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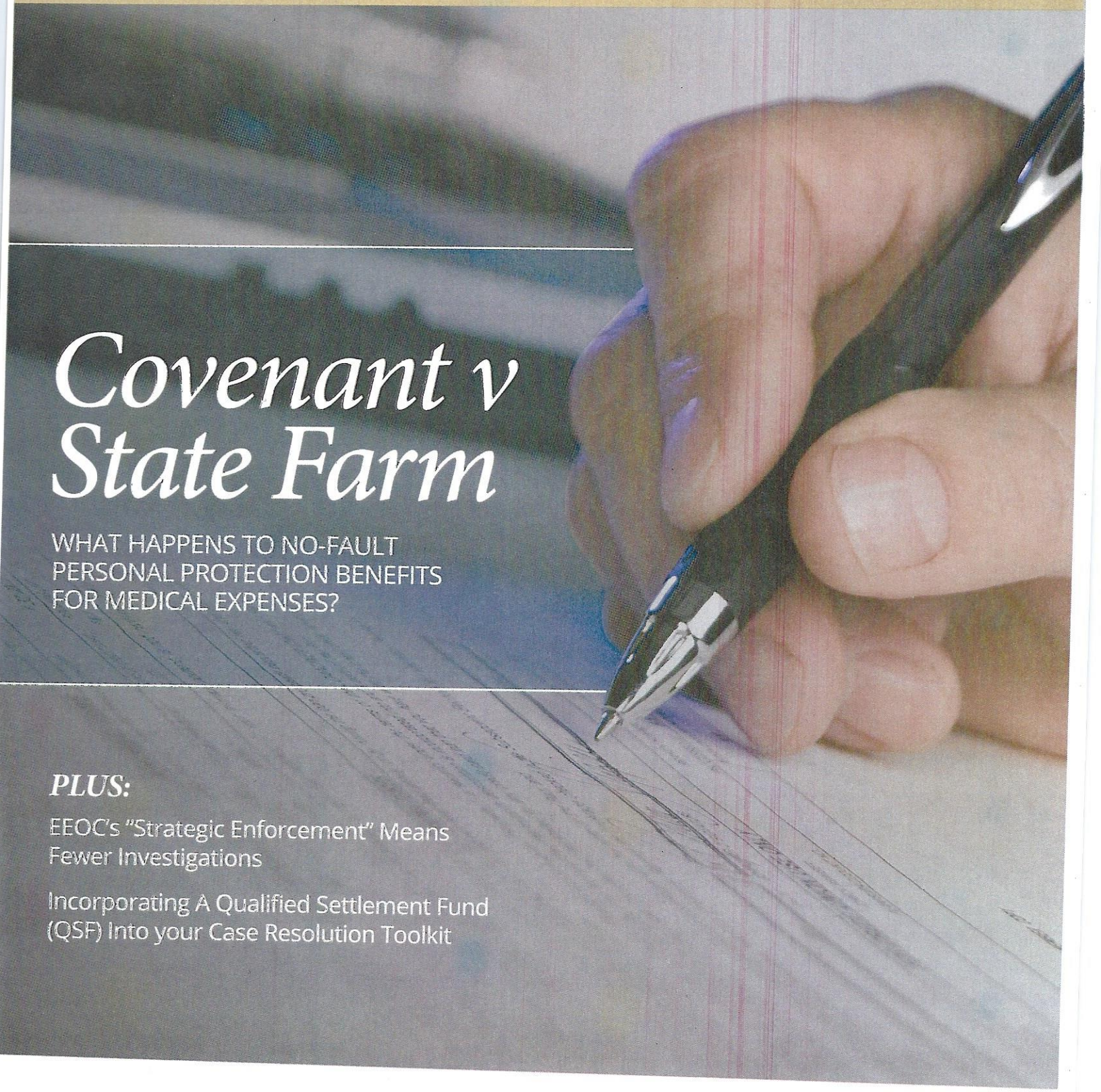

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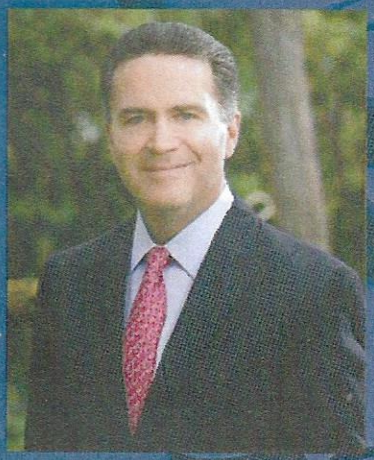

HR 1215:

Stripping Rights From Our Most Vulnerable Michigan Medical Malpractice Clients

By Jesse M. Reiter

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Legislators in Washington are attempting to push through HR 1215, the spuriously dubbed "Protecting Access to Care" Act of 2017. The bill was passed in the U.S. House of Representatives on June 28th, 2017, and is now headed for a vote in the Senate. This bill is slated to *reduce* patient access to the legal system, stripping them of their American right to pursue civil justice when they have been wronged by service providers they are supposed to trust. The bill impacts far-reaching fields: not only medical service providers, but pharmaceutical firms, medical device manufacturers, and nursing home operators, dentists, insurers and HMOs, among others.

The bill purports to overhaul medical costs and drive down the costs of healthcare in an environment where litigation comprises only 2.4% of total U.S. healthcare expenditures, according to Harvard researchers publishing in *Health Affairs*.[1] Formal CBO cost estimates[2] find that the legislation—if enacted—would decrease spending by about 0.4%—a trivial amount in comparison to the massive changes it would mean for injured parties.

Caps on Damages and Attorney Fees Spell Disaster for Representation

The bill spells disaster for patient recoveries across the country, by capping non-economic damages at $250,000. This is significantly lower than Michigan's already low damage caps.[3] It is also catastrophic, not only for patients whose lives have been permanently altered by severe injury, but also for the attorneys who help them seek justice. With the higher cost of litigation, few attorneys will be willing to take on high-risk, high-cost cases involving limited economic damages.

This impact is further significantly compounded by a tiered cap on attorney fees:

- The first $50,000 awarded to a malpractice victim is subject to a 40 percent limit
- The next $50,000 is subject to a 33.3 percent limit
- The next $500,000 is subject to a 25 percent limit
- For awards higher than $600,000, attorneys can only receive contingency fees of 15 percent.

Caps on damages and attorney fees disincentivize attorneys from taking on all but the most significant cases, which means that many patients legitimately injured in a medical malpractice case lose their most valuable weapon in defending themselves against corporate entities and inept or under-trained medical providers. Functionally, the caps bar many of those impacted by medical malpractice, nursing home neglect, or faulty medical devices from seeking restitution in court. The bill even provides complete safe harbor from product liability litigation for those who prescribe of dispense FDA-approved products. If this bill passes, the courtroom door will close to most injured patients as attorneys will only take a fraction of the current number of cases.

The bill also directly preempts numerous state laws and constitutions that ban damage caps, and at least a dozen state supreme courts' decisions that have struck down damage caps. A 2014 opinion by the Florida Supreme Court,[4] for instance, held that such caps were unconstitutional because they "[imposed] unfair and illogical burdens on injured parties" and saved "a modest amount for many by imposing devastating costs on a few." The court in this case did its job—preserving the rights of individuals, rights that HR 1215 would take away.

Replacing Joint-and-Several Liability

HR 1215 also would replace Michigan's joint-and-several liability for medical malpractice actions with a "fair-share" rule. Under joint-and-several liability, each defendant is liable for the full amount of the judgment, regardless of their degree of fault, to provide full compensation to the injured person.[5] Under the fair-share rule, defendants would be liable only for the percentage of the final award that was equal to his or her share of responsibility for the injury. This policy exclusively ends

up benefitting large corporations with deep pockets, placing the responsibility for their errors onto the public instead.

Short Statutes of Limitations: Leaving Birth Injury Patients Out in the Cold

The proposed bill mandates a three-year statute of limitations in most cases.[6] In some of the most nuanced and difficult malpractice cases—such as birth injury—a three-year statute is simply *far too short*. In birth injury law, the cognitive and developmental impact of an injury may only reveal itself as late as grade school, when the child begins to fall behind his or her peers and misses key developmental milestones. Keeping this short statute means that parents of children with injuries inflicted by medical providers may not even realize that an injury has occurred by the time the statute has already run, barring them from ever pursuing a case and leaving medical providers to continue negligent care.

Limitations on Expert Witnesses

One proposed amendment to the current bill would place undue burden on plaintiff's attorneys in finding experts to testify regarding the standard of care. According to the most recent amendments, for an expert to qualify as an expert, he or she must be licensed to practice within that specific state (or a contiguous bordering state).[7] This arbitrary "rule" does not assure particular additional expertise, instead placing unnecessary roadblocks to finding experts willing and able to testify for a client in the first place. In the tight-knit medical community, it can be difficult to find experts willing to testify against medical professionals in their small circle within their geographical location. These limitations serve as a functional barrier to bringing a suit—if no experts are willing to testify against other doctors in their own small backyard, even the most compelling of suits can't go forward.

Apologies as Admissions of Guilt

Further amendments to the bill propose that "expressions of apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence" which relate to the patient's outcomes as the result of an unanticipated outcome of medical care is **inadmissible for any purpose as evidence of an admission of liability or against interest.**[8] This amendment *directly disallows an admission of guilt from being used*. When a medical professional apologizes for a poor outcome, an apology does not absolve them from the consequences of their mistakes. Barring some of the most compelling evidence of fault serves no-one but at-fault medical practitioners and hospitals.

A Case of Federal Overreach

Furthermore, the bill is an act of federal overreach, stripping the power from individual states in deciding how and under what circumstances patients may even seek legal recourse. This violates the 10th amendment and individual states' rights. The United States' foundational principles of federalism[9] *leaves tort law up to states.*[10] The bill preempts state legislatures, state courts, and even some state Constitutions. The passing of such a bill also violates the federalist tradition of allowing states to make their own decisions regarding the health and well-being of their citizenry.

The Impact of Tort Reform on Michigan Cases

Tort "reform" passed in Michigan[11] has already provided us with a clear idea of the impact such legislation may have on medical malpractice litigation as a whole, granting medical providers with partial economic immunity. The number of malpractice cases has dropped 80 to 85%.[12] The majority of meaningful cases can no longer be filed due to a hostile and expensive environment. The economic risks for attorneys and their clients are too high and the potential recoveries too low to justify taking on the majority of medical malpractice cases. Two-tiered caps on noneconomic damages, MCL 600.1483, have reduced recoveries while new requirements skyrocket litigation costs. For each defendant who is a specialist or board certified, a standard-of-care expert must be found with identical qualifications. MCL 600.2169. The result is functional immunity from many lawsuits. Attorneys cannot economically pursue cases, leaving the public without a path to justice.

Intended Effects Unrealized

Numerous studies have found that tort reform fails to curb insurance premiums and costs of medical care, the purported goals of tort reform efforts.[13] Studies of insurance data in states with damage caps have found that there is no correlation between tort reform laws and rate changes.[14] Further, it is not the responsibility of the courts to help line the pockets of insurance companies by reducing payouts and curtailing the individual rights of citizens. Tort revision bills like HR 1215 place the priorities of corporations above the individual citizen, making the court system a mere tool of powerful conglomerates, rather than a vehicle for just restitution.

Letting the Third Leading Cause of Death Claim More Lives

Medical malpractice "reform" laws increase patient harm. Roughly 440,000 people die each year due to medical errors, making it the 3rd-leading cause of death in the United States.[15] Tort reform legislation such as HR 1215 removes one of the most powerful ways we can hold medical providers accountable for preventable errors. When this is removed, medical errors increase, resulting in more patient deaths. Indeed, a UCLA study cited by the CBO finds that a 10% decrease in medical malpractice liability costs increases overall mortality by 0.2%; the study concluded that the monetary savings was not worth the cost the additional 48,000 patient deaths caused by malpractice over a 10-year period.[16]

Constant Vigilance: Other Attacks on Individual Rights

We must remain on alert for other potential legislation that seeks to curtail individual rights beyond just HR 1215. These include HR 1704, which enacts additional roadblocks such as certificate of merit requirements and expert witness restrictions, and allows courts to reduce already-capped attorney fees where attorneys represent minors or incompetent individuals. It further prevents apologies and expressions of sympathy by the defendant being used as an admission of liability.

We must also take a stance against HR 1565 ("Saving Lives, Saving Costs Act"). This bill proposes that if a doctor follows a physician organization's written policy guidelines on certain health issues, they *by definition* have not violated the standard of care. Such self-serving consensus documents are often written with the explicit purpose of providing physicians and other medical professionals protection from litigation. That process is part and parcel of defensive medicine, rather than optimal care for the patient. Such guidelines are written broadly, lacking specifics to provide meaningful guidance in the course of patient care. In addition, trade groups (such as the American College of Obstetrics and Gynecologists) specifically state that their guidelines do *not* set the standard of care. It is ridiculous to say that merely following the letter of written policy guidelines absolves a physician of liability when a physician must take care of a patient in light of the entirety of their potentially complex health history. Care for patients is rendered in an individual manner, and thus medical liability must be viewed in light of the total package of care rendered, not merely through the lens of general broad-strokes consensus documents.

Tort reform is a perennial topic of legislation and we must be careful to ensure that our clients' rights are preserved. HR 1215 is the most current and recent example of tort reform efforts; but there will be others, and attorneys must vigorously lobby against them to ensure the health of our justice system and their own legal practices.

Advocating For Our Clients

We must consider the impact of the wide-reaching impact of HR 1215 in terms of both our clients and legal practices. The bill has already passed the House of Representatives. If passed in the Senate, the President will sign it into law. If such a bill passes, it would radically re-shape the field of medical malpractice. It is within the best interests of our clients for us to advocate for them—and urge our legislators to vote NO on HR 1215.

ENDNOTES

1. Michelle Mello, Amitabh Chandra, Atul Gawande & David Studdert, "National Costs of the Medical Liability System", Health Affairs (Sept 2010 Millwood), vol. 29, No. 9, pp. 1569-1577.

2. Congressional Budget Office Cost Estimate, HR 1215, March 22, 2017, available online at https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/hr1215.pdf. In footnote 1, CBO cites its earlier letter to Senator Orrin Hatch regarding CBO's Analysis of the Effects of Proposals to Limit Costs Related to Medical Malpractice, (October 9, 2009) available online at http://www.cbo.gov/ftpdocs/106xx/doc10641/10-09-Tort_Reform.pdf. The CBO points out, however, "The estimated effect on national health spending reported in that letter is different from the estimated effect for this legislation because the two proposals would impose different limits on medical malpractice litigation.

3. MCL 600.1483.

4. *McCall Estate v US*, 134 So 3d 894, 901, 903 (Fla 2014).

5. MCL 600.6304(6); *Bell v Ren-Pharm, Inc*, 269 Mich App 464, 471-472; 713 NW2d 285 (2006).

6. Compare with Michigan's two-year statute of limitations with a limited two-tiered tolling for minors. MCL 600.5805(6) and MCL 600.5851(7) and (8).

7. One proposed new §11 to HR 1215, "follows Tennessee law" and was passed by voice vote. See Congressional Record 115th Congress, Vol 163, No. 111, p H5273, June 28, 2017. Compare with MCL 600.2169(1) ("in this state or another state").

8. Another new §§11-14, to HR 1215. See Congressional Record 115th Congress, Vol 163, No. 111, p H5279, June 28, 2017. Michigan has already enacted a similar evidentiary statute making expressions of "sympathy, compassion, commiseration, or a general sense of benevolence relating to the pain, suffering, or death" inadmissible an admission of liability in an action for medical malpractice. MCL 600.2155.

9. Federalism has been described as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v Harris*, 401 US 37, 44; 91 S Ct 746; 27 L Ed 2d 669 (1971).

10. Justice Brandeis aptly explained, "Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties." *Erie RR v Tompkins*, 304 US 68, 74; 58 S Ct 817; 82 L Ed 2d 1188 (1938) (diversity jurisdiction, footnotes omitted).

11. 1986 PA 178, 1993 PA 78, 1995 PA 161, and 1995 PA 249.

12. See, T. Berg, "Medical Malpractice Reform Analysis," Michigan Medical Law Report, Fall 2007, Vol. 3, No. 3; Michigan Lawyers Weekly, July 2007. For example, in 2002, there were 3,817 medical malpractice ("MH") cases pending in the circuit courts' caseload, of which 1,591 were reportedly disposed. Michigan Courts website, "2002 Annual Report, Caseload Reports, Statistical Supplements, Statewide", http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Statistics/2002/2002 Michigan Supreme Court Circuit Court Statistical Supplement.pdf (accessed online August 10, 2017). By 2016, only 1,772 "NH" cases were pending and 778 disposed. "Caseload Reports, Statistical Supplements, Statewide, http://courts.mi.gov/education/stats/Caseload/Pages/2016-Caseload-Reports.aspx (accessed online August 10, 2017).

13. J. Robert Hunter & Joanne Doroshow, "Premium Deceit: The Failure of 'Tort Reform' to Cut Insurance Prices," Center for Justice & Democracy (2002).

14. Robert Watson, "Q & A: A Voice Against Tort 'Reform'" interview of Joanne Doroshow, Trial (May 2017).

15. Martin Makary, "Medical Error: third leading cause of death in the US," British Medical Journal, Vol. 353, I2139 (May 3, 2016).

16. Darius Lakdawalla & Seth Seabury. 2009, "The Welfare Effects of Medical Malpractice Liability," Working Paper No. 15383, Cambridge, Mass.: National Bureau of Economic Research. September 2009, available online at http://www.nber.org/papers/w15383.pdf. Cited in CBO letter to Senator Hatch, October 9, 2009.