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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 that reads "Thomas M. Susman". The signature is written in a cursive style 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