

OPPOSE S. 23

***MOTHERS AND BABIES SHOULD NOT BE
SECOND CLASS CITIZENS IN OUR NATION'S COURTS***

May 8, 2006

Dear Senator:

We urge you to oppose any effort to bring S. 23, the misnamed “Healthy Mothers and Healthy Babies Access to Care Act,” to the Senate floor. By singling out pregnant women and their babies, S. 23 is the most troubling attempt yet to place limits on the legal rights of individuals harmed by someone else’s negligence or wrongdoing.

Incredibly, S. 23 places limits only on medical malpractice cases involving the provision of obstetrical or gynecological services. In other words, the bill targets *only* the legal rights of women – particularly pregnant women – and babies. Adult men have nothing to fear from this legislation – if they are injured by medical malpractice, they can sue their doctor, hospital, HMO, or nursing home under state law without any limits imposed by this bill.

S. 23 fails to include a single provision that would make liability insurance for ob/gyns more available or affordable. And the bill makes no attempt to provide access to health care for women and babies who are uninsured or underinsured.

Even so, the proponents of this bill claim that it will result in greater access to healthcare by women and babies. The facts do not support this claim.

- Insurers have refused to lower malpractice insurance premiums after caps and other “tort reforms” have been enacted. To the contrary, states that have enacted legal restrictions have seen their insurance rates continue to shoot up, even after passing severe liability limits (e.g., Florida, Nevada, Ohio, Missouri and Texas).
- Lawsuits are not limiting access to health care. After extensive investigation, the U.S. General Accounting Office determined that doctors’ groups’ claims that malpractice insurance problems have limited access to health care could not be substantiated. In many cases, the GAO found the claims that doctors had left their practices or their states because of high malpractice premiums to be wrong.
- Medical malpractice costs are a tiny percentage of overall health care expenditures - under 1 percent according to the GAO and the Congressional Budget Office.
- Medical malpractice lawsuit filings, payouts and jury verdicts are all dropping, according to the National Center for State Courts.

Very simply, S. 23 discriminates against women and infants by restricting their right to hold physicians, hospitals, nursing homes, insurance companies, and HMOs, accountable for injuries or death resulting from negligent obstetrical or gynecological care. The bill would do nothing to make healthcare for women more available or more affordable.

The provisions of the bill include:

- **\$250,000 cap on pain and suffering damages—the only compensation a jury can provide for the injury itself.** Non-economic damages compensate patients for very real, life-altering injuries, such as loss of fertility, excruciating pain, permanent and severe disfigurement, or the death of a spouse or child. In many cases, the victim may have few out-of-pocket losses, but suffer great harm. For example, an 18-year-old woman who loses her ability to have a child may suffer no monetary loss. Under S. 23, the most she could recover in a medical malpractice lawsuit against negligent health care providers would be \$250,000. Only if the injured woman or child has the extreme misfortune of also being injured by a “health care institution” could that one-size-fits-all cap be greater. This cap is especially inequitable for persons with disabilities. A man who becomes disabled as a result of medical malpractice at age 40 will be able to recover unlimited damages for pain and suffering, while a baby born with a severe life-long disability as a result of medical malpractice at birth will be limited in what he or she can recover for a lifetime of pain and suffering.
- **Preempts state laws.** Despite its deliberately misleading language, this bill provides for a sweeping preemption of state law, not “state flexibility” or the “protection of states’ rights.” While the bill does not preempt state laws which already penalize negligently injured patients with one-size-fits-all compensation limits, S.23 does preempt *all other areas of state law covered in the bill*, including state rules regarding joint and several liability, the availability of damages, collateral sources, standards for qualifying expert witnesses and periodic payments. Ironically, it preempts no state laws that favor insurance companies, HMOs, hospitals, nursing homes, doctors and other health care defendants.
- **Restrictive statute of limitations.** Under the bill, a lawsuit would have to be filed no later than one year from the date the injury was discovered or should have been discovered, but in no case later than three years after the “manifestation” of injury. This unfair rule is much more restrictive than many state rules, and would arbitrarily cut off meritorious claims involving diseases or injuries with long incubation periods that may be difficult to identify. 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. In contrast, many state laws preserve the rights of minors to bring suit on their own behalf until they reach the age of majority.
- **Elimination of joint liability for all damages.** Proponents of S. 23 claim that the bill does not limit the out-of-pocket losses of injured patients. However, by eliminating joint liability for all damages, the bill will under-compensate injured mothers and babies whenever one or more defendant is unable to pay its share. This overturns many state laws, based on centuries of common law jurisprudence, that place the burden of an insolvent defendant on the other negligent parties instead of shortchanging the innocent victim.

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S. 23 would discriminate against women and children, making them second class citizens in our courts, but it would do absolutely nothing to help either patients or doctors. The real beneficiaries will be insurance companies and HMOs. On behalf of our organizations, and the millions of individuals we represent, please oppose any effort to bring S. 23 to the Senate floor.

If you have any questions or want more information, please contact Andrea LaRue, (202) 530-0175.

Sincerely,

Legal Momentum
National Organization for Women
National Partnership for Women & Families
National Women's Law Center