Americans for Insurance Reform
"PROTECTING RIGHTS, NOT WRONGS"

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(A project of the Center for Justice & Democracy)

HEALTH COURTS AND OTHER ALTERNATIVE SYSTEMS ARE INTOLERABLY UNFAIR TO INJURED PATIENTS

Proposals for "health courts," no-fault, or other similar alternatives, limit or eliminate the long-standing and fundamental right to trial by jury for medical malpractice victims. Instead, patients are forced into an alternative system without juries, without any accountability mechanisms, without procedural safeguards, and without any meaningful appeals process. These hardships, coupled with the burden of having to prove fault or "causation," render the injured patient virtually powerless and at the mercy of the insurance and medical industries. Specifically:

PATIENTS ARE FORCED TO PROVE FAULT OR "CAUSATION" WITHOUT LEGAL PROTECTIONS OR ADEQUATE LEGAL HELP.

- **Burden of Proof:** Whether discussing health courts, which are fault-based, or no-fault systems that require patients to prove that treatment "caused" an injury, patients all face significant initial burdens of proof not unlike "negligence" under the current tort system. Even patients with catastrophic injuries, including the families of brain-damaged babies, would have to fight a "causation" battle to obtain compensation for a potential lifetime of care.

- **Legal Assistance.** Patients would find it difficult to locate a competent attorney to help them with this burden of proof, since attorneys would be so hamstrung by limitations on what are already difficult and costly cases. Fees likely would be limited, as well. The consequences would be significant. The Harvard School of Public Health wrote, "our findings underscore how difficult it may be for plaintiffs and their attorneys to discern what has happened before the initiation of a claim and the acquisition of knowledge that comes from the investigations, consultation with experts, and sharing of information that litigation triggers." David M. Studdert, Michelle Mello, et al., "Claims, Errors, and Compensation Payments in Medical Malpractice Litigation," *New England Journal of Medicine,* May 11, 2006.

- **Bias.** Decision-makers would be heavily weighted toward health industry or business representatives, who even might have conflicting financial interests in rejecting or reducing compensation. So-called "neutral experts" appointed to help render decisions, would also bring inevitable bias. As some researchers have noted, "[T]he public setting in which these experts will render their opinions could place considerable pressure on them to demonstrate their loyalty to the profession. As a consequence, these 'neutral' experts may show the same reluctance to label another physician's care as negligent that physicians have exhibited in other settings. …[R]esearchers have found that physicians are so unwilling to label another physician's care as negligent that they refuse to do so even when the treatment given to the patient was 'clearly erroneous.'" Peters Jr., Philip G., "Doctors & Juries," U of Missouri-Columbia School of Law Legal Studies Research Paper No. 2006-33 at 44.

BENEFITS WOULD BE SLASHED

- **Schedules.** Compensation for injuries under administrative systems are often determined by a benefits "schedule" (so much for a lost leg, so much for an eye) developed by the medical establishment or political appointees instead of decided on a case-by-case basis by a jury. Schedules are inherently unfair. As pointed out in 2006 congressional testimony by Neil Vidmar, "Even when some leeway is built into compensation schedules, they cannot take into account the number of factors and extreme variability of pain and suffering, physical impairment, mental anguish, loss of society and companionship, and other elements of damages that fall under the rubric of non-economic damages. That is why these matters have been entrusted to juries. They provide justice on an individualized basis." Testimony of Neil Vidmar, Russell M. Robinson, II Professor of Law, Duke Law School before The Senate Committee on Health, Education, Labor and Pensions, "Hearing on Medical Liability: New Ideas for Making the System Work Better for Patients," June 22, 2006.

- **Future**. Even if a system starts with good intentions, taking any compensation decision out of courts subjects it eventually to influence-peddling and future budgetary/solvency considerations that no lawmaker today can control. These problems are always resolved on the backs of more powerless victims, who gave up their legal rights with vague and unenforceable promises that are ultimately broken.

OTHER ALTERNATIVE SYSTEMS HAVE TYPICALLY FAILED PATIENTS. THESE INCLUDE:

- **Workers' compensation.** It is widely accepted that workers' comp, originally envisioned as a no-fault system, works poorly, especially for the permanently disabled, and the system's problems are typically solved by reducing benefits and increasing obstacles for workers. McCluskey, Martha T., "The Illusion of Efficiency in Workers' Compensation "Reform," 50 Rutgers L. Rev 657, 670-671, n. 34, 35 (1998).

- **Federal Vaccine Injury Compensation Program.** Although originally proposed as a no-fault model that would be efficient and provide for quick compensation for vaccine injuries, many experts say that the program has been co-opted by political forces and turned into a victim's nightmare. Elizabeth C. Scott, "*The National Childhood Vaccine Injury Act Turns Fifteen*," 56 Food & Drug L.J. 351 (2001)

- **Virginia's Birth-Related Neurological Injury Compensation Program.** This compensation program for brain damaged infants has been a tremendous failure on every level, including fiscally. One parent called the program "a generous system of care gone awry, of state-sanctioned impunity for doctors and hospitals, and of the struggle families face caring for society's weakest children." Bill McKelway, "Danville Has High Birth-Injury Rate; Critics Say Virginia Law Shields Doctors from Lawsuits," *News Virginian*, June 1, 2003; Bill McKelway, "Study Faults Program for Brain-Injured; Shortcomings Found in Care for Children," *Richmond Times Dispatch*, Nov. 13, 2002; Bill McKelway, "Brain-Injury Program's Outlook Dim; Cost Savings for Doctors Meant Less for Children," *Richmond Times Dispatch*, Nov. 16, 2002.