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February 16, 2005

The Honorable Nathan Deal
Chairman
Subcommittee on Health
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I am writing to you on behalf of the American Bar Association regarding the February 10, 2005 Subcommittee's hearings on medical liability to present ABA views on federal proposals to pre-empt state medical liability laws.

The ABA, which has over 400,000 members throughout the country has long opposed legislation that would pre-empt the state tort laws and impose federal medical professional laws on the states.

It has been suggested by some that enactment of such legislation would help the uninsured. This is simply not the case. Limiting compensation to those who have been injured by medical malpractice will not help the uninsured gain access to health insurance. While limiting medical malpractice awards would have a major impact on those patients most severely injured by malpractice, it would have only a minor impact on national health care costs. According to the Congressional Budget Office, malpractice costs make up less than 2 percent of overall health care spending. The CBO also reports that even if malpractice costs were reduced by 25 to 30 percent, it would only lower health care costs by 0.4 to 0.5 percent and would likely have a comparably small effect on insurance premiums.

The ABA is especially concerned about proposals that would place a cap on pain and suffering awards in states that have no such cap for patients who have proved in their state courts that they were harmed by malpractice or a defective medical product. Those affected by caps on damages are the patients who have been most severely injured by the negligence of others. No one has stated that their pain and suffering injuries are not real or severe. These patients should not be told that, due to an arbitrary limit, they will be deprived of the compensation they need to carry on. Yet legislation to cap pain and suffering awards, if enacted, would result in the most

seriously injured persons who are most in need of recompense receiving less than adequate compensation.

The rallying cry of proponents of this type of legislation has been that doctors have experienced significant increases in their insurance premiums. Insurance premiums in a number of areas are up significantly. Pre-empting the state tort laws and limiting the rights of patients to be compensated for malpractice and harm caused by defective medical products will not solve this problem. Caps on non-economic damages have failed to prevent sharp increases in medical malpractice insurance premiums, according to a white paper comparing states with caps to states without caps that was released June 2, 2003, by Weiss Ratings, Inc., an independent provider of ratings and analyses of financial services companies, mutual funds and stocks.

For over 200 years, the authority to promulgate medical liability laws has rested with the states. This system, which allows each state autonomy to regulate the resolution of medical liability actions within its borders, is a hallmark of our American justice system. Because of the role they have played, the states are the repositories of experience and expertise in these matters. Thus, the ABA urges your subcommittee not to approve legislation that would pre-empt the states' medical liability laws.

In addition to the policy reasons why this long- and effectively-functioning liability system should not be altered by the U.S. Congress, it should be noted that the constitutionality of the amendment will surely be challenged based on constitutional separation-of-powers grounds. The Supreme Court, in the decisions of *Pegram et al. v. Herdrich*, 120 S.Ct. 2143 (2000), and *Rush Prudential HMO, Inc. v. Moran*, 122 S.Ct. 2151 (2002), continued to recognize that it is appropriate for the states to handle health accountability matters because health care is an area traditionally left to the states to regulate. In addition, a number of states have constitutions that prohibit caps on damage awards in personal injury cases.

Currently, states have the opportunity to enact and amend their tort laws, and the system functions well. Congress should not substitute its judgement for the systems which have thoughtfully evolved in each state over time. To do so would limit the ability of a patient who has been injured by medical malpractice or by defective medical products to receive the compensation he or she deserves.

The ABA is concerned about those in America who are without health insurance. Since 1972, the ABA has been on record supporting access to quality health care for every American regardless of the person's income. In February, 1994, the ABA's House of Delegates reaffirmed its support of legislation calling for universal coverage for all through a common public or public/private mechanism though which all contribute. But federal legislation to pre-empt state liability laws would not help the situation.

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We request that you include this letter in the record of your February 10 hearings. Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Robert D. Evans". The letters are fluid and connected, with a prominent initial 'R' and 'E'.

Robert D. Evans

Cc: Members of the Subcommittee on Health