physicians and more effective disciplining of doctors who engage in substandard practice, that could decrease the type of negligence that leads to malpractice suits.'"
>
> Randall R. Bovbjerg, a researcher at the Urban Institute, said, "If you take the worst performers out of practice, that will have an impact" on malpractice litigation.[45]

CONSUMER/PATIENT SAFETY GROUP RECOMMENDATIONS

The following are patient safety recommendations contained in the October 2004, study by NYPIRG, Center for Medical Consumers and Public Citizen entitled, *The Doctor* Is *In: New York's Increasing Number of Doctors*, which the Center for Justice & Democracy endorsed:

> 1. Better reporting of hospitals' and physicians' health care quality. Consumers should have easy access to hospital quality data already collected by the state. Such information should be contained in a "hospital profile" that includes reports of the experience level of a hospital and its physicians in performing particular surgeries and other treatments.
>
> 2. Create a system of periodic recertification of physicians. The Institute of Medicine has recommended that physicians be recertified to assure that they continue to be able to

[45] Robert Pear, "Panel Seeks Better Disciplining of Doctors," *New York Times,* January 5, 2005.

practice as competent professionals. Over time, physicians may see some of their skills erode and it is difficult to keep current with the latest medical research and advances in technology. In an effort to identify these physicians *before* a patient gets harmed, a system of recertification based on testing competency is needed.

3. Require the state to review malpractice payments by physicians to identify potential problems. A small percentage of physicians account for an extremely high percentage of malpractice payments. The overwhelming majority of physicians make no malpractice payments, yet their high premiums help subsidize the losses caused by a few.

4. Require health care providers who harm patients as a result of a medical mistake to tell the patient or patient's family when such a mistake occurs. Physicians are required by their own code of ethics to report medical mistakes even if such admission exposes them to liability. The force of law should back up this common sense ethical requirement.

CONCLUSION

It is the lesson of history that alternative compensation funds 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 provide guaranteed health insurance coverage and better patient safety for Connecticut citizens.