

January 14, 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 you continue your efforts to forge a final agreement on health care reform legislation, we, the undersigned members of the Health Coalition on Liability and Access applaud the ongoing discussion about the important role medical liability reform can play in our current health care system. In this regard, we would like to share with you our perspective on how the reforms currently being discussed can be shaped to provide the maximum benefit to both patients and health care providers.

The Health Coalition on Liability and Access (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. While the HCLA strongly supports comprehensive reforms that include reasonable limits on non-economic damages, which have a proven track record of success in states like California and Texas, the coalition also supports alternative federal reforms, as well as funding for states to consider other options. We wish to limit our comments today to these latter issues, and specifically to:

- Demonstration projects;
- Standards of care; and,
- State medical liability reform statutes

### **Demonstration Projects**

Both chambers have recognized the importance of encouraging some states to enact alternatives to the current medical liability system – an acknowledgement that the current litigation system, which can take years to resolve a complaint and draws too much money away from patients and into the legal system, is not in the best interest of health care providers or their patients. The two bills, however, take dramatically different approaches. We believe the language approved by the House of Representatives (Sec. 2531 of H.R. 3962) should serve as the starting point for the provision which will be retained in the final legislation.

One of the advantages of the House language is the use of incentive payments, rather than demonstration grants, to aid states in their reform efforts. Incentive payments are preferable because they will encourage states to focus on reforms which have a strong likelihood of success and which will remain in effect after the “demonstration” period has ended. Grants, on the other

hand, only serve to get projects started, and offer no guarantee that the expenditure of federal funds will actually result in either their success or their subsequent implementation.

Another advantage of the House language is the specific nature of the reform options under the proposal. Ensuring that tested reforms fit within certain classifications will help ensure that time and resources are not spent on projects with little hope of success. At the same time, there must be enough options for states to be able to sufficiently experiment with reforms that meet their individual needs. Along these lines we recommend that the certificate of merit and early offers options be retained, while other options (such as health courts, “I’m sorry laws,” etc.) also be included in the legislation. Providing for regular Congressional reauthorization of the options that are available to states would further help ensure that only those reforms with the most promise were eligible for federal funding. This would be preferable to the Senate language which limits reforms to only those that include a patient safety element – a notable goal for sure but one which prevents the enactment of reforms to the legal system itself, a critical element of any successful medical liability reform proposal.

Finally on the issue of demonstration projects, we must object to the inclusion of language, as in the Senate bill, which would allow for a broad-based opt-out from the alternative system. An opt-out provision allows plaintiffs to use the “alternative” system merely as a testing ground for weak cases before litigation is commenced (a likely result if patients may opt out even after seeing the alternative process through to near completion). To appropriately measure the effectiveness of the alternative system, we recommend that any opt-out must be triggered within a limited time frame after all parties involved are aware of the claim and of the existence of the alternative to traditional litigation.

### **Standards of Care**

In H.R. 3962, the House adopted language which clearly states that elements of the legislation designed to improve the delivery of health care services did not establish new standards of care for medical liability lawsuits (see Sec. 261). As the House and Senate bills are merged, we request that the principle behind this provision be retained in final legislation. To ensure there is no confusion about what is and is not covered by the provision, we believe it should be broadly applied to the entire legislation, however, rather than just a few select sections. As such, we recommend creating a new section of the legislation as follows:

#### **Sec. XXXX – Construction Regarding Standard of Care**

The development, recognition, or implementation of any guideline or other standard under any provision of this Act shall not be construed to establish the standard of care or duty of care owed by health care providers to their patients in any medical malpractice action or claim (as defined in section 431(7) of the Health Care Quality Improvement Act of 1986 (42 U.S.C.10 11151(7))).

### **State Reform Statutes**

Both H.R. 3962 and H.R. 3590 clearly express the intent of each chamber to not interfere with current or future State legislation to enact needed medical liability reforms [see Sec. 261(c) of the House language and Subsec. (m) of the new Sec. 399V-4 created by the Senate bill]. Given the fact that numerous states have already enacted reforms which have been critical in easing the Medical liability crisis which existed at the start of this decade, we share that belief that the right of States to keep those reforms, and/or enact additional reforms in the future, should be explicitly

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protected by health care reform legislation. We therefore recommend that a new section, which adopts the principles already expressed in the aforementioned sections of both H.R. 3962 and H.R. 3590, be included in the final bill.

Sec. XXXX – Construction Regarding State Medical Malpractice Laws

Nothing in this Act or the amendments made by this Act shall be construed to modify or impair State law governing legal standards or procedures used in medical malpractice cases, including the authority of a State to make or implement such law.

We appreciate your time and your consideration of these proposals. As mentioned previously, we believe each of these recommendations is not new, but instead merely clarifies the intent of the Congress as previously expressed in both the Affordable Health Care for America Act and the Patient Protection and Affordable Care Act. The final legislation must, at a minimum, address the three issues noted above in order to ensure that the newly enacted federal health care reforms do not expand health care provider liability and do not roll back, limit or impinge upon existing or future state liability reform efforts. We look forward to working with you to see that this goal, which we know we share with many Members of Congress, is achieved.

Sincerely,

The American Academy of Otolaryngology—Head and Neck Surgery  
American Association of Neurological Surgeons/Congress of Neurological Surgeons  
American Association of Nurse Anesthetists  
American Association of Orthopaedic Surgeons  
American College of Cardiology  
American College of Osteopathic Surgeons  
American College of Surgeons  
American Dental Association  
American Medical Association  
American Medical Directors Association  
American Osteopathic Academy of Orthopedics  
American Society of Plastic Surgeons  
MAG Mutual  
Medical Liability Mutual Insurance Company  
National Association of Health Underwriters  
NORCAL Mutual Insurance Company  
Physician Insurers Association of America  
Physicians Insurance A Mutual Company  
PMSLIC  
ProAssurance  
State Volunteer Mutual Insurance Company

Cc: The Hon. Max Baucus  
The Hon. Chris Dodd  
The Hon. Tom Harkin  
The Hon. Richard Durbin

The Hon. Steny Hoyer  
The Hon. Henry Waxman  
The Hon. Charles Rangel  
The Hon. George Miller  
The Hon. James Clyburn