

STANDING COMMITTEE ON
GOVERNMENTAL AFFAIRS

AMERICAN BAR ASSOCIATION

Governmental Affairs Office

740 Fifteenth Street, NW
Washington, DC 20005-1022
(202) 662-1760
FAX: (202) 662-1762

CHAIR

Mark H. Tuohey III
mtuohey@brownrudnick.com

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ABA DAY IN WASHINGTON
PLANNING COMMITTEE

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William.hubbard@nelsonmullins.com

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"

GOVERNMENTAL AFFAIRS OFFICE

DIRECTOR

Thomas M. Susman
(202) 662-1765
Thomas.Susman@americanbar.org

DEPUTY DIRECTOR

Denise A. Cardman
Denise.Cardman@americanbar.org

SENIOR LEGISLATIVE COUNSEL

R. Larson Frisby
Larson.Frisby@americanbar.org

LEGISLATIVE COUNSEL

Ann Carmichael
Ann.Carmichael@americanbar.org

Kristi Gaines

Kristi.Gaines@americanbar.org

Kirra L. Jarratt

Kirra.Jarratt@americanbar.org

E. Bruce Nicholson

Bruce.Nicholson@americanbar.org

LEGISLATIVE COUNSEL/
DIRECTOR OF STATE LEGISLATION

Kenneth J. Goldsmith
Kenneth.Goldsmith@americanbar.org

INTELLECTUAL PROPERTY
LAW CONSULTANT

Hayden Gregory
Hayden.Gregory@americanbar.org

LEGISLATIVE COORDINATOR/
DIRECTOR FOR GRASSROOTS OPERATIONS

Jared D. Hess
Jared.Hess@americanbar.org

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.

May 10, 2011

Page 3 of 3

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