

March 19, 2012

U.S. House of Representatives
Washington, DC 20515

Dear Member of the House of Representatives:

The House will soon consider H.R. 5, the “Protecting Access to Healthcare Act.” Title I of the bill includes troubling tort reform language that was reported out of the Judiciary and Energy and Commerce Committees last year. Title II of the bill repeals the Independent Payment Advisory Board (IPAB), created in 2010 as part of the Patient Protection and Affordable Care Act. Without commenting on Title II (the American Bar Association takes no position on the proposed repeal of the IPAB), I write on behalf of the ABA, with nearly 400,000 members nationwide, to express our opposition to the key provisions of H.R. 5 and our doubts regarding the presumed savings that would result from those provisions.

If enacted, Title I of H.R. 5 would cap the noneconomic damages that a plaintiff in a health care lawsuit could recover. It would also preempt existing state laws on proportionate liability, allow courts to reduce contingent fees, and abolish the collateral source rule. For over 200 years, the authority to determine these matters and other aspects of medical liability law has rested with the states. This system, which allows each state the autonomy to regulate the resolution of medical liability actions within its borders, is a hallmark of our American justice system.

The ABA shared its concerns regarding language within Title I of H.R. 5 on two prior occasions during this Congress. On February 8, 2011, the ABA wrote to Judiciary Chairman Smith and Ranking Member Conyers regarding the “Help Efficient, Accessible, Low-cost, Timely Healthcare HEALTH) Act of 2011” (at the time also H.R. 5), the language of which is identical to the language in Title I of the new H.R. 5. And on May 10, 2011, we shared our concerns again with Energy and Commerce Chairman Upton and Ranking Member Waxman. Our May 10, 2011, letter is attached; it more fully describes the ABA’s concerns regarding damages, proportionate liability, contingent fees, and the collateral source rule.

Because there has been a great deal of discussion regarding the decreased costs that purportedly would result from the so-called “tort reform” provisions in Title I, I also want to share with you a letter sent to the Congressional Budget Office in November 2009. The ABA’s Standing Committee on Governmental Affairs (SCGA) carefully reviewed the October 9, 2009 CBO letter to Senator Hatch asserting this positive revenue impact and the studies on which CBO based its conclusions. The committee noted that “the CBO

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letter selectively relied on some studies addressing only one side of the tort reform argument and misconstrued the conclusions of some of the studies cited.” The SCGA concluded that “on the whole, the results regarding potential savings through tort reform appear ambiguous at best.”

As we have expressed previously, the American Bar Association remains committed to maintaining a fair and efficient system of justice where victims of medical malpractice can obtain redress based on state laws. Because of the historic role they have played, the states remain the repositories of experience and expertise in these matters, and Congress should not substitute its judgment, as it does in Title I of H.R. 5, for the systems that have thoughtfully evolved in each state over time. Because of our opposition to the provisions in Title I and our doubts about cost-saving claims, we urge you to vote “no” on H.R. 5.

Sincerely,

A handwritten signature in black ink, reading "Thomas M. Susman" with a long horizontal flourish extending to the right.

Thomas M. Susman
Director

Attachments

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May 10, 2011

The Honorable Fred Upton
Chairman
Energy & Commerce Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Henry A. Waxman
Ranking Member
Energy & Commerce Committee
U.S. House of Representatives
Washington, DC 20515

Re: Concerns Regarding H.R. 5, the "Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011"

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Dear Chairman Upton and Ranking Member Waxman:

On behalf of the American Bar Association, which has nearly 400,000 members, I am writing to express our concerns regarding certain key provisions in H.R. 5, the "Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011." I understand that your committee is scheduled to mark up this bill on Tuesday and Wednesday, May 10 and 11, 2011.

For over 200 years, the authority to determine medical liability law has rested with the states. This system, which allows each state the autonomy to regulate the resolution of medical liability actions within its borders, is a hallmark of our American justice system. The states also regulate the insurance industry. Because of the role they have played, the states are the repositories of experience and expertise in these matters. Therefore, the ABA believes that Congress should not substitute its judgment, as it does in H.R. 5, for the systems that have thoughtfully evolved in each state over time.

Specifically, I would like to share with you the ABA's concerns and other views regarding key provisions in the proposed legislation relating to damages, proportionate liability, contingent fees, and the collateral source rule.

Damages. The ABA believes that compensatory damages should not be capped at either the state or federal level, and as a result, we have serious concerns regarding Section 4(b) of H.R. 5 which would cap noneconomic damages for a plaintiff's injuries at \$250,000. For more than thirty years, the ABA has studied the research on federal and state legislative efforts to impose limits on noneconomic damages, including pain and suffering. Empirical research has shown that caps diminish access to the courts for low wage earners, like the elderly, children and women; if economic damages are minor and noneconomic damages are capped, attorneys are less likely to represent these potential plaintiffs.

Those affected by caps on damages are the patients who have been most severely injured by the negligence of others. These patients should not be told that, due to an arbitrary limit, they will be deprived of the compensation determined by a fair and impartial jury. The courts already possess and exercise their powers of remittitur to set aside excessive verdicts, and that is the appropriate solution rather than an arbitrary cap. For all these reasons, the ABA opposes those provisions in H.R. 5, such as Section 4(b), which would place a dollar limit on recoverable damages and operate to deny full compensation to a patient in a medical liability action.

Proportionate Liability. Section 4(d) of H.R. 5 would create a "fair share rule" under which each party would be liable only for its share of any damages, and as a result, the provision would preempt existing state laws that provide for joint and several liability in medical liability cases. The ABA believes that, at the state level, the laws providing for joint and several liability "should be modified to recognize that defendants whose responsibility is substantially disproportionate to liability for the entire loss suffered by the plaintiff are to be held liable for only their equitable share of the plaintiff's non-economic loss." While the ABA supports these and other improvements to the tort laws at the state level, it opposes federal preemption of the medical liability laws of the states and territories. Therefore, the ABA opposes Section 4(d) to the extent that it would preempt existing state laws and to the extent that it would apply a proportionate liability rule to all damages, not just the plaintiff's non-economic damages.

Contingent Fees. Section 5(a) of H.R. 5 would empower a court to reduce the contingent fees paid from a plaintiff's damage award to an attorney, redirect damages to the plaintiff, and further reduce contingent fees in cases involving minors and incompetent persons. The ABA has long opposed sliding scales for contingent fees and other special restrictions on such fees. In 1985, the ABA created a Special Committee on Medical Professional Liability ("Special Committee") to study the initiatives proposed at that time in an Action Plan of the American Medical Association Special Task Force on Professional Liability and Insurance. Among the initiatives was a recommendation of sliding scales on contingent fees, having effects comparable to the caps proposed here. After review, the Special Committee concluded the following:

a sliding scale for contingency fees in medical malpractice litigation may very well reduce total awards for patient-victims by depriving them of representation by a trial lawyer sufficiently skilled at obtaining the highest appropriate award.

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Mandatory sliding scale systems could also inhibit claimants' access to the court system by limiting the availability of counsel. And imposing sliding scales only in medical malpractice cases would, in effect, create a different level of skills among available counsel for plaintiffs in medical malpractice cases from those available to claimants in other tort cases.

As a result of this finding, the ABA adopted policy in 1986 that "no justification exists for imposing special restrictions on contingent fees in medical malpractice actions." Therefore, the ABA opposes the limits on contingent fees contained in Section 5(a) of H.R. 5.

Collateral Source Rule. Section 6 of H.R. 5 would abolish the collateral source rule, a common law doctrine that prohibits evidence that a plaintiff has received monetary benefits, such as private health or disability insurance, from third parties. The ABA supports retention of the collateral source rule while allowing third parties who have furnished monetary benefits to plaintiffs to seek reimbursement out of the recovery.

The American Bar Association remains committed to maintaining a fair and efficient system of justice where victims of medical malpractice can obtain redress based on state laws, without arbitrary or harmful restrictions. We offer these perspectives for your consideration as you mark up H.R. 5.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman
Director

cc: Members of the House Energy and Commerce Committee

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November 3, 2009

Douglas W. Elmendorf
Director
Congressional Budget Office
U.S. Congress
Washington, DC 20515

Dear Mr. Elmendorf:

On October 9, 2009, the Congressional Budget Office sent a letter to Senator Hatch on “the effects of proposals to limit costs related to medical malpractice (‘tort reform’)” that said that tort reform could decrease costs for health care. The American Bar Association has adopted numerous policies directed toward improving the medical liability system. However, the ABA has long opposed medical malpractice caps on noneconomic damages, health courts, and other alternatives to the traditional state-based tort system that deprive those injured by medical malpractice of the ability to obtain redress through a traditional jury trial. Because your letter may lend support to a position inconsistent with this ABA policy, the ABA’s Standing Committee on Governmental Affairs has carefully reviewed the CBO letter and the studies on which it bases its conclusions. That review suggests that the CBO letter selectively relied on some studies addressing only one side of the tort reform argument and misconstrued the conclusions of some of the studies cited.

Numerous scholars have studied the issues other than those discussed in the CBO letter. For example, in August 2008, twenty-four law and social science professors submitted an amicus brief in the case of Lebron v. Gottlieb Memorial Hospital, then pending before the Illinois Supreme Court. The amicus brief presents extensive empirical evidence relevant to the questions the CBO letter addresses. Although several of the studies referred to in the CBO letter cite to the work of some of these scholars, the bibliography does not include the work of any of the scholars who signed on to the amicus brief. The ABA Governmental Affairs Office would be pleased to share with the CBO materials prepared by these scholars.

Our review of the few studies cited in your letter suggests that, on the whole, the results regarding potential savings through tort reform appear ambiguous at best. For example, the CBO letter refers to a study by Lakdawalla & Seabury (September 2009) finding that several types of reform lowered the costs of health

plans offered by self-insured employers, but does not mention the study's key conclusions that "policies that reduce expected malpractice costs are *unlikely* to have a major impact on health care spending for the average patient, and are also *unlikely* to be cost effective over conventionally accepted ranges for the value of a statistical life." (Emphases in this and subsequent quotations have been added.) In addition, the CBO letter states that the Currie & MacLeod study (2008) (which focused on cases relating to child births in the United States) found different financial incentives for doctors when different reforms are imposed. Yet the authors say that the study shows that, *contrary* to the conclusion that defensive medicine is reduced in response to tort reforms, we "show that *this does not appear to be true* for at least one large and important class of cases – child births in the United States" (page 2). The authors do say that caps on damages, in the context of child births, reduce the threat of malpractice liability. However, the study concludes that our "model shows that contrary to popular belief, *reducing the threat of malpractice can increase the use of unnecessary procedures* and may reduce the effort made by doctors in realistic scenarios" (page 26).

Also, the Sloan & Shadle (2009) study referenced on the topic of adverse impacts on patients' health says, among other things, that "assertions that tort reforms will reduce waste of scarce resources seems, *at best, highly premature.*" That study also concluded that "it seems *inappropriate to conclude* that tort reforms implemented to date succeed in reducing non-beneficial care as their proponents would have it" (page 490).

In addition to these deficiencies in the CBO letter, it appears that the CBO was not asked to look at the impact of tort reform when those injured by medical malpractice face additional obstacles in seeking compensation for their losses. This may explain why it did not address the potential downsides of tort reform referred to in the limited number of studies to which the CBO cites. For example, the Currie & MacLeod study (2008) of childbirth-related cases states:

tort reform that reduces the malpractice risk facing doctors *appears to increase rather than decrease* unnecessary procedure use, with harmful effects on patients. Much of the public and academic discussion of tort reform on medical malpractice is premised on the idea that reforms must either reduce unnecessary procedure use or have no effect. Our results demonstrate that the incentives created by the tort system are complex, and interact in important ways with other incentives facing physicians. Without knowing more about the specific incentives faced by physicians *it is hazardous to predict that a specific tort reform will either reduce unnecessary procedure use or have beneficial impacts on health* (Pages 26-27).

The ABA submitted the attached amicus brief in the appeal of Lebron v. Gottlieb Memorial Hospital that cites its own research over the last 30 years that clearly demonstrates through objective evidence that caps for noneconomic damages discourage lawyers from filing *meritorious* malpractice cases where economic damages are low, thus depriving such persons injured by malpractice of their day in court. It would be expected that other proposed tort reforms would also impact the ability of some injured persons to obtain lawyers to seek compensation for their losses. Even if no lawsuit is filed, those losses do not vanish. The person injured by malpractice still has needs that must be met for things such as health care

and lost [income](#), and the costs resulting from those needs would shift to be absorbed by the injured person or his or her family or, if not, will likely shift to already overburdened government programs to ultimately be paid by the taxpayer--a shift either way to those who did not cause the harm. These collateral costs represent substantial costs to the government, to American taxpayers and to the injured patient and his or her family.

By way of example, an injured patient who is unable to work due to malpractice and is not compensated by the insurer will apply for Social Security disability or SSI eligibility (unless that person has significant other financial resources or otherwise does not qualify). Social Security is already facing a significant backlog in disability cases. 720,000 Americans with disabilities are currently waiting for a hearing before an ALJ to rule on their applications to receive Social Security Disability Insurance benefits. And there is an increase in delays, at this time, on the front end of the SSA Disability process as well. Facing the highest unemployment levels in 25 years, Americans are filing disability claims with the Social Security Administration at a higher rate than in past years. It is not clear that, as a matter of public policy, it is desirable to shift the costs of providing disability payments for injuries from medical malpractice from the health care providers' insurer to SSA's coffers.

In addition, if certain pending health care reform proposals are enacted, injured patients who cannot work, and who therefore may have lost access to employer-sponsored health care, may be given federal government subsidies paid by taxpayers. Those injured patients may resort to Medicaid in order to get the health care they need. The states are already struggling with large deficits as they pay for their part of Medicaid costs for those who are otherwise unable to afford medical care. Also, under the current system, both Medicare and Medicaid routinely receive sizeable third-party liability payments from insurers via lien or subrogation rights when there is a settlement or award in a malpractice claim. These payments reimburse Medicare and Medicaid for medical expenditures made for the benefit of the injured persons. Any significant curtailment of the patient's right to recover from the health care provider's insurer will shift health care costs from the health care provider's insurer to the government. CBO should take these cost shifts into account.

Finally, we would point out CBO's evaluation of medical malpractice insurance premiums may be skewed by the possible presence of imperfect competition in the insurance industry. This issue would in some part be addressed by pending proposals to repeal the McCarran-Ferguson exception to the antitrust laws. The American Bar Association believes that the McCarran-Ferguson exception to the antitrust laws should be repealed and replaced by a series of safe harbor protections for certain insurance industry conduct. For all other conduct, the ABA position is that the insurance industry should be subject to the same antitrust rules as other industries. (The ABA testified most recently on October 8, 2009, on McCarran-Ferguson reform before the House Judiciary Committee Subcommittee on Courts and Competition Policy. Attached is the ABA's written testimony from the hearing.) The ABA will continue to urge Congress to enact McCarran-Ferguson reform legislation.

Representatives of the ABA would be pleased to meet with you at your earliest opportunity to discuss these issues. Lillian Gaskin, ABA Senior Legislative Counsel, would be pleased

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to work with you and your staff to schedule such a meeting. Ms. Gaskin can be reached at (202) 662-1768 or at gaskinl@staff.abanet.org.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman

cc: Honorable Patrick J. Leahy
Chairman
Senate Committee on the Judiciary

Honorable Jeff Sessions
Ranking Member
Senate Committee on the Judiciary

Honorable John Conyers, Jr.
Chairman
House Committee on the Judiciary

Honorable Lamar Smith
Ranking Member
House Committee on the Judiciary

Members, Senate Committee on the Judiciary

Members, House Committee on the Judiciary