

March 18, 2010

The Hon. Harry Reid
Majority Leader
U.S. Senate
Washington, DC 20510

The Hon. Nancy Pelosi
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Leader Reid and Speaker Pelosi:

As the debate on healthcare reform legislation reaches a conclusion, the members of the Health Coalition on Liability and Access (HCLA) listed below wish to, once again, express deep concerns about the medical liability reforms provisions in the “Patient Protection and Affordable Care Act” (H.R. 3590) as passed by the Senate.

As you are aware, the HCLA is a national advocacy coalition comprised of more than 30 associations and businesses representing doctors and other health care providers, hospitals, health care liability insurers, employers, and health care consumers. We are dedicated to reforming our medical liability system to increase patient safety, ensure that injured patients are compensated quickly and fairly, improve provider-patient communications, and ensure affordable and accessible medical liability insurance. The broad alliance which makes up the HCLA ensures that we develop solutions to our medical liability problems that are designed to have the most comprehensive benefits to the entire health care community, and we have presented such proposals to you in the past.

Regrettably, rather than consider one of the many reform alternatives we proposed, Congress and the President are instead moving forward to adopt the demonstration project language included in the Senate-passed health care reform bill. This proposal contains provisions mandating that a plaintiff may opt-out of an approved demonstration project at anytime, even after the process has reached a final determination. Allowing a patient to participate in a demonstration project through its conclusion before deciding whether or not to commence litigation guarantees the failure of these demonstration projects before they have even begun. This provision encourages plaintiffs to use the “alternative” system merely as a testing ground for their cases, so they may determine which cases are strong enough to pursue in traditional litigation. Thus only weaker cases will go through the demonstration project in order to potentially receive payments that would not be awarded in traditional litigation. The remaining cases will still work their way through the time and resource consuming litigation process we see today. The end result will be that the entire medical liability system will see increases in costs and delays in claims resolution without any benefit to healthcare providers or injured patients. While we do not object to a limited opt-out provision, the overly broad opt-out language in the bill renders the demonstration projects completely ineffectual.

We also object to the limitations placed on demonstration projects which are supposed to evaluate “alternatives to current tort litigation.” The Senate-passed language limits acceptable

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demonstration projects to only those that include a patient safety element. While enhancing patient safety is a goal we all share, this requirement would exclude funding for states that focus their medical liability reforms specifically on the numerous flaws in our civil litigation system. These flaws, which needlessly delay payments to claimants and consume vast amounts of money (which would be better utilized helping patients recover from unexpected medical outcomes), are at the heart of our medical liability problems. The Senate bill, however, attempts to shift the focus of this debate from the failings of our litigation system on to healthcare providers. Again, we fully support efforts to increase patient safety, but we believe mandating a patient safety element as a part of liability reform demonstration programs needlessly diverts attention away from the well documented problems with the “current tort litigation” system.

Finally, the Senate bill also fails to adequately prevent the misuse of Federal medical standards or guidelines in litigation. H.R. 3590 clearly recognizes this issue by ordering the Government Accountability Office (GAO) to conduct a study on whether sections of the bill create new causes of action for medical liability lawsuits. Quite simply, such a study is unnecessary and possibly harmful. If, as we have been told, Congress does not intend to substantially increase medical liability litigation, why not state as much explicitly in the legislation? Studying the issue will only delay the need to address this matter, needlessly creating an opening for such standards/guidelines to be abused until Congress recognizes the problem and eventually finds the opportunity to correct it. The failure to include language in the bill which plainly and clearly states that no standard or guideline in the bill establishes a new standard of care creates an open invitation to create a new medical liability crisis by expanding litigation substantially while the study is being conducted.

The failings we have outlined above are not minor. Rather, they are so fundamental as to render the “medical liability reforms” included in the legislation completely meaningless at best, and may in fact exacerbate the problems with the current system. As such we are compelled to state our total opposition to the medical liability reform language included in Senate-passed bill that is now under consideration by the House of Representatives and supported by the President.

We hope at some point in the future we will be able to address the issue of medical liability reform again so that real, and much needed, reforms may someday be enacted at the federal level. At this time, however, we cannot endorse a proposal that would be detrimental to not only health care providers but also to the patients they serve.

Sincerely,

American Academy of Otolaryngology-Head and Neck Surgery
American Association of Neurological Surgeons
American Association of Orthopaedic Surgeons
American Dental Association
American Insurance Association
American Osteopathic Academy of Orthopedics
American Society of Plastic Surgeons
Californians Allied for Patient Protection
Cooperative of American Physicians

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MAG Mutual
Medical Liability Mutual Insurance Company
National Association of Health Underwriters
NORCAL Mutual Insurance Company
Physicians Insurance A Mutual Company
Physician Insurers Association of America
PMSLIC Insurance
ProAssurance
State Volunteer Mutual Insurance Company
The Doctors Company

cc: All Members of Congress