

March 19, 2014

The Honorable Ami Bera
United States House of Representatives
Washington, DC 20515

Dear Representative Bera:

The undersigned consumer, public interest and public health groups write in strong opposition to H.R. 4106, the "Saving Lives, Saving Costs Act." This legislation would present unwarranted, onerous and discriminatory burdens on injured patients and families of those killed by negligent health care. Among other things, this bill would violate the due process of patients who seek to exercise their constitutional legal rights; create a two-tiered system of justice disproportionately harming anyone insured by Medicare, Medicaid, or the Affordable Care Act, including those purchasing private insurance through exchanges; directly intrude on the fundamental power of judges and juries to determine law and facts in a case; and allow doctors, hospitals, insurance companies, nursing homes, and long-term care facilities to dump negligence cases into federal court, further burdening the federal court system for no reason.

One of the most serious flaws in the bill is the one-sided violation of due process rights provided to patients. Almost every provision in the bill is crafted in a manner that favors health care providers over patients. Some of the more glaring examples include: preemption of state laws that protect patients; a provision allowing health care providers to remove state-based claims to federal court; a one-sided loser-pays provision that only penalizes patients who lose; and a medical screening panel that is stacked against the patient.

H.R. 4016 would essentially allow the federal government to become the sole arbiter of what is acceptable medical practice based on clinical guidelines developed by specialty societies, which are then turned into legal standards. Even if this were all the bill did, it would be unfair to patients. It is generally recognized that conflicts of interest and specialty bias are inherent problems in the development of practice guidelines. Further, the bill actually allows those with direct conflicts of interest to participate in the development of these guidelines, requiring only disclosure of such conflicts. It is fundamentally unfair for patients to have their cases judged by such standards, written by medical and specialty societies with the knowledge that they will help exculpate their fellow physicians from liability.

Before even getting to Court, a patient must comply with an onerous medical screening panel process. Screening panels have already been rejected in many states as a wasteful and unnecessary step in the legal process. But the screening panel process envisioned

here is not just a waste of resources. It would tilt the legal playing field so heavily in favor of doctors, hospitals, nursing homes and their insurers that it raises disturbing questions about fairness and due process under the U.S. Constitution's Fifth and Fourteenth Amendments as well as under state constitutional principles – not to mention the right to trial by jury under the Seventh Amendment and state constitutions.

The panel is *required* to be composed of three 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. Moreover, the injured patient would be forced to pay half the costs of compensating the physicians who are picked for this panel. 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. It is clear that this provision alone will block legitimate cases from moving forward.

The patient is prevented from conducting any discovery during this panel process. Yet within 60 days, the panel is to decide not only liability but also whether a guideline breach led to the patient's injury. Given the substantial weight this finding is then entitled to in Court before a trial is allowed to proceed (see below), it is clear that the screening panel process is intended not to assist the Courts but rather to entirely usurp the role of judges and juries. But that's assuming the patient even gets to Court. The only way a case will be filed is if the patient is willing to risk having to reimburse a health care provider for costs and inflated, hourly legal fees should they lose (after having already financed compensation costs for half of the screening panel). Further, this “loser pays” provision applies only to the patient – not to hospitals, insurance companies, or nursing homes.

It should be noted that the “loser pays” rule is also known as “the British rule.” Our founding fathers had no interest in bringing it here for a reason. It chills victims' right to file suit, which is why it has been rejected even in conservative states like Indiana.¹ It is safe to assume that should this bill pass, few patients will ever risk having to pay such costs, rendering their right to access the courts virtually meaningless.

What's more, if the patient loses before the screening panel and then decides to risk economic devastation and go forward in Court, the patient is further penalized by having to overcome the screening panel finding with “clear and convincing evidence” before trial even begins. Unless the patient can develop the evidence she needs and meet this exceptionally high burden, the Court is obligated under this bill to throw out the patient's case on summary judgment. Again, hospitals, nursing homes and insurance companies face no such process, no such burden, no such financial risk. In fact, even if the panel found that the standard of care were *breached*, the bill *prohibits* a Court from finding that breach constituted negligence per se or conclusive evidence of liability.

Not only is this highly discriminatory and fundamentally unfair to the patient, it constitutes an unprecedented interference with the work of judges and juries. And the

¹ Mary Beth Schneider, “Gov. Mike Pence-backed tort reform bill exits quietly,” *Indianapolis Star*, January 31, 2013.

bill's one-way preemption of state law provisions that protect patients makes clear that the intent of this legislation is not to make medical malpractice laws uniform in the 50 states. Rather, it is crafted to provide relief and protections for the insurance, medical, and nursing home establishment.

The bill would also give hospitals, doctors and insurers as well as nursing homes and long-term care facilities – again, not patients – the power to remove a medical negligence case to federal court. Even aside from the discriminatory nature of this provision, it is terrible policy. Cases involving medical negligence and patient harm have absolutely no business clogging the federal court system – a system now struggling with severe budget cuts due to the sequester.

The bill says it is meant to improve quality of care and patient safety. In fact, the bill contemplates a system so biased and unfair that legitimate cases would never go forward for patients covered by the bill's provisions including elderly Medicare recipients; elderly, poor and disabled Medicaid recipients; and seemingly anyone who takes advantage of the Affordable Care Act, including those purchasing private insurance through exchanges. The definitions of "health care liability claim" and "health care provider" are broadly crafted, to include not just traditional state medical negligence claims, but also claims brought against anyone licensed, registered or certified to provide health care services such as nursing homes and long-term care facilities. When legitimate cases are blocked from proceeding and negligence in hospitals and nursing homes is not properly exposed, patient safety suffers. We strongly oppose this bill.

Thank you for your consideration. For any questions or comments, please contact Joanne Doroshov at Center for Justice & Democracy at New York Law School (212) 431-2882.

Sincerely,

Alliance for Justice
California Advocates for Nursing Home Reform
Cancer Prevention and Treatment Fund
Center for Justice & Democracy
Consumer Watchdog
Mothers Against Medical Error
National Consumers League
National Consumer Voice for Quality Long-Term Care
National Research Center for Women & Families
New Yorkers for Patient & Family Empowerment
Public Citizen
U.S. PIRG