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Dear Senator:

I am writing to you regarding S. 22 and S. 23, legislation to pre-empt portions of the state medical professional liability laws, that will shortly be considered on the floor of the Senate. The ABA opposes S. 22 and S. 23 and urges you to vote against them.

A stated purpose of the legislation is to address the rise in doctors' malpractice insurance premiums over the last few years. These premiums are now leveling off and in some areas are even beginning to drop. Unfortunately, there is a common misunderstanding that a rise in lawsuit claims and payouts caused the cost of malpractice insurance to increase. There is simply no evidence that insurance costs go up or go down based on the number of lawsuits or the amounts of damages--rather, the rates reflect the investment returns of the insurance companies.

The insurance industry is cyclical. The insurance market in the U.S. is intensely competitive which has caused both dramatic increases and dramatic decreases in insurance rates over time. For example, competition caused insurance rates to be comparatively lower in the United States from 1979 through 1983 than in other countries. When increases occurred in the U.S. between 1984 and 1986, they appeared more dramatic because they occurred against the background of the prior artificially low rates. A similar situation has taken place in the early years of this decade.

Another stated purpose of the legislation is to increase access to health care services. The Congressional Budget Office noted in a January 2004 study: "On the one hand, [the U.S. General Accounting Office] confirmed instances of reduced access to emergency surgery and newborn delivery, albeit 'in scattered, often rural, areas where providers identified other long-standing factors that affect the availability of services.' On the other hand, it found that many reported reductions in supply by health care providers could not be substantiated or 'did not widely affect access to health care.'"

For over 200 years, the authority to promulgate medical liability laws has rested with the states. This system, which allows each state the autonomy to regulate the resolution of medical liability actions within its borders, is a hallmark of our American justice system. The states also regulate the insurance industry. Because of the role they have played, the states are the repositories of experience and expertise in these matters. S. 22 and S. 23 would preempt portions of the state medical liability laws, and, therefore, the ABA opposes their enactment. Congress should not substitute its judgment for the systems that have thoughtfully evolved in each state over time.

To do so would limit the ability of a patient who has been injured by medical malpractice to receive the compensation he or she deserves. This is especially problematic since such a patient already is in a very difficult position. When a car is hit by another car that has run a red light, it is relatively easy to know what caused the accident. But when, by way of example, a surgery patient wakes up to an unexpected bad outcome, he or she cannot possibly comprehend the cause. Those in the position to know what caused the bad outcome are the medical professionals. Because patients lack the necessary information, they often must file a claim to determine what happened. Professor of Law Tom Baker, the Director of the Insurance Law Center at the University of Connecticut, recently published a book, *The Medical Malpractice Myth*. In this book, Baker analyzed a host of medical malpractice studies including those relating to hospital claims. He found that patients who bring weak claims usually do so only to find out whether a hospital has been negligent; that patients who learn that their care was appropriate generally drop their claims; and that insurance companies very seldom pay weak claims.

Contrary to what some believe, juries do not favor plaintiffs over doctors in medical malpractice cases. Duke University School of Law Professor Neil Vidmar's extensive study of juries found that

[o]n balance, there is no empirical support for the propositions that juries are biased against doctors or that they are prone to ignore legal and medical standards in order to decide in favor of plaintiffs with severe injuries. This evidence in fact indicates that there is reasonable concordance between jury verdicts and doctors' ratings of negligence. On balance, juries may have a slight bias in favor of doctors.

See *Medical Malpractice and the American Jury: Confronting the Myths about Jury Incompetence, Deep Pockets, and Outrageous Damage Awards*, University of Michigan Press, at page 182 (1995).

In addition, he concludes at page 259 of his book that research "does not support the widely made claims that jury damage awards are based on the depth of the defendants' pockets, sympathies for plaintiffs, caprice, or excessive generosity." A survey of studies in the area by University of Missouri-Columbia Law Professor Philip Peters, Jr., published in March 2002, likewise found that

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[t]here is simply no evidence that juries are prejudiced against physician defendants or that their verdicts are distorted by their sympathy for injured plaintiffs. Instead, the existing evidence strongly indicates that jurors begin their task harboring sympathy for the defendant physician and skepticism about the plaintiff.

See Philip G. Peters, Jr., *The Role of the Jury in Modern Malpractice Law*, 87 Iowa L. Rev. 934 (2002).

The ABA is especially concerned about the provisions in S. 22 and S. 23 that would place a cap on pain and suffering awards. Those affected by caps on damages are the patients who have been most severely injured by the negligence of others. These patients should not be told that, due to an arbitrary limit, they will be deprived of the compensation they need to carry on. Yet S. 22 and S. 23, if enacted, would result in the most seriously injured persons and those who are most in need of recompense receiving less than adequate compensation. The courts already possess and exercise their powers of remittitur to set aside excessive verdicts, and that is a far more appropriate solution than an arbitrary and harmful cap.

We urge you to vote against S. 22 and S. 23. Thank you for considering our views.

Sincerely,

A handwritten signature in cursive script that reads "Robert D. Evans".

Robert D. Evans