

September 22, 2009

The Honorable Max Baucus
Chairman, Senate Finance Committee
United States Senate
Washington, D.C. 20510

Dear Chairman Baucus:

We understand that when your Committee marks up its health reform proposal beginning tomorrow, amendments may be offered relating to preemption of portions of the states' medical liability laws. On behalf of the American Bar Association, I am writing to share the views of the ABA on the subject.

While the ABA has developed proposals to improve the tort laws at the state level, it opposes federal preemption of the medical liability laws of the states and territories since the courts and legislatures of the states and territories are the appropriate bodies to administer the tort laws. For over 200 years, the authority to promulgate medical liability laws has rested with the states. This system, which allows each state and territory the autonomy to regulate the resolution of medical liability actions within its borders, is a hallmark of our American justice system. The states and territories also regulate the insurance industry.

Medical malpractice litigation accounts for only a very small portion of health care costs, and proposed changes to these laws would have a negligible impact on overall health care costs. Medical malpractice costs, as measured by medical malpractice premiums in 2006—the most recent year for which all the necessary data to make these comparisons is available—accounted for only .58 percent of overall health care costs. The cost of medical malpractice insurance premiums generally reflects the cost of the medical-legal system.¹

“Defensive medicine” is sometimes discussed in connection with medical malpractice. Contrary to what some believe, research performed by the ABA shows that incidents of defensive medicine are not common. Doctors order tests to ensure that they have all the information they need to provide patients with the best possible care. In fact, a 1992

¹ “National Health Expenditures Aggregate, Per Capita Amounts, Percent Distribution, and Average Annual Percent Growth, by Source of Funds: Selected Calendar Years 1960-2007.” Centers for Medicare & Medicaid Services, Office of the Actuary, National Health Statistics Group; U.S. Department of Commerce, Bureau of Economic Analysis; and U.S. Bureau of the Census; “Property/Casualty Insurance Industry Aggregates.” Medical Malpractice Direct Premiums Written. National Association of Insurance Commissioners, 1992-2007.

Congressional Budget Office report concluded that most of the care commonly referred to as "defensive medicine" would have been provided anyway, for reasons other than concerns about medical malpractice.² More recently, a 2004 CBO study noted, "Some so-called defensive medicine may be motivated less by liability concerns than by the income it generates for physicians or by the positive (albeit small) benefits to patients. On the basis of existing studies and its own research, CBO believes that savings from reducing defensive medicine would be very small."³

Tort laws—including medical malpractice laws—that work for everyone by protecting the rights of patients, doctors, and insurers alike are essential. To this end, the ABA has adopted policy supporting a number of improvements that states should consider fashioning in their tort laws if they have not already done so. In addition, the ABA adopted policy urging enactment of legislation at the state level relating to the admissibility of apologies in medical malpractice cases. It also adopted policy in 2008 urging federal, state and territorial legislative bodies to adopt legislation establishing pilot programs that enable and encourage medical personnel to report hospital events which, if repeated, could threaten patient safety. In short, there are a number of responsible approaches to addressing medical malpractice issues that can improve the system without sacrifice to the interests of persons injured and deserving of compensation.

An amendment may also be offered during the Committee mark-up relating to a proposal to create "health courts" in which medical liability cases would be removed on a mandatory basis from the state court system—where cases are heard by judges and or juries—to health care tribunals. The ABA firmly supports the integrity of the jury system, the independence of the judiciary, and the right of consumers to receive full compensation for their injuries without any arbitrary caps on damages or denial of rights to a jury trial. It is for these reasons that the ABA opposes the creation of any health court system that undermines these values by requiring injured patients to utilize "health courts," rather than allowing them to utilize regular state courts to be compensated for medical negligence.

For decades, the ABA has supported the use of and experimentation with voluntary alternative dispute resolution techniques in medical malpractice cases, but only after a dispute has arisen. Requiring injured patients to be a part of a Workers' Compensation model—such as the "health courts" proposal for medical malpractice cases—is inappropriate. Under Workers' Compensation systems, there is a trade-off of the loss of a right to bring an action in court that is counterbalanced by a "guaranteed" award that is not fault-based. With the proposed "health courts" proposal, an injured patient loses the right to bring an action in court but receives no guarantee of an award. If a "health courts" amendment is offered, we urge you to vote "no."

An amendment may also be offered relating to caps on damages. The ABA is especially concerned about caps on pain and suffering recoveries and believes they should not be

² See Congressional Budget Office, *The Economic Implications of Rising Health Care Costs*, October 1992, p. 27.

³ Congressional Budget Office, *Limiting Tort Liability for Medical Malpractice*, Economic and Budget Issue Brief (Jan. 8, 2004), p. 6

capped at either the state or federal level. 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 and harmful cap.

Thank you for considering our views on this very important subject.

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, Senate Finance Committee