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## **MEMORANDUM IN OPPOSITION TO MEDICAL MALPRACTICE BILLS**

*Bills that propose immunity for physicians who follow federal practice guidelines and force patients to litigate before medical tribunals place unfair burdens on patients to prove negligence and favor the medical industry*

### **Summary of Provision**

Several medical malpractice bills and proposals, including Title V of the American Health Care Reform Act of 2017 (HR 277), and the Saving Lives, Saving Costs Act (HR 1565), protect medical professionals from medical malpractice lawsuits while making it nearly impossible for an injured patient to successfully bring a valid medical malpractice claim.

### **Introduction**

The American Health Care Reform Act of 2017 (AHCRA) was proposed by the Republican Study Committee in January 2017 in order to repeal and replace the Affordable Care Act (ACA) in its entirety.<sup>1</sup> This bill, as well as the more recent HR 1565, empowers the U.S. Secretary of Health and Human Services to direct medical societies to create clinical guidelines for physicians to follow. These guidelines would become legal standards in a medical malpractice case, exonerating the physician even if a patient were harmed or killed due to adherence to guidelines, and even if the physician knew they were providing unsafe care.

Patients seeking to sue in court would be initially blocked from doing so, forced to bring their case before a biased medical industry tribunal. The tribunal would determine whether the physician adhered to the guidelines or not, and if not, whether the physician's failure to adhere to the guidelines was negligent. A finding by the panel that the physician did not breach a guideline or that the physician was not negligent when the guideline was breached can be used as evidence to dismiss the patient's entire case should they ever get to court, while creating a higher burden and making it extremely difficult for the injured party to prove negligence.

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<sup>1</sup> Phil Roe's "American Health Care Reform Act of 2017. Ballotpedia.  
[https://ballotpedia.org/Phil\\_Roe%27s\\_%22American\\_Health\\_Care\\_Reform\\_Act\\_of\\_2017%22](https://ballotpedia.org/Phil_Roe%27s_%22American_Health_Care_Reform_Act_of_2017%22).

## **Who Opposes These Proposals**

Victims of medical practice and patient and consumer advocacy groups have opposed these proposals. Opponents include: 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, and U.S. PIRG.

## **Turning Guidelines into Legal Standards: Some Specific Concerns**

Under these bills, the federal government would be the exclusive authority on what constitutes acceptable medical practice based on clinical guidelines developed by specialty medical societies. Specialty medical societies already have well-recognized conflicts of interests and biases that the proposed legislation does not attempt to minimize; and creating guidelines that immunize their peers from liability will only create more conflicts of interests.<sup>2</sup>

Also, guidelines can be flawed for a variety of reasons.<sup>3</sup> Incentivizing physicians to use possibly flawed clinical practice guidelines will result in practices that present a danger to patients.<sup>4</sup> If guidelines are inflexible, there will be no room for physicians to customize patients' care to their individual circumstances.<sup>5</sup>

## **Medical Tribunals are Biased Against Patients and Interfere with State Law**

These bills would establish a federal structure for resolving medical malpractice claims, interfering with existing state laws. They would interfere with the legal rights of patients to have their medical malpractice claims heard in court instead of by a medical tribunal that favors physicians over the injured patients.

The medical tribunal process is designed to make it nearly impossible for the patient to prevail. The tribunals themselves are intentionally and inherently biased because they are comprised of physicians that are chosen and approved by the same medical societies that created the clinical practice guidelines being used to exculpate physicians from liability. The patient is not allowed to conduct discovery, collect information before the case begins, in order to present evidence during the tribunal process, as the patient would have been allowed to do if the case was being heard in a court. The tribunal bases its decision on whether the physician is liable solely on limited evidence comprised of the patient's medical records and the applicable clinical practice

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<sup>2</sup> See "Developing Trusted Clinical Practice Guidelines, Selected Findings from Knowing What Works in Health Care: A Roadmap for the Nation," Institute of Medicine, January 2008.

<sup>3</sup> 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/>.

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

<sup>5</sup> 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/>.

guidelines. This extremely poor decision-making process is unfair to the patient and makes it tremendously difficult for the patient to prove the physician's negligence.

The injured patient is required to pay half of the costs associated with compensating the members of the tribunal. This requirement is cost-prohibitive and is especially cruel and burdensome for patients that are facing financial devastation due to their injuries and inability to work.

If the tribunal finds that the physician was not negligent, the physician can use the tribunal's decision to dismiss the entire medical malpractice claim unless the injured patient can prove otherwise by "clear and convincing evidence," which is extremely difficult without conducting discovery. However, the proposed legislation explicitly states that if the tribunal finds that a physician breached the guidelines and was negligent, the injured plaintiff cannot use this determination as evidence in court. The process is designed to intentionally favor physicians and protect them from liability while creating insurmountable obstacles for the injured plaintiff.

### **Conclusion**

These bills are intentionally crafted to protect the medical industry and medical professionals from liability. By changing the legal structure of medical malpractice lawsuits and creating biased clinical practice guidelines and unfair medical industry tribunal panels, the proposed legislation would prohibit injured plaintiffs from obtaining justice and compensation for their negligently caused injuries.