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ABA DAY IN WASHINGTON  
PLANNING COMMITTEELaurel G. Bellows, Chair  
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Monday, January 11, 2010

**The Honorable Harry Reid**  
Majority Leader  
United States Senate  
Washington, D.C. 20510**The Honorable Max Baucus**  
Chair  
Committee on Finance  
United States Senate  
Washington, D.C. 20510**The Honorable Tom Harkin**  
Chair  
Committee on Health, Education  
Labor and Pensions  
United States Senate  
Washington, D.C. 20510**The Honorable Patrick Leahy**  
Chairman  
Committee on the Judiciary  
United State Senate  
Washington, D.C. 20510**Dear Majority Leader Reid and Senators:**

I am writing to you on behalf of the American Bar Association, with nearly 400,000 members nationwide, to commend you on your dedication to ensuring that no American goes without health care. Since 1972, the American Bar Association has supported access to quality health care for all Americans regardless of their income and, as the final terms of this historic legislation are resolved, the ABA would like to express its strong support for several important provisions found in H.R. 3962 and H.R. 3590.

**Provisions found in H.R. 3962*****1) McCarran-Ferguson exemption from the federal antitrust laws***

Section 262 of H.R. 3962, as passed by the House, partially repeals the McCarran-Ferguson exemption from the federal antitrust laws currently enjoyed

**The Honorable Mitch McConnell**  
Minority Leader  
United States Senate  
Washington, D.C. 20510**The Honorable Charles Grassley**  
Ranking Member  
Committee on Finance  
United States Senate  
Washington, D.C. 20510**The Honorable Michael B. Enzi**  
Ranking Member  
Committee on Health, Education,  
Labor and Pensions  
United States Senate  
Washington, D.C. 20510**The Honorable Jeff Sessions**  
Ranking Member  
Committee on the Judiciary  
United State Senate  
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by health care and medical malpractice insurers. Congress, in the past, eliminated exemptions for many industries with the result that competition increased after the elimination of the exemption. The American economy, its consumers and the insurance industry would benefit in the long-run from repeal of the McCarran-Ferguson exemption since, as in the case of other industries, elimination of the exemption can be expected to result in increased competition in the insurance industry.

The ABA has for twenty years urged the repeal of the McCarran-Ferguson exemption from the antitrust laws, to be replaced by a series of safe harbors defining certain categories of exempt conduct. For conduct outside these safe harbors, the insurance industry should be subject to the same rules as other industries. The safe harbors are not intended to alter existing antitrust policy; rather, they are intended to serve the important objective of deterring private litigation challenging conduct that, in the unique circumstances of the insurance industry, may actually promote competition. H.R. 3962 is consistent with ABA recommendations to provide safe harbors for certain procompetitive conduct. The ABA believes that the safe harbors incorporated in the legislation will provide clarity and guidance to the insurance industry without eliminating competition.

## ***2) Advance planning consultations***

Section 1233 of H.R. 3962, as passed by the House, provides medical coverage for a voluntary consultation between enrollees and practitioners to discuss advance planning issues. Consultations could be provided every 5 years, or more frequently if the enrollee undergoes a significant change in health. The ABA believes these voluntary options would improve the quality of care for America's seniors for several reasons. Many seniors are not aware of their end-of-life options, and many caregivers and extended family members lack the expertise to provide the proper guidance in these situations. In addition, physicians would benefit from understanding patients' needs and goals, whatever they may be. This information often is not conveyed to them at all, or not until the very final stages of the patient's life. Physicians clearly prefer to provide care based on specific wishes of their patients.

## ***3) Medical-Legal Partnerships***

Section 2537 of H.R. 3962, as passed by the House, establishes a national demonstration project for Medical-Legal Partnerships (MLPs), one of the most important innovations in recent years to improve the health of vulnerable populations while also lowering costs. Today, over 80 medical-legal partnerships serving about 200 hospitals and health centers in 38 states have already shown results in providing better health care for patients and improving living, learning and working conditions for patients and their families. The MLP network consists of teams of front-line health care providers - doctors, nurses and social workers - and lawyers currently serving over 10,000 patients and their families annually including children, the elderly, patients with cancer, pregnant women, the formerly incarcerated reentry community and other vulnerable populations.

MLPs help educate physicians about the impact of unmet legal needs on the health of patients and provide physicians with information on screening for such unmet legal needs of their patients. Low-income patients confront illnesses that interfere with their ability to meet their basic needs. Not every illness has a biological remedy, however, a family forced to choose between food and heat in the winter months cannot be treated with a prescription or a

vaccination. Similarly, a child with asthma will never breathe symptom free – no matter how much medication is administered – if he or she returns from the doctor’s office to mold-infested housing, as thousands do. MLPs integrate lawyers in the healthcare setting to help patients navigate the complex legal system that often holds solutions for many social determinants of health – income supports for food-insecure families, utility shut-off protection during cold winter months, and mold removal from the homes of asthmatic children.

Section 2537 supports the ongoing collaborative efforts of the American medical and legal professions to help identify and resolve diverse legal issues that affect patients’ health and well-being. The ABA strongly supports the expansion of this model.

### **Provisions found in H.R. 3590**

#### ***1) Elder Justice Act***

Subtitle H of H.R. 3590, as passed by the Senate, contains Elder Justice Act provisions to establish a much needed, multi-pronged, coordinated strategy to address elder abuse, neglect, and exploitation at the federal, state and local levels. Congress estimates that as many as five million older people are abused, neglected, or exploited each year in their homes and in long-term care facilities. We know that elder abuse hastens death. It is also costly; a recent study estimated that older persons lose \$2.6 billion annually to financial exploitation alone. Currently, despite the extent and expense of elder abuse, only \$154 million is devoted to this problem compared to more than \$7 billion dedicated to child abuse and domestic violence. The Elder Justice Act is the first comprehensive federal effort to address and prevent elder abuse, neglect, and exploitation.

### **Provisions found in H.R. 3962 and H.R. 3590**

#### ***1) Parity of substance abuse disorder benefits***

The ABA is pleased that the versions of the health reform legislation passed in both Houses of Congress contain provisions (Section 1311 of H.R. 3590 and Section 214 of H.R. 3962) that provide for parity of substance abuse disorder benefits similar to those contained in P.L. 110-343, the “Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008.”

The provisions of P.L. 110-343 are only applicable to certain employer-sponsored health care plans. To ensure that millions of Americans suffering from addiction are provided equitable coverage, the “parity” provisions should be made applicable to all plans covered by the new health care legislation.

Because dependence on alcohol and other drugs is a disease, the American Bar Association has long supported the principle that insurance coverage for the treatment of alcohol and drug disorders should be at parity with that for other diseases. Eliminating inequality in the benefits provided for the treatment of addiction is the key to extending coverage to the millions of Americans suffering from addiction to alcohol and other drugs. It is estimated that 22.6 million Americans needed treatment for substance use problems in the past year, and only 18 percent of those needing substance use treatment received it. Providing parity in benefits for the treatment

of these disorders on a par with benefits provided for other medical and surgical problems would make an enormous difference in the treatment of millions of Americans who desperately need it.

## ***2) Insurability for conditions arising out of acts of domestic violence***

The ABA is pleased that the versions of health care reform legislation passed in both Houses of Congress (Section 2705 of H.R. 3590 and Section 107 of H.R. 3962) prohibit discrimination based on certain health status factors arising out of acts of domestic violence. In 1995, when domestic violence was the single largest cause of injury to young adult women, the ABA adopted policy urging Congress to “enact legislation to provide that no person or entity could deny insurance benefits solely on the basis of the applicant’s status as a victim of domestic violence.” Victims of domestic violence were often denied health insurance coverage because their status of being abused was considered a pre-existing condition.

Today, domestic, dating and sexual violence continue to be pervasive and costly problems in this country. For victims fortunate enough to survive their abuse, the injuries suffered can cause health problems that last a lifetime. Even so, it remains legally permissible in several states to deny individuals health insurance coverage because of their status as a survivor of domestic violence. Survivors of violence should not be victims of a second battering by being denied health insurance coverage solely on the basis of their status as an abuse victim.

### **The ABA also urges addressing the following provisions in the health care reform legislation.**

#### ***Interstate health insurance compacts***

Section 309 of H.R. 3962, as passed the House, and Section 1333 of H.R. 3590, as passed the Senate, contain provisions approving the formation of interstate health insurance compacts. Under the House bill, the Secretary of Health and Human Services (HHS) would consult with the National Association of Insurance Commissioners (NAIC), along with others, to develop model guidelines for the creation of such compacts. Under the Senate bill, the Secretary would consult with NAIC and issue regulations for the creation of such compacts. Both bills raise the possibility that the guidelines or regulations would approve the formation of a compact agency similar to the Interstate Insurance Product Regulation Commission.

The ABA believes that Congress, when it consents to the creation of an interstate compact agency under Article I, Section 10, clause 3 of the U.S. Constitution, should prescribe the administrative procedures to be employed by the agency, provide for judicial review of agency action, and specify the standards of judicial review. In addition, the ABA believes that provisions concerning administrative procedure and judicial review for compact agencies should be consistent with the following fundamental administrative law norms:

1. In the case of adjudication, parties should be able to present their positions orally or in writing and challenge positions of opposing witnesses orally or in writing; the adjudicatory decision should be rendered by an impartial decision-maker; and, a statement of reasons should accompany each decision.
2. In the case of rulemaking, there should be an opportunity, following notice, for the public to comment on proposed regulations

3. Statutory provisions relating to judicial review of agency decisions should assure that those adversely affected by an agency decision should receive an appropriate form of judicial review, and should specify standards of review that do not vary depending on the court that reviews an action of the compact agency.

The purpose of the various principles is to ensure transparency, accountability, and fairness in the operation of entities created by interstate compacts authorized by Congress. That purpose is clearly relevant to the interstate compact entities envisioned in the pending health care legislation.

Thank you for your consideration of the issues raised in this letter. If you would like additional information or to discuss the ABA's views on these issues in greater detail, please feel free to contact me at (202) 662-1765 or Lillian Gaskin, Senior Legislative Counsel, at (202) 662-1768.

Sincerely,

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

Thomas M. Susman