

Chapter VII

Health Care "Reform": The New Battlefield for the Latest Assault on Malpractice Victims

The AMA wants to limit everyone's right to sue — except its own.

With Washington engrossed in the intricacies of health care reform, the AMA has adamantly insisted upon its own prescription for relief: limit the right of people injured by medical malpractice to bring a lawsuit. Instead of launching a major drive to toughen the physician self-regulation and peer review systems, strengthening the medical licensing review boards in the 50 states and working to prevent the awful agonies of malpractice, the stubborn AMA guild uses its muscle collaborating with insurers to weaken the rights of victims seeking justice.

The White House knows that the medical industry's plan won't even make a ding, much less a dent, in the nation's health care bill. Nevertheless, the White House, anxious to win the AMA's support for the rest of its health care plan, has endorsed a series of anti-consumer proposals to restrict the rights of malpractice victims. And the AMA and insurance lobbies are mounting a multi-million dollar political campaign to win even more draconian restrictions based on laws already in place in states where the medical/insurance industry has been able to overwhelm the opposition of consumer, legal and victims' rights organizations. In fact, California's failed MICRA law is promoted by the AMA as the pre-eminent model for federal health care legislation. Here are the civil justice rights targeted by insurance and medical lobbyists:

Caps on compensation to victims.

The most egregious of the proposals would place an arbitrary, flat cap on the amount of compensation a jury may order a doctor or hospital to pay to malpractice victims for their pain and suffering. This compensa-

tion includes physical and emotional distress and other intangible “human damages,” which compensate for injuries like severe pain; the loss of a loved one; loss of the enjoyment of life that an injury has caused, including sterility, loss of sexual organs, blindness or hearing loss, physical impairment and disfigurement.²⁰⁷ The cap would not be adjusted for inflation.

Require victims to pay part of the costs of the malpractice.

A legal principle, known as the “collateral source rule,” prohibits doctors or hospitals charged with negligence from informing the jury that the victim has other sources of compensation, such as health insurance or government benefits, including social security and disability.

The purpose of this long-established doctrine is to ensure that the jury holds the defendant responsible for the full cost of the harm the defendant caused by requiring the physician or hospital to pay all the victim’s expenses — even if another (“collateral”) source has already paid them. In effect, the “collateral source rule” prevents negligent doctors or hospitals from reaping a windfall in situations in which a malpractice victim’s medical bills are paid by someone else — either because the victim, through his or her own foresight, had previously purchased health insurance coverage that ended up paying the bills for the malpractice injuries, or by taxpayer-subsidized programs like welfare.

Application of a related legal doctrine, known as “subrogation,” permits a victim’s insurance company or a government agency to take the funds from the negligent physician or hospital to reimburse itself for payments it has already made to the malpractice victim. Virtually all health, auto and workers compensation insurance policies give the health insurer subrogation rights. State and federal laws give the government similar rights.

In effect, subrogation ensures that the collateral source rule does not result in the injured victim getting his or her bills and expenses covered twice (once by the consumer’s own health insurance policy, and once by the defendant or his liability insurance policy).

For an example of how these legal mechanisms work, consider the individual with a typical health insurance policy. Assume she is hospitalized with a previously undetected heart condition that requires immediate surgery. Her health insurance policy will pay most of the hospital and doctors’ bills.

Now assume that during surgery the anesthesiologist uses the wrong drugs and the patient's brain is severely injured. The patient is a victim of malpractice. Her health care coverage will normally pay the additional medical bills arising from treating her for the injuries caused by the negligent doctor.

But the victim's health insurance won't reimburse her for the wages she would have made at her job, had she not been injured by the anesthesiologist. Nor will it cover the costs of hiring a full-time nurse plus someone to care for the victim's children. The only way the victim can obtain compensation for these expenses is by suing the physician for the lost wages and additional expenses as well as for the medical bills.

Under the traditional "collateral source rule," when the victim sues the wrongdoer for compensation, including payment of medical bills, the defendant cannot tell the jury that the bills have already been paid by her health insurance company.

If the jury makes an award to the victim which includes damages for medical care, the health insurer can then exercise its subrogation rights. It will recover from the defendant (or the victim, if the award has been paid) the amount of money the health insurer already paid to cover the victim's medical bills — up to the amount the jury awarded. (The health insurance company cannot ask its policyholder to give up more than the jury gave her.)

There is some dispute about the operation of these two legal rules — the collateral source rule and subrogation. Many experts think that since the consumer pays premiums for health insurance coverage, it would be just fine if the health insurance company pays the bills and the consumer keeps the money that the defendant eventually is forced to pay as well. But subrogation rights are part of every contract, and, at least theoretically, subrogation should keep insurance premiums lower.

No one, however, thinks that the *defendant* should not have to pay the bills — except the AMA and the malpractice insurance companies. They want to repeal the "collateral source rule." Under their proposal, the jury must reduce the amount of money the defendant owes the victim by the amount of alternative compensation the victim receives or is entitled to receive. As with the cap on non-economic damages, abolition of the collateral source rule reduces the amount of money the neg-

ligent physician or hospital must pay. In effect, a portion of the responsibility for the harm is transferred to the victim, who purchased the insurance coverage; to the victim's insurer; and/or to taxpayers.

Here is another way to look at the AMA/insurance industry proposal: the negligent physician or hospital gets a windfall, simply because its victim was fortunate to have purchased private insurance or received taxpayer-subsidized care.

Force victims to accept compensation on an installment plan.

The AMA and the insurance industry want to allow physicians or hospitals found liable for malpractice to pay jury-ordered compensation to victims on a periodic, rather than a lump sum, basis. The periodic payment arrangement, once approved by a judge, cannot be modified — unless the victim dies earlier than expected, in which case the defendants, rather than the family of the deceased, are allowed to retain some or all of the balance of what they owe.

This allows the negligent defendant or its insurance carrier to control, invest and earn interest upon the victim's compensation year after year. No adjustment is made in the payments to reflect unexpected trends in the inflation rate or changes in the cost of medical care — which has risen sharply and well above the inflation rate for many years.

If the defendant enters bankruptcy or simply ceases to pay, the victims are forced to return to court and engage in another lengthy legal proceeding. Further, an inflexible payment schedule leaves the victim without sufficient resources in the event that unanticipated medical or other expenses arise. This is most likely to occur in the years immediately following the injury, when the periodic payments are unlikely to cover the expenses.

Eliminate the right to a trial.

The medical and insurance lobbies want to allow physicians and hospitals to write into any contract for medical services a provision for mandatory or "binding" arbitration of any dispute regarding malpractice. In an arbitration, the case is presented outside the courthouse before a private judge chosen by the victim and the defendant. The malpractice victim's right to a jury trial may be completely foreclosed by such clauses, which are now increasingly inserted in agreements patients must sign before receiving treatment. Most consumers are completely unaware of

this restriction when they fill out and sign legal forms in the doctor's office or at the hospital.

Limiting the time in which to bring a suit.

To prevent malpractice lawsuits, the AMA and the insurance companies want to impose a short "statute of limitations" for medical malpractice cases. The "statute of limitations" limits the period of time during which a victim can bring suit for malpractice after the injury has occurred. In some versions of the proposal, the time could expire before the victim even became aware of the injury or the malpractice that caused it. There have been many instances in which malpractice involving children has not readily been detected or for which no action is taken initially because the family is unfamiliar with the legal system. Legal action in such cases would be precluded by the shortened statute of limitations.

Discourage attorneys from accepting malpractice cases.

The insurance industry and the AMA has proposed a sliding contingency fee schedule for attorneys representing victims of medical malpractice. In California — the model for the AMA's proposal — the fees are limited to 40 percent of the first \$50,000 recovered from the negligent or incompetent physician or hospital; 33 1/3 percent of the next \$50,000; 25 percent of the following \$100,000, and 15 percent of any amount exceeding \$200,000.

This provision of MICRA discourages attorneys from taking the most severe or difficult malpractice cases. Combined with the cap on damages — which proportionately reduces the plaintiffs' attorneys' fees — medical malpractice cases have become prohibitively expensive for plaintiffs' attorneys to accept on a contingency basis. Those plaintiffs' attorneys who do take such cases may require patients to pay at an hourly rate, since hourly fees are not controlled by the statute. Of course, most consumers cannot afford to pay hourly fees. There is no proposed limit on the fees which the defendant — the hospital or doctor accused of negligence — may pay its lawyers.

Minimal legal standards for medical care.

Many have suggested that a set of "practice guidelines" could be developed to assist physicians in providing quality health care — a checklist of treatment procedures. Unfortunately, in the hands of the medical

industry's lobbyists, this positive approach to preventing malpractice has become a technique for diminishing health care. According to the AMA's approach, physicians who follow the guidelines should be free of any legal responsibility for medical injuries which might result from the treatment. Turning the guidelines into legal "safe-havens" for malpracticing physicians creates an incentive for physicians, who draft the guidelines, to establish "lowest common denominator" rules that any physician could hide behind. Thus, the quality of care patients receive will decline, rather than improve. Further, these guidelines are of little use in complex cases, where a patient has more than one disorder. Indeed, following guidelines in such situations could result in conflicting treatments that lead to injuries!

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Unfortunately, President Clinton has endorsed a number of these proposals. Worse, the White House health care plan does not include meaningful reforms urged by consumer and victims' groups which would actually prevent malpractice, reform the liability insurance industry and make the new health care system safer for everyone.

Why did the White House reject reforms proposed by citizen groups? Because they were vigorously opposed by the AMA and insurance industry, and both the White House and Congress are afraid to move on health care reform without the support of these powerful lobbies, and their campaign contributions.

Indeed, such political considerations now dominate the entire health care debate in Washington.

The medical and insurance industries and most corporate lobbying groups want to maintain the present system of "private health care" — a system in which the insurance industry sets prices (there are no controls on premiums or fees), private insurance companies sell health care coverage at an enormous profit, 37 million Americans are uninsured and government efforts to protect patients against malpractice are feeble at best.

It is a remarkable example of hypocrisy that, in contrast to their hostility to government involvement in the delivery of health care, these interest groups strongly support government-set limits on malpractice lawsuits and compensation. In fact, buried in the fine print of the medi-

cal industry's plan is an insidious invasion of the historic right of judges and juries in each state to fashion their own common law. Under the plan that Congress is poised to adopt, congressional restrictions on the rights of malpractice victims will *override the tort laws protecting medical consumers' rights in every state in the nation*. The decisions of state court judges and juries — the only people who can see, hear and evaluate the evidence of malpractice — will be preempted by a single federal law. In effect, Washington politicians will determine the quality of justice for every malpractice victim in the country. Gone will be the traditional notion of an individual trial and the jury's sacred role in meting out responsibility. In place of these tribunals will be Congress. Its proven subservience to the medical lobby suggests that this will be only the beginning of the assault on consumer rights. Yet despite the unprecedented nature of the AMA's self-aggrandizing proposal, virtually all Republican and quite a few Democratic members of Congress have endorsed this repressive approach.

President Clinton, seeking a middle ground that will not offend the powerful medical and insurance lobbies, has proposed a convoluted system in which nonprofit agencies — so-called “health care alliances” — will contract with private insurance companies to cover members of the public. The insurance companies will then contract with doctors and hospitals to perform the services. “Federalization” of justice and restrictions on the rights of malpractice victims are part of the President's “compromise.”

The politicians in Washington, D.C. may think that surrendering to the medical lobby on malpractice litigation makes good politics, but it's a disaster for consumers and for medical accountability.

Both the White House and the medical industry's approach guarantee an increase in malpractice, as millions of new health care consumers flood the complicated system with few government protections and with insurance companies and physicians less accountable than ever to their patients.

Those with limited incomes are particularly at risk under the proposals advocated by the AMA and the White House. Dr. Troyen Brennan, an expert from the Harvard School of Public Health and an author of the comprehensive Harvard Medical Practice Study recently stated bluntly that the amount of money available to hospitals in the future will determine the quality of care:

At a hospital level, the major risk factor associated with negligent injury is the total amount of resources expended in the care of patients. . . . As the [Clinton]Administration attempts to attain control of costs, it must ensure that resources are distributed evenly. Otherwise patients hospitalized at relatively poor hospitals will be at much greater risk for negligent injury.²⁰⁸

He continued:

Poor patients are one fifth as likely to bring claims as are the wealthy. The aged are also unlikely to bring claims. Since the [President's proposed] Health SecurityAct limits contingency fees, and since the poor are more dependent on contingency fee mechanisms in order to bring claims, the Health Security Act will likely worsen the inequity of the tort system. The poor will be even less likely to sue than they are at present.²⁰⁹

Dr. Brennan warned Congress that the restrictions on the right of malpractice victims contained in the White House "Health SecurityAct" plan would be costly and devastating:

[T]hese reforms may . . . have detrimental effects. Tort litigation is intended to compensate individuals who have been injured and deter practices that lead to injuries. Most of the proposals by the Health Security Act will not improve the ability of the tort system to undertake these critical functions. In fact, if enacted, the Health Security Act will likely lead to less compensation for individuals injured by medical practice, will reduce deterrence of practices that cause such injuries and overall will increase the costs of the medical care system.²¹⁰

Ironically, the President's cynical political compromises have failed to win the President the support he had hoped to get for the rest of his package, including universal coverage. TheAMA, drug manufacturers and most of the insurance industry have rejected the White House pro-

posal, and are pushing alternatives in Congress which would do little to solve the health care crisis, but would increase malpractice while limiting victims' ability to sue. These special interests hope to evade meaningful reform, which would limit their profits, by shifting the blame for the health care crisis to malpractice victims.

Unfortunately, many members of Congress are prepared to carry out the AMA's strategy. The first committee of Congress to begin writing national health care reform legislation in 1994 largely ignored the White House proposal. Pro-medical industry legislators substituted an even more heinous constraint on the rights of victims of medical malpractice: a cap of \$350,000 on compensation to malpractice victims for their human suffering.

But the industry's allies were unable to stop other committee members from placing limits on medical costs and profits in the same bill. In other words, the lobbyists' strategy of imposing the malpractice restrictions in order to evade true reform failed. Indeed, once it became clear that controls on medical costs would remain in the legislation, the chief sponsor of the provisions to limit malpractice rights — whose spouse is a physician — immediately termed the legislation “a bad bill” and voted against its passage.²¹¹

Unless Washington policy-makers suspend their traditional allegiance to special interests like the AMA and the insurance industry and devote much more attention to the quality of care that will be provided under the new health care system, “reform” will end up making matters worse, not better.

That means the White House and the Congress are going to have to hear from the American people, not just from the medical industry and its insurers. Appendix A contains a list of organizations you can contact that are working to make sure that the public interest and consumer rights are protected in the health care debate.

If, as has been shown, there is no rational or moral justification for weakening victims' rights, and if the most effective solutions lie in reforming the medical profession and the insurance industry, why then does the steady drumbeat against the rights of malpractice victims persist? Because two of the most powerful constituencies in the health care reform debate — the medical profession and insurance companies — find the theory of such a crisis congenial to their institutional interests. The war on victims' legal rights is a scapegoat. It is a callous drive that

seeks to exonerate the medical profession and insurance industry for their role in boosting health care costs, and divert policymakers from considering deep structural reforms in insurance and medical practice.

That the avaricious insurance industry wants to limit consumer rights can come as no surprise to those who have observed the industry's behavior in the past. But the AMA is supposed to be different. Fond of describing itself as a nonprofit professional society, the AMA says its aim is a high quality medical system. The truth is that it is just a trade association that represents the commercial interests of its well-to-do members. Indeed, a recent study found that the AMA's "political action committee" consistently made large donations to members of Congress who *opposed* the AMA's position on public policy issues such as regulating tobacco and handgun use, but who supported the AMA on matters of financial self-interest to physicians. The study found that congresspeople who voted for the public health positions endorsed by the AMA got *smaller* contributions from the lobby group.²¹²

Just how important is access to the courts? Never mind what you think. Ask the AMA itself. AMA executives have threatened to file lawsuits to block any health care proposal that they do not support.²¹³ According to the AMA's legal analysis, limiting how much physicians can charge their patients — an essential element of any national health care reform — would deprive doctors of their constitutional right to a "fair profit." Each physician would be entitled to go to court to bring a lawsuit to protect his or her constitutional right to profit from the practice of medicine, if the AMA is correct. In other words, the AMA wants individual justice for doctors when it comes to maintaining their considerable income, but not for victims of medical negligence, incompetence or criminal behavior. And the AMA won't hesitate to litigate to protect its own economic interests!

Removing the deterrent effect of the legal system against bad medicine is not only inconsistent with the development of a high quality health plan. It is inconsistent with the medical profession's role. It will dramatically increase the number of Americans who die from medical negligence, especially when 37 million uninsured Americans are given access to health care, many for the first time. The father of modern medicine, Hippocrates, told his students: "Do no harm." But in the AMA's unseemly struggle to expand the privileges and prerogatives of its members at the expense of their patients, it seems to have forgotten that charge. It is hypocrisy, not Hippocrates, which guides organized medicine today.