

**Mr. SCOTT of Virginia:** Mr. Chairman, I rise today in opposition to H.R. 5. There are several troublesome provisions with the bill.

For example, it sets an arbitrary and discriminatory \$250,000 cap on noneconomic damages; it reduces the amount of time an injured patient has to file a lawsuit; and it also repeals IPAB, the board created by the Affordable Care Act to control Medicare costs while preserving access to care.

Although there are many troublesome provisions in the bill, I'd like to speak at length about one provision, the so-called fair share provision.

The fair share provision would repeal the general rule of joint and several liability. Joint and several liability is a common law principle that enables an injured patient to seek compensation from any or all of the parties responsible for the patient's injuries. Joint and several liability provides that each of the guilty defendants are jointly responsible and individually responsible for the total damages, and, if they want, they can agree in advance on how to apportion fault among themselves; thus they can purchase and share the cost of insurance and charge their fees for services based on that agreement.

The general rule of joint and several liability does not burden the injured patient with the requirement of assigning proportional fault. This PATH Act creates a bizarre and impossible standard for the patient by eliminating joint and several liability. It requires that the plaintiff, who is the patient, demonstrate each negligent party's proportional responsibility. This is often impossible for the plaintiff because frequently all the patient knows is he woke up as the victim of malpractice. Why should he then be required to find out what each and everybody did? And how does he do that when everybody is denying any liability?

Unfortunately, this bill essentially requires the plaintiff to conduct a separate case against each defendant, each case requiring a finding of duty of care, a breach of that duty, a proximate cause, a finding of damages, and then a determination of what part of the damages are attributable to what malpractice.

Each of those cases requires an expensive expert witness, depositions, and the full expense of complicated litigation. It also complicates any settlement that might take place because a patient can't take a chance of settling with one defendant without knowing what, ultimately, the other defendants might have to pay.

What's most disturbing about this bill is it eliminates joint and several liability for all kinds of damages, including economic damages. In doing so, H.R. 5 is more extreme than most States' laws. Economic loss compensates injured parties for their out-of-pocket expenses, such as the hospital bills, the doctor bills, and lost wages. Even though the proponents of H.R. 5 claim to use California's Medical Injury Compensation Reform Act as a model, not even California

eliminates joint and several liability for economic damages.

Mr. Chairman, over centuries, each State has balanced judicial procedures between defendants and plaintiffs. Some provide longer and some shorter statutes of limitations. Some have large, some have small, and some have no caps at all on damages. Some deny recovery in cases of contributory negligence. Others allow recovery based on comparative negligence. Most have joint and several liability--a few do not--but the interests of plaintiffs and defendants have been balanced over the years in each State. We should not override centuries of the State-level balancing of these interests by preempting some parts of tort law with this Federal bill.

Mr. Chairman, we usually hear that tort reform is necessary to address three problems: defensive medicine, high malpractice premiums, and frivolous lawsuits.

This bill will not prevent, will not do anything to deal with defensive medicine, because the lawsuits are not eliminated. There will still be defensive medicine, and because it increases expenses for defendants, it may actually increase total malpractice premiums.

Finally, the bill does not target frivolous lawsuits. The Institute of Medicine estimates that approximately up to 100,000 patients die every year due to medical mistakes, and yet there are only about 15,000 medical malpractice payments each year, so there's a question of whether or not frivolous lawsuits are even a problem. But to the extent that it is a problem, this bill will not target frivolous lawsuits; it will increase the cost of litigation and may reduce all lawsuits, but it will not target frivolous lawsuits.

So, Mr. Chairman, I would hope that we will not pass a Federal law to abolish joint and several liability at the State level, and I would urge my colleagues to oppose this legislation.