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February 24, 2010

Senator Harry Reid, D-NV, *Majority Leader*

Senator Mitch McConnell, R-KY, *Republican Leader*

Senator Richard Durbin, D-IL, *Majority Whip*

Senator Jon Kyl, R-AZ, *Republican Whip*

Senator Max Baucus, D-MT, *Chairman, Finance Committee*

Senator Chuck Grassley, R-IA, *Ranking Member, Finance Committee*

Senator Tom Harkin, D-IA, *Chairman, Health, Education, Labor and Pensions Committee*

Senator Mike Enzi, R-WY, *Ranking Member, Health, Education, Labor and Pensions Committee*

Senator Christopher Dodd, D-CT, *Member, Health, Education, Labor and Pensions Committee*

Representative Nancy Pelosi, D-CA, *Speaker*

Representative Steny Hoyer, D-MD, *Majority Leader*

Representative John Boehner, R-OH, *Republican Leader*

Representative James Clyburn, D-SC, *Majority Whip*

Representative Eric Cantor, R-VA, *Republican Whip*

Representative Charles Rangel, D-NY, *Chairman, Ways and Means Committee*

Representative Dave Camp, R-MI, *Ranking Member, Ways and Means Committee*

Representative Henry Waxman, D-CA, *Chairman, Energy and Commerce Committee*

Representative Joe Barton, R-TX, *Ranking Member, Energy and Commerce Committee*

Representative George Miller, D-CA, *Chairman, Education and Labor Committee*

Representative John Kline, R-MN, *Ranking Member, Education and Labor Committee*

Representative John Dingell, D-MI, *Chair Emeritus, Energy and Commerce Committee*

Dear Congressional Leaders:

We applaud your recent efforts to break the partisan gridlock in the Congress and make progress on important policy issues. We write, however, to urge that you not compromise in one particular way: shielding negligent doctors and hospitals from accountability, which puts patients at risk and wastes taxpayer dollars. Limits on medical malpractice liability have no place in legislation that seeks to improve access to quality care and decrease costs. So-called tort “reform” laws increase the risk of medical negligence and shift the costs away from those who should pay—doctors and hospitals that have committed malpractice—to taxpayers.

Liability limits do not lower health care costs. Most states have enacted tort reform in some form or another, but health care costs continue to skyrocket. We examined the effects of Texas' restrictive medical malpractice liability limits, which tort "reformers" laud as a model for the nation. The data show that the Texas limits did nothing to lower costs or increase access. In fact, since the liability laws were enacted in 2003, Texas' performance on significant measures of cost and delivery has worsened, harming patients and taxpayers.

- the cost of health care has increased at nearly double the national average;
- the cost of diagnostic testing has grown 50 percent faster than the national average;
- the uninsured rate has increased, remaining the highest in the country;
- the cost of health insurance has more than doubled;
- growth in the number of doctors per capita has slowed; and
- the number of doctors per capita in underserved rural areas has declined.¹

The only cost related to malpractice liability that has declined in Texas is malpractice liability insurance. But while liability insurers have paid 67 percent less to injured patients, doctors' premiums have not declined nearly as much, suggesting that insurers are pocketing most of the savings rather than passing it on to doctors.² Doctors, in turn, are passing nothing on to patients or taxpayers, whose health care costs rose at a rate double the national average.

In October 2009, the Congressional Budget Office (CBO) stated that a tort reform package would reduce federal budget deficits by roughly \$5.4 billion a year. But the CBO's analysis is deeply flawed. First, it fails to explain how each tort reform proposal would reduce costs. In fact, the agency admits that the "estimated effect of any specific legislative proposal would depend on the details of that proposal."³ The CBO also fails to discuss the effects on the federal budget of shifting the costs of medical errors from the responsible parties (negligent medical providers) to federal government programs, such as Social Security Disability, Medicaid, and Medicare. Finally, even if the CBO's conclusion were well-founded, it estimates savings of less than one-fourth of one-percent of U.S. health care spending – an insignificant amount that is not worth the tradeoff in reduced safety.

Medical errors are exacting a devastating toll in lives and dollars. Even if liability limits could bring some of the benefits that proponents claim—and the evidence plainly shows they do not—those benefits would not be worth the price in human lives and injuries. Ten years ago the Institute of Medicine estimated that up to 98,000 Americans die from medical errors in hospitals, and cost \$17 billion to \$29 billion annually. A 2009 investigation by Hearst newspapers concluded that approximately 200,000 Americans die every year from preventable medical errors and health care-associated infections. Our investigation showed that fixing a mere 10 types of medical errors would save,

¹ See Public Citizen, *Liability Limits in Texas Fail to Curb Medical Costs* (December 2009).

http://www.citizen.org/documents/Texas_Liability_Limits.pdf.

² *Id.* at 7.

³ Congressional Budget Office *letter to Sen. Orrin Hatch*, Oct. 9, 2009, at page 5.

conservatively, 85,000 lives and \$35 billion per year. Modest improvements in patient safety would save far more money than draconian limits on medical liability—and they would save lives as well.

Liability limits in contrast would cause more deaths and injuries, not to mention higher costs from additional medical errors. A 2009 study by the National Bureau of Economic Research that found that a 10 percent reduction in costs related to medical malpractice liability would increase deaths by 0.2 percent, or an additional 4,800 deaths per year.⁴

Medical providers benefit financially when they order unnecessary tests. The high rate of needless medical testing, often attributed to “defensive medicine” to avoid lawsuits, is more likely due to the fee-for-service system that pays medical providers for each test they perform rather than for providing quality care. Although medical malpractice litigation in Texas has declined sharply, with malpractice payments dropping 67 percent, testing costs in Texas grew 50 percent faster than the national average.⁵ When lawsuits drop and excessive testing skyrockets, it is hard to believe that testing is driven by litigation. The more likely cause is the financial incentive to order more tests.

Most people injured by malpractice don’t sue. Researchers estimate that there are nearly 10 times as many injuries caused by medical negligence as malpractice claims.⁶ According to data derived from the National Practitioner Data Bank and the Institute of Medicine, three to seven patients die from medical errors for every patient who receives payment for any type of malpractice injury.⁷

The health care system lacks accountability. Negligent medical providers who commit preventable errors are rarely held accountable outside of the liability system. Not only are state medical boards extremely deficient in policing their own; a disturbing mindset exists system-wide to protect medical professionals and the rest of the industry. Recently, Texas authorities brought criminal charges against a nurse for reporting a doctor whom she alleged was performing bad medicine and hurting patients. This month, a jury of her peers recognized that she was acting to protect patients and acquitted her of all charges.⁸ Congress must not impose federal liability limitations to insulate medical providers even more while patients lack adequate assurances of safety.

Federal liability limits would nullify well-established state laws and judicial precedent. Finally, state legislatures have been active in setting medical malpractice policy

⁴ Congressional Budget Office letter to Sen. Orrin Hatch, Oct. 9, 2009, at page 5, *citing* Darius N. Lakdawalla and Seth A. Seabury, *The Welfare Effects of Medical Malpractice Liability*, Working Paper w15383. Cambridge, Mass.: National Bureau of Economic Research (2009).

⁵ Public Citizen, *Liability Limits in Texas Fail to Curb Medical Costs*, Dec. 2009.
http://www.citizen.org/documents/Texas_Liability_Limits.pdf.

⁶ David A. Hyman and Charles Silver. *Medical Malpractice Litigation and Tort Reform: It’s the Incentives, Stupid*, 59 Vand. L. Rev. 1085, 1089 (2006).

⁷ Public Citizen, *The 0.6 Percent Bogeyman, Medical Malpractice Payments Fall to All-Time Low as Health Care Costs Continue to Rise*, July 2009.

⁸ Kevin Sack, *Whistle-Blowing Nurse Is Acquitted in Texas*, The New York Times, Feb. 11, 2010, at <http://www.nytimes.com/2010/02/12/us/12nurses.html>.

for their residents, and medical malpractice law has developed in the judiciary over decades, through careful consideration of thousands of cases. The federal government should not usurp states' traditional authority to protect their citizens from medical negligence.

We urge you not to include medical malpractice liability limits in health insurance legislation. Decreasing accountability for medical providers and limiting patients' legal rights will only increase costs and harm patients.

Sincerely,

A handwritten signature in black ink, appearing to read "David Arkush", with a long, sweeping underline.

David Arkush,
Director, Public Citizen's Congress Watch

cc: Kathleen Sebelius, Secretary, U.S. Department of Health and Human Services
Members of the U.S. Congress