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## **Medical Malpractice In the Republican Health Care “Substitute”: Outrageous, Pointless and Cruel**

The medical malpractice and drug industry liability protections contained in the proposed House health care “Substitute Offered by Mr. Boehner of Ohio” (the “Substitute”) contemplate severely reducing the rights of those injured by unsafe medical care or drugs. It is so outrageously broad that it would limit liability not only of malpracticing doctors, hospitals, HMOs and nursing homes, but also the pharmaceutical industry! And it would overturn countless state laws to accomplish this. Here are just some the problems with this proposal:

**Massive interference with states’ rights:** The Substitute would dictate for the first time in U.S. history broad medical negligence and drug liability standards to courts in all 50 states. Its sweeping provisions would interfere with judgments made by state officials and judges as to what remedies should be available for injured patients. Far from standardizing the laws across 50 states, the legislation would place a ceiling on patients’ legal rights but allow state laws to survive where those laws place *more* restrictions on patients’ rights, making clear that the intent of this legislation is not uniformity. Rather, it is a carefully crafted bill to provide relief and protections for the insurance and pharmaceutical industries that would most benefit from it.

**Cap on Non-Economic Damages:** The Substitute would impose a severe and arbitrary ceiling -- \$250,000 -- on the amount that a patient injured by medical negligence or an unsafe drug or medical device could receive for non-economic injuries, no matter how devastating. Non-economic injuries include infertility, permanent disability, disfigurement, blindness, trauma, loss of a limb or other physical impairment. The caps in the Substitute would only come into play in the most serious cases, hurting those who have been most severely injured. Such caps also have a disproportionate effect on women who work inside the home, children, seniors or the poor and other low wage-earners who are more likely to receive a greater percentage of their compensation in the form of non-economic damages if they are injured.

**Reduced Statute of Limitations:** With very limited exceptions, the legislation reduces the amount of time an injured patient has to file a lawsuit against a doctor, hospital, HMO, nursing home or drug company to one year from the date an injury is discovered or should have been discovered, but not later than three years after the date of injury. In addition, the bill limits the rights of injured newborns by requiring claims to be filed within three years of the manifestation of the injury or by the child’s eighth birthday, conflicting with many state laws that preserve the rights of minors to bring suit on their own behalf until they reach the age of majority. Indeed, this entire provision is much more restrictive than a majority of state laws. It would cut off many meritorious claims,

especially those involving diseases with long incubation periods. Thus, a person who contracted HIV through a negligent transfusion but learned of the disease more than five years after the transfusion would be barred from filing a claim.

**Abolishes Joint and Several Liability:** This bill would completely eliminate joint and several liability for both economic and non-economic damages. Joint and several liability is a centuries-old doctrine that protects injured consumers if more than one wrongdoer is fully responsible for causing an indivisible injury (i.e., “but for” their misconduct, the victim would not have been injured), but one is insolvent or cannot pay. For example, this rule is critical in a situation where a senior citizen is assaulted in a nursing home due to the nursing home’s negligence. It allows the victim to obtain full compensation against the nursing home if the assailant is indigent. But under this provision, a fully responsible nursing home would be off the hook for paying a significant part of the compensation owed. Ironically, the Congressional Budget Office has said that this provision, even when just applied to medical malpractice cases, would actually increase overall health care costs.

**Repeals the Collateral Source Rule:** The collateral source rule prevents a wrongdoer from reducing its financial responsibility for the injuries it causes by the amount an injured party receives (or could later receive) from outside sources. Payments from outside sources are those unrelated to the wrongdoer, like health or disability insurance, for which the injured party has already paid premiums or taxes. The Substitute says that payments received from health insurance, social security or other sources can be used to reduce the wrongdoer’s liability.

**Structured Settlements:** The Substitute allows a defendant to request that future damages awarded by a judge or jury be made to the injured patient over his or her lifetime. In other words, the injured consumer is prohibited from receiving payments in a lump sum. This provision would increase the hardships of the most seriously injured consumers who are hit soon after an injury with large medical costs and must make adjustments in transportation and housing.

**Severe Limits on Punitive Damages:** The Substitute provides that punitive damages may only be awarded if the patient proves them by an impossibly high standard, and limits punitive damages to two times the amount of economic damages or \$250,000, whichever is greater. Punitive damages are assessed against defendants by judges or juries to punish particularly outrageous, deliberate or harmful misconduct, and to deter the defendant and others from engaging in similar misconduct in the future. Capping or limiting punitive damages will allow drug companies and other defendants to treat liability as a cost of doing business, significantly weakening their deterrent impact.

**Contingency Fee Limits:** The Substitute limits contingency fees by capping them along a sliding scale so fee percentages decrease as judgments increase. The principal impact is to make it less likely attorneys can afford to risk bringing many cases particularly the more costly and complex ones, providing practical immunity for many hospitals, physicians, nursing homes and drug companies whose conduct or product injured or killed patients.