H.R. 1215 is a Massive Assault on States' Rights, a Sledgehammer to State Tort Systems

H.R. 1215 broadly preempts both state medical malpractice law and state products liability laws, violating the 10th Amendment and States' Rights.

Under the U.S. tradition of federalism, tort law is an area of law exclusively left to state governments. In other words, there is no federal tort law. While the bill has provisions regarding "State Flexibility" these provision are in-fact preemption clauses, mandating a strict federal regime that contradicts the decisions of state legislatures and state courts. Even CBO has recognized this bill's preemption of state law.[1]

Importantly, H.R. 1215 would preempt not just state tort law as it relates to medical malpractice but also state product liability law. The immunity provided by the bill broadly applies to insurance companies, biotech companies, pharmaceutical corporations, medical device manufacturers, compounding pharmacies and for-profit nursing homes, making it much broader than any state medical malpractice reform laws.

Preempts State Constitutions. The most offensive type of preemption in the bill is the bill's direct preemption of State Constitutions. Many states have constitutional provisions that forbid the limitation of damages in civil suits. H.R. 1215 overrides these State Constitutions, demanding that damages in lawsuits against "health care providers" be limited to $250,000.

- Five states (AZ, AR, KY, PA and WY) have state constitutional prohibitions on damage caps.
- Two states (NY and OK) have state constitutional prohibitions on damage caps in cases of wrongful death, including medical malpractice.
- Eleven states (AL, FL, GA, IL, MO, NH, ND, SD, UT, WA and WI) have state supreme courts that have struck down statutorily enacted medical malpractice damage caps.[2]

H.R. 1215 mandates that non-economic damages in health care lawsuits must be capped at $250,000, preempting the State Constitutions in these states. H.R. 1215 has a "State

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[1] CBO, *Options for Reducing the Deficit: 2017 to 2026* (December 2016) ("Some people might oppose this option because it would be a federal preemption of state laws. Currently, many states either specify higher limits on liability, loss, or damage claims than those proposed in this option or do not limit such claims at all."); available at: https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/52142-budgetoptions.pdf.

[2] The state legislatures in Missouri, North Dakota, South Dakota and Wisconsin has subsequently re-passed statutorily enacted caps on damages in medical malpractice cases after the state supreme court has stuck down the original statutorily enacted cap on damages. In these states, the state legislature did not amend their state constitutions, but rather re-passed statutory caps on damages. Nevertheless, the state supreme court cases that declared caps unconstitutional remain good law in each of these states, and it remains untested whether the newly enacted statutory caps will pass constitutional muster under a challenge in the court.

Flexibility" section that states the bill will not preempt any State law that specifies a particular monetary amount of economic or noneconomic damages –whether that amount is greater or lesser than $250,000 (Sec. 3(e) of the bill).

However this "state flexibility" language is useless to states that have Constitutional prohibitions on damages caps; these states have no caps, and thus, no cap to defend a "greater or lesser" amount. These State Constitutions will be preempted by H.R. 1215.

Preempts State Legislatures' Decisions to Reject Caps on Damages. In addition to states that have struck down caps on damages or have constitutional provisions prohibiting the capping damages, ten states (CT, DE, IA, ME, MN, NJ, NY, OR, RI, VT) have no damage caps for personal injury actions. While not a violation of these states' constitution, any federal legislation capping damages would radically preempt the law of these ten states.

These states are also unaided by H.R. 1215's "State Flexibility" language. These states have no caps, their legislatures have considered and rejected them. Yet, H.R. 1215 would preempt their decisions and mandate a cap of $250,000 under their state law.

Preempts States that Cap ONLY Medical Malpractice. H.R. 1215 is NOT a medical malpractice law, it provides immunity to the entire health care industry, including pharmaceutical and biotech companies, insurance companies and for-profit nursing homes. It applies to any claim against a "health care provider" regarding the provision or use of health care services or medical products, and "regardless of the theory of liability." (Sec. 8).

Many states have passed medical malpractice caps on damages, but stopped short of providing these immunities to the broader health care industry. H.R. 1215 would leave in place existing state malpractice caps on economic and non-economic damages, but also adds new damage caps for additional lawsuits involving a health care defendant such as a bad faith claim against an insurer, product liability claim against a biotech company or an abuse and neglect claim against a nursing home.

So, states that have already passed a cap on medical malpractice cases would keep their damage caps, but the bill would force another federal cap mandate applying to a broader group of health care defendants.

For example, the California MICRA cap applies to non-economic damage claims but only against hospitals and doctors. California would keep that cap, but H.R. 1215 would force another cap on non-economic damages against the pharmaceutical, nursing home, and insurance industries cases as well.

Preempts States that Have Already Reformed Medical Malpractice Laws. H.R. 1215 includes other "reforms" than just caps on damages including, limits on attorney's fees, periodic payment of damages, immunity from product liability, and strict limits on statutes of limitation. Many states have passed various forms of medical malpractice reform laws, including reducing statutory limitations, reforming joint and several liability or other types of litigation reforms. H.R. 1215 preempts almost all of these carefully-balance state laws; it only excludes "reforms" that provide greater benefit to defendants (Sec. 10(c)).

For example, California law only eliminates joint liability for noneconomic damages. H.R.1215 completely eliminates joint liability for economic and noneconomic loss, and thus would preempt California medical malpractice law. Most states have rejected the elimination of

joint liability for economic loss because it shifts costs from multiple negligent wrongdoers to the taxpayers, who are left paying for the injured patient's care.

As another example, Texas has passed medical malpractice reform laws but did not include limitations on attorneys' fees as part of its "reform" package. H.R. 1215 will preempt Texas's law, mandating a strict attorney fee limitation. H.R. 1215's "State Flexibility" language in this section (Sec. 4(b)) is useless to the state of Texas, since Texas did not pass a higher fee limit, but rather rejected attorney fee limits entirely.

Notably, H.R. 1215 contains a special grant of immunity to any health care provider, which could include a doctor, dentist or other licensed medical service provider; a hospital, nursing home, or assisted living facility; a mental health treatment center, drug and alcohol rehabilitation facility, out-patient surgery center, or any other person or facility licensed to provide medical services for prescribing or dispensing a prescription drug, and prohibits such a provider from being named in a product liability lawsuit, specifying that these providers should not be liable in class action lawsuits involving medical products.

This provision would preempt the state product liability law in all 50 states. No state law has a similar grant of immunity regarding prescribing or dispensing prescription drugs.

The Alleged "Federal Nexus" under H.R. 1215 is a Joke. Proponents of H.R. 1215 have recognized the federalism concerns of this bill - that the bill blatantly preempts the laws of states - and have sought to justify this vast preemption by claiming that the 115th Congressional version of the bill has a new "federal nexus" provision, only applying the bill's provisions to health care goods and services in which coverage, a good or service was provided in whole or in part under any federal program, any federal subsidy or tax benefit. (Sec. 8(7)).

This language is new to this version of the bill and is totally untested since the bill never received a hearing. While the proponents express its "limiting" purpose, this "federal nexus" language would unquestionably apply to every health care good and service remotely related to Medicare, Medicaid, Veterans or military health plan, such as Tricare, COBRA, flexible spending benefits, an ERISA plan (pre-tax dollars); a multi-employer health care plan (pre-tax dollars); or a health savings plan (again, pre-tax dollars), and all insurance products purchased via the Affordable Care Act (which are purchased on ACA exchanges, by ACA mandates or with ACA tax subsidies).

In short, this "federal nexus," "*limiting*" the bill to health care coverage, products and services that are paid in part or whole by a federal program, is another way of saying that the bill applies to nearly every healthcare good and product in the United States.