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June 12, 2017

The Honorable Paul Ryan
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: Concerns Regarding H.R. 1215, the “Protecting Access to Care Act of 2017”

Dear Speaker Ryan:

On behalf of the American Bar Association, which is the largest voluntary membership organization of legal professionals in the United States, consisting of more than 400,000 members from all 50 states, the District of Columbia and other jurisdictions, I am writing to express our opposition to H.R. 1215, the “Protecting Access to Care Act of 2017.” I understand this legislation is scheduled for floor consideration as early as this week.

For over 200 years, the authority to determine medical liability law has rested in the states. This system, which grants each state the autonomy to regulate the resolution of medical liability actions within its own borders, is a hallmark of our American justice system. The states also regulate the insurance industry. Because of the roles 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 is proposed in H.R. 1215, for the systems that have evolved in each state over time.

The Republican Platform speaks to returning power from a one-size-fits all federal government back to individual people in states and localities. The preamble of the Platform states; “And this means returning to the people and the states the control that belongs to them. It is the control and the power to make their own decisions about what’s best for themselves and their families and communities.” H.R. 1215 violates this principle by imposing federally mandated restrictions on aspects of the civil justice system that have traditionally belonged to the states. In fact, most states have already considered, or are in the process of considering, possible reforms to their civil justice systems. Some states have decided to impose caps in medical liability cases while others leave that decision to juries.

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, and contingent fees.

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 3(b) of H.R. 1215 that would cap noneconomic damages for a plaintiff's injuries at \$250,000 regardless of the number of parties against whom the action is brought or the number of separate claims or actions brought with respect to the same injury. 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, victims are less likely to be able to obtain counsel to represent them in seeking redress.

Those affected by caps on damages are the patients who have been most severely injured by the negligence of others. These patients who reside in communities around the country should not be told that, due to an arbitrary limit set by members of Congress in Washington, DC, 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 jury verdicts, and that is the appropriate solution rather than an arbitrary cap. For these reasons, the ABA opposes those provisions in H.R.1215, such as Section 3(b), which would place a dollar limit on recoverable damages and operate to deny full compensation to a patient in a medical liability action. Further, caps on damages shift the costs of the injuries from the party responsible for the harm to taxpayers, whether that harm was caused negligently or purposely. This burden-shift from the guilty party to the taxpayer violates public policy principles to safeguard taxpayer funds.

Proportionate Liability. Section 3(d) of H.R.1215 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 should be held liable for only their equitable share of the plaintiff's noneconomic loss. Although the ABA supports this principle and encourages 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 3(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 noneconomic damages.

Contingent Fees. Section 4(a) of H.R. 1215 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 opposes 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 Plain 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. 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 different levels 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 a 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 4 of H.R. 1215.

Instead of bringing this seriously flawed legislation to the floor, we respectfully urge you to request that the relevant committees in the House hold hearings to examine the many factors contributing to rising health care costs. The American Bar Association remains committed to maintaining a fair and efficient justice system 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 an alternative to federal government overreach and the attack on state's rights represented by H.R. 1215.

Sincerely,



Thomas M. Susman

cc: The Honorable Nancy Pelosi, House Minority Leader