CENTER FOR JUSTICE & DEMOCRACY
185 WEST BROADWAY
NEW YORK, NY 10013
TEL: 212.431.2882
centerjd@centerjd.org
http://centerjd.org

JURY EXCISION: MEDICAL MALPRACTICE, FORCED ARBITRATION, AND ALTERNATIVE COMPENSATION SYSTEMS

Executive Summary

Organized medicine and the insurance industry have pushed for proposals to force or pressure medical malpractice victims to have their disputes resolved entirely outside the court system. These proposals harm patients, weaken accountability for dangerous or incompetent doctors and hospitals, and make our health care more unsafe.

FORCED ARBITRATION

Forced arbitration clauses, which prohibit harmed individuals from suing for medical malpractice in court, are starting to spread in health care despite serious ethical concerns raised by requiring a patient to sign away their legal rights in order to get medical help.

What may be accelerating this trend is the recent takeover of health care by private equity firms that want to avoid jury verdicts and publicity from lawsuits. This is particularly disturbing since private equity ownership is leading to more injuries and deaths.

Forced arbitration clauses have been common throughout the skilled nursing/nursing home industry for years. They are also increasingly being used at surgery centers and clinics, which can be risky places for medical procedures.

ALTERNATIVE COMPENSATION SYSTEMS

Health Care Tribunals

Health courts and similar proposals, such as the "Patient Compensation Act," are circulating in some states although none have passed. They contemplate replacing the civil justice system with a government agency to resolve all medical malpractice claims. Judges and juries are abolished and replaced by decision-makers who are pulled from the medical and business establishments. They need not follow established common law. Instead, there would be new anti-patient standards of liability and compensation schedules. The costs of such systems would be significant.

Brain-Damaged Infant Funds; Litigation Prohibited

Florida and Virginia have compensation funds for children born with catastrophic birth-related brain injuries. Both programs promise these children a lifetime of care in exchange for their families

having given up their rights to sue the negligent doctor or hospital. However, both funds have had numerous problems. They include: failing to adequately provide for these children; failing to hold accountable even the most dangerous doctors; and serious fiscal issues. Both programs have also been caught by the federal government for illegally raiding Medicaid to pay for children's care.

Brain-Damaged Infant Funds; Litigation Required

New York's Medical Indemnity Fund pays for the future medical care of babies catastrophically harmed due to negligence at birth. This fund kicks in only after a jury verdict or settlement, in other words, *after* the family has endured the time and expense of proving their case in court (or settled). The law condemns the injured child to a lifetime of suboptimal care by limiting reimbursement for therapies to cheap Medicaid rates. In 2016, the law was temporarily amended to address these and other concerns, but those amendments are scheduled to sunset in 2025.

OTHER TYPES OF OBSTACLES

Medical Review Panels

Medical review or screening panel laws force patients to prove their case before a non-judicial panel before they are allowed in court. Panel members often come from or are funded by the health care industry, with clear conflicts of interest. Patients are burdened by extra time and expenses in their quest just to get into court. A number of these laws have been repealed or found unconstitutional.

Certificates of Merit

Some "certificate of merit" laws are not unreasonably burdensome for the patient. Others, however, are onerous and prevent legitimate cases from going forward. For example, certain laws require the patient to verify that malpractice has occurred, which is often impossible before there has been any opportunity for discovery.

Safe Harbor/Clinical Practice Guideline Immunity

These proposals say that doctors who practice "evidence-based medicine" or follow "clinical practice guidelines" should be immune from lawsuits. Both patients and doctors have had problems with such approaches. For example, it is unfair for patients to have their cases judged by liability standards chosen by biased or conflicted medical societies. The few limited state and federal experiments with such proposals, which began and ended in the 1990s, were collectively unsuccessful. None were renewed.

"Sorry Works"/Apology/Early Offer Proposals

Apology laws allow doctors to apologize for their negligence but usually prohibit the apology – essentially an admission of fault – from being mentioned in court (*i.e.*, "apology plus shield"). Many combine apologies with "early offer" programs, also known as "communication and resolution" (C&R) programs. Research shows that if the patient is properly represented by independent counsel during early offer negotiations, the patient fares well. If they are not, they don't. Yet most apology/early offer programs, such as the University of Michigan's, do not require that the patient be represented by counsel. And some punish patients who do not accept offers, including New Hampshire's now-expired program.