

**Alliance for Justice  
Center for Justice & Democracy  
Center for Medical Consumers  
Consumer Watchdog  
National Consumers League  
National Research Center for Women & Families  
National Women's Health Network  
NCCNHR: The National Consumer Voice for Quality Long-Term Care  
Public Citizen**

September 22, 2009

The Honorable Max Baucus  
Chairman, Senate Finance Committee  
United States Senate  
Washington, D.C. 20510

Dear Chairman Baucus:

**RE: SUBTITLE H--SENSE OF THE SENATE REGARDING MEDICAL  
MALPRACTICE OF THE AMERICA'S HEALTHY FUTURE ACT OF 2009**

The undersigned consumer and public interest groups strongly oppose Subtitle H or any provisions that would encourage states to adopt "alternatives" to medical malpractice litigation. Medical malpractice is at epidemic levels in this country. The Institute of Medicine has estimated that up to 98,000 people die every year from medical errors in America's hospitals. Diminishing medical providers' accountability for wrongful acts conflicts with Congress's stated intent to provide affordable and quality health care to Americans. Congress should focus on improving patient safety and reducing deaths and injuries, not insulating negligent providers from accountability and saddling taxpayers with the cost.

Alternative systems where *both* parties voluntarily agree to enter into negotiations after the dispute arises are not only appropriate, but already resolve the vast majority of legitimate medical malpractice claims today. However, schemes that place undue burdens on injured patients, or require that cases be heard in informal settings, tilt the legal playing field heavily in favor of insurers that represent health care providers. These measures are fundamentally unfair to patients.

We urge you to consider the facts, followed by suggestions for bringing real reform to our medical malpractice system without punishing the innocent patients and families who are victims of medical malpractice.

The Facts:

- Medical malpractice litigation has fallen to less than 0.6 percent of all health care spending – the lowest level on record. At the same time, health care costs have soared.

- Three to seven people die from preventable medical errors for every one who receives compensation for any malpractice, including those resulting in injury or death.
- States with the most draconian “tort reform” measures have seen little or no reduction in their health care costs. That isn’t surprising. The Congressional Budget Office found that “Malpractice costs account for less than 2 percent of [health care] spending.” Medical malpractice cases also account for only about four percent of tort cases.
- Doctors in many states have seen dramatic rate increases after “tort reform” measures were approved. Rates were only held down in states with strong state insurance rate regulation.
- States with the most severe “tort reform” have seen insurance rates for medical providers rise and fall at similar levels as other states, according to a recent study by Americans for Insurance Reform, a coalition of nearly 100 consumer and public interest groups that examined the insurance industry’s own data.
- States with the most severe “tort reform” measures have often left patients without any remedy regardless of the severity of their injuries or the degree of negligence that may have occurred.
- “Tort reform” laws shift the costs away from those who should pay — insurance companies or health care providers who have committed malpractice — onto the taxpayer. We are aware of families with children severely injured by medical malpractice who had to seek government assistance to survive because “tort reform” reduced their compensation, burdening state Medicaid systems funded by federal and state taxpayers.
- Total medical malpractice payouts for injuries and deaths caused by medical negligence in the nation, have recently hovered between \$5 billion and \$6 billion annually. This is less than half of what Americans pay for dog and cat food each year.
- Government studies, from the Congressional Budget Office to the Government Accountability Office, that have examined so-called “defensive medicine” have found little or no substantiation for it, particularly in this age of managed care.

#### Real Malpractice Reform Should Include:

- A physician’s registry that tracks doctor records in all 50 states. As Public Citizen’s examination of the National Practitioners Data Bank found, 5% of doctors commit 54% of the malpractice. Such a registry would be transparent and ensure that incompetent dangerous physicians would be unable to move from state to state — as they do today — and injure more patients. In addition or in the alternative, simply open the National Practitioners Data Bank to the public.
- Enact the federal bill creating a registry of hospital infection rates nationally. Infections are a significant source of morbidity and mortality for nursing home residents and account for up to half of all nursing home resident transfers to hospitals. Infections result in an estimated 150,000 to 200,000 hospital admissions per year at an estimated cost of \$673 million to \$2 billion annually. When a nursing home resident is hospitalized with a primary diagnosis of infection, the death rate can reach as high as 40 percent. Consumers Union’s “StopHospitalInfections” has successfully helped to pass state laws requiring hospitals to publish their infection rates. When such state laws are enacted, hospital infection rates go down markedly.
- Encourage health care providers — doctors, hospitals, nurses — to adopt full disclosure programs when malpractice occurs, but without coercive measures like some Sorry

Works/Early Offer programs. The provider must commit to discovering the cause of the injury and to ensuring it won't happen in the future.

- Encourage the implementation of patient safety reforms to reduce preventable medical errors. Public Citizen's "Back to Basics" report listed simple measures, such as best practices to eliminate patient falls and prevent pressure ulcers, that would save 85,000 lives and \$35 billion a year in health care delivery.

Real Insurance Reform Should Include:

- Repeal of the McCarran-Ferguson Act's exemption of the health and medical malpractice insurance industry from anti-trust laws. Congress must prohibit insurers from cooperating in collusion and price fixing, behavior that costs doctors and consumers a tremendous amount.

Health care reform cannot be accomplished by taking away the legal rights of patients who are injured through no fault of their own, or reducing the accountability of those who commit wrongdoing. We urge the Committee to reject any measures that limit patients' legal rights. Thank you for your consideration. (For any questions or comments, please contact Joanne Doroshov at Center for Justice & Democracy (212) 267-2801 or David Arkush at Public Citizen, (202) 454-5130.)

Sincerely,

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