



## **Board of Directors**

June 8, 2017

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### **Re: Concerns about H.R. 1215, “Protecting Access to Care Act”**

Dear Members of Congress:

As professors of law who teach and write about the essential value of the civil justice system in our society, we are writing to share our concerns about H.R. 1215, Rep. Steve King’s “Protecting Access to Care Act.” The bill has many questionable features, but we focus our attention here on two overarching concerns:

1. Its broad scope, which extends well beyond medical malpractice litigation; and
2. Its preemption impacts, which could upend state law in more than two dozen states.

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### **Getting More Than You Bargained For**

As this bill was rushed through committee, its proponents frequently suggested it is designed to address a crisis in medical malpractice litigation. Putting aside for a moment the fact that no such crisis has been empirically identified, anyone considering whether to support the bill should understand that its coverage is far broader than medical malpractice litigation. It also covers:

- Pharmaceuticals and medical devices (i.e., product liability law),
- Nursing home abuse and neglect, and
- Even intentional torts like sexual assault.

In other words, this bill starts with legitimate concerns about rising health care costs and uses them to justify sweeping changes to liability regimes across the medical industry that are not significant drivers of overall health care costs. By some estimates, the costs of medical

malpractice payouts *plus* the costs of defending claims add up to less than 1 percent of national health care spending.<sup>1</sup>

The changes proposed in the bill are also unlikely to have their intended effect on doctors' insurance premiums. It is worth noting a recent study by Americans for Insurance Reform, which found that inflation-adjusted premiums are at their lowest levels in almost 35 years.<sup>2</sup> That study shows that total medical malpractice payouts generally track the rate of inflation, but doctors' premiums have spiked during three discrete periods: 1974-1977; 1985-1988; and 2002-2006. That is because, in addition to an insurance company's potential claim payouts, its premiums are driven by the income that it has obtained from investing premiums in bonds and other financial instruments. Imprecise investment income projections by insurance companies, combined with competition for clients and macroeconomic trends, leads to boom-and-bust profit cycles. The busts lead to premium increases and misplaced calls for restrictive laws on litigation.<sup>3</sup> There is little credible empirical evidence that state-imposed limitations on malpractice liability have brought about stability in malpractice insurance markets, certainly nothing to justify federal legislation like H.R. 1215.

### **Orwellian 'State Flexibility'**

When an individual suffers an injury—be it physical, economic, or emotional—we have traditionally allowed state and local courts and legislatures to set the ground rules for assessing liability. In other words, we look for guidance from the institutions that are most directly accountable to people who have suffered injuries. That is not to say that the federal government has no role. In fact, federal laws provide critical backstops against a race to the bottom among the states, setting a floor for state-based ground rules to ensure that everyone, regardless of ethnicity, age, gender, or class, has access to a court, can have her case heard by a jury, and so on. H.R. 1215 would take Congress out of that traditional role by putting a ceiling on damages and other restraints on the state-based civil justice system.

The limits imposed by H.R. 1215 are subject to cleverly labeled and downright deceptive “state flexibility” provisions. Caps on noneconomic damages and attorneys' fees, limits on joint and several liability, restrictions on evidence that can be presented, and other aspects of the bill are paired with text that states they shall not be construed as preempting state law that specifies other limits. You should be aware of the sleight of hand at work here. The bill would

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<sup>1</sup> American Association for Justice, *Medical Negligence: Health Care Costs* fact sheet, combining data from CMS Personal Health Care Expenditures data and National Association of Insurance Commissioners *Countrywide Summary of Medical Professional Liability 2015*.

<sup>2</sup> Americans for Insurance Reform, *Stable Loses / Unstable Rates 2016* (Nov. 2016), available at <http://centerjd.org/content/fact-sheet-medical-malpractice-insurance-studies-undermine-leading-arguments-tort-reform>.

<sup>3</sup> For additional information, please see Douglas A. Kysar, Thomas O. McGarity & Karen Sokol, *Medical Malpractice Myths and Realities: Why an Insurance Crisis Is Not a Lawsuit Crisis*, 39 LOY. L.A. L. REV. 785 (2006). Also available as a Center for Progressive Reform report, *The Truth About Torts: An Insurance Crisis, Not a Lawsuit Crisis* (June 2005), available at [http://www.progressivereform.org/articles/Torts\\_509.pdf](http://www.progressivereform.org/articles/Torts_509.pdf).

not preempt existing state laws on these subjects, but it would preempt state constitutions that prohibit caps on damages, state legislatures' decisions not to cap damages, and other aspects of the civil justice system traditionally left to the states.

Take, for example, the H.R. 1215 ceiling on noneconomic damages (Sec. 4). The loss suffered by a woman in cases of sexual or reproductive harm, pregnancy loss, or sexual assault injuries is predominantly "noneconomic" in nature—that is, she suffers injuries that may not have costs that economists can easily monetize, but that society recognizes as having a meaningful, often devastating, effect on her life.<sup>4</sup> Most states respect the difficulty of monetizing a person's suffering and have no limits on these damages. Five have constitutional prohibitions on legislative caps on such damages. Two more have constitutional prohibitions on damage caps for wrongful death cases, including medical malpractice. Supreme courts in eleven states have struck down medical malpractice damage caps. And ten more states have no statutory damage caps for personal injury actions. In total, more than two dozen states have no law that specifies a particular monetary limit on damages. The "State Flexibility" provision in H.R. 1215 Sec. 4(e) would actually preempt the flexibility that judges and juries in those states currently possess.

### **Conclusion**

H.R. 1215 would dramatically redefine judges' and juries' role in determining how a patient should be compensated after suffering a health care-related injury, as well as the role of state legislatures and appellate courts in setting the ground rules for how those determinations are made. In doing so, the bill changes policy in ways that limit liability for insurance companies but do almost nothing to raise the floor for victims' rights.

We urge you to look for a better way to address the problems of the health care industry, which today center on patient access and affordability, not insurance company liability.

Sincerely,

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<sup>4</sup> See Lucinda M. Finley, "The Hidden Victims Of Tort Reform: Women, Children, And The Elderly," 53 EMORY L.J. 1263 (2004), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=898863](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=898863).