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THE EPIDEMIC OF MEDICAL MALPRACTICE

(Response To November 7, 2009, House Floor Speech By Rep. Eric Cantor On Medical Malpractice Issues)

Rep. Eric Cantor (R-VA) led the effort to defeat the House health care bill with a Motion to Commit the bill, a procedural device that would have sent the bill back to committee and kept it from going forward. The motion failed by a vote of 247 to 187.

The political argument on which he focused to support this motion was medical malpractice. He did not discuss reducing instances of medical malpractice, but only making it more difficult for those already injured by malpractice to go to court.

Rep. Cantor's floor speech focused not on the victims of medical negligence but on attorneys who represent them ("real medical liability reform" ... would save \$54 billion" and is not in the bill because of "opportunistic trial lawyers" and cases that are "lining the bank accounts of trial lawyers"). He did not discuss the true victims of liability limits – injured patients and taxpayers.

The following are a few facts about some of the issues raised by Rep. Cantor:

- **\$54 Billion Savings = Also More Deaths and Injuries:** The \$54 billion figure (over 10 years) cited by Rep. Cantor – or .5 percent of health care costs - is a figure based on an analysis by the Congressional Budget Office, which also notes that, according to one study, such tort restrictions would lead to a .2 percent increase in the nation's overall death rate. That would be an additional 4,853 Americans killed every year by medical malpractice¹, 48,250 over the 10 years examined by CBO, and another 400,000 or more injured during this period (given that one in 10 injured patients die²).
- **The Cost of Errors, Which CBO Notes Could Increase, Are Already Tremendous and Not Addressed by CBO.** Up to 98,000 Americans die each year (and at least 300,000 are injured) due to medical errors in hospitals alone, according to the Institute of Medicine, which already puts the costs *annually* of these errors between "\$17 billion and \$29 billion, of which health care costs represent over one-half."³
- **New Burdens on Medicaid.** If someone is brain damaged, mutilated or rendered paraplegic as a result of medical negligence, but cannot obtain compensation from the culpable party through the tort system, he or she may be forced to turn elsewhere for compensation,

¹ Based on 2,426,264 deaths according to the Center for Disease Control and Prevention.

<http://www.cdc.gov/nchs/FASTATS/deaths.htm>

² Study of California hospitals cited in Tom Baker, *The Medical Malpractice Myth*, University of Chicago Press, 2005.

³ *To Err Is Human, Building a Safer Health System*, Institute of Medicine, 1999.

particularly Medicaid. None of these increased Medicaid costs, covered by taxpayers, are considered by CBO.

- **Contrary to popular myth, few injured patients file lawsuits.** Eight times as many patients are injured as ever file a claim; 16 times as many suffer injuries as receive any compensation.⁴ At the highest level, the estimated number of medical injuries (in hospitals and otherwise) is more than one million per year; approximately 85,000 malpractice suits are filed annually. “With about ten times as many injuries as malpractice claims, the only conclusion possible is that injured patients rarely file lawsuits.”⁵
- **“Frivolous Lawsuits” are Not the Problem.** The Harvard School of Public Health found that 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.”⁶
- **Tort Restrictions Will Not Reduce “Defensive Medicine.”** A June 1, 2009, *New Yorker* magazine article by Dr. Atul Gawande, “The Cost Conundrum; What a Texas town can teach us about health care,” explored why the town of McAllen, Texas, “was the country’s most expensive place for health care.” 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. “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.

- **“Fee-for Service” Health Care Is the Problem.** Even CBO finds little evidence of “defensive medicine” in private managed care systems, as opposed to “fee-for-service” systems like Medicare. In other words, CBO virtually admits that to the extent defensive medicine exists at all, it can be controlled through simply managing care correctly as opposed to taking away patients’ rights and possibly killing and injuring more people.

⁴ National Academy of Sciences Institute of Medicine, “To Err is Human” (1999); Harvard Medical Practice Study (1990).

⁵ David A. Hyman and Charles Silver, “Medical Malpractice Litigation and Tort Reform: It’s the Incentives, Stupid,” 59 Vand. L. Rev. 1085, 1089 (May 2006) (citing Brian Ostrom, Neal Kauder & Neil LaFontain, Examining the Work of State Courts (2003) at 23).

⁶ David M. Studdert, Michelle Mello, et al., “Claims, Errors, and Compensation Payments in Medical Malpractice Litigation,” *New England Journal of Medicine*, May 11, 2006.