M E M O R A N D U M

To: **Members**
COMMITTEE ON THE JUDICIARY

From: **Lamar Smith**
Chairman

Date: **February 4, 2011**

Subject: Full Committee Markup of:
Judiciary Committee Oversight Plan for the 112th Congress; and
H.R. 5, the "Help Accessible, Efficient, Low-cost, Timely Healthcare (HEALTH) Act"

On **Wednesday, February 9, 2011, at 10:00 am in Room 2141 of the Rayburn House Office Building**, the Committee on the Judiciary will meet to mark up the following: Oversight Plan for the 112th Congress; and H.R. 5, the "Help Accessible, Efficient, Low-cost, Timely Healthcare (HEALTH) Act".

JUDICIARY COMMITTEE OVERSIGHT PLAN FOR THE 112TH CONGRESS

House Rule X, clause 2 provides:

> "(d)(1) Not later than February 15 of the first session of a Congress, each standing committee shall, in a meeting that is open to the public and with a quorum present, adopt its oversight plan for that Congress. Such plan shall be submitted simultaneously to the Committee on Oversight and Government Reform and to the Committee on House Administration."

Pursuant to this Rule, the Judiciary Committee will consider its proposed oversight plan for the 112th Congress. This plan was developed by the Majority in consultation with the Minority and is supported by Ranking Member Conyers. The plan does not preclude the Committee from conducting oversight on other relevant topics as needed.

H.R. 5, THE "HELP ACCESSIBLE, EFFICIENT, LOW-COST, TIMELY HEALTHCARE (HEALTH) ACT"

I. Procedural History

H.R. 5, the "Help Accessible, Efficient, Low-cost, Timely Healthcare (HEALTH) Act" was introduced by Reps. Phil Gingrey (R-GA) and David Scott (D-GA), along with chief cosponsor Chairman Lamar Smith, on January 24, 2011. A Full Committee hearing on the need for health care lawsuit reform was held on Thursday, January 20. The two Republican-invited witnesses were Ardis Hoven, MD, Chair, American Medical Association Board of Trustees, and Stuart L. Weinstein, MD, a physician spokesperson for the Health Coalition on Liability and Access. The Democrat-invited witness was Joanne Doroshow, Executive Director, Center for Justice & Democracy.

II. The Need for the HEALTH Act

The "Help Efficient, Accessible, Low-cost, Timely Healthcare Act" (the HEALTH Act, H.R. 5) has been passed by the House of Representatives in several previous Congresses. Its bipartisan reforms are premised on the need to limit otherwise unlimited lawsuits, including the need to put limits on so-called "non-economic damages." A survey from *Emergency Physicians Monthly* found that the HEALTH Act's limits on noneconomic damages are essential to reducing defensive medicine, saying "The survey … found that non-economic caps are … physicians' preferred choice of malpractice reform, with 84 percent of emergency physicians calling them a 'non-negotiable part of health reform.'"[1]

III. What the HEALTH Act Does

The HEALTH Act's reforms are necessary to help improve health care, make it more affordable, and save taxpayer money while reducing the federal deficit. The HEALTH Act, modeled after California's decades-old and highly successful health care litigation reforms, addresses the current crisis in health care by reigning in unlimited lawsuits and thereby making health care delivery more accessible and cost-effective in the United States. California's Medical Injury Compensation Reform Act ("MICRA"), which was signed into law by Governor Jerry Brown in 1976, has proved immensely successful in increasing access to affordable medical care. Overall, according to data of the National Association of Insurance Commissioners (with the latest data available from 2008), the rate of increase in medical professional liability premiums in California since 1976 has been a relatively modest 387%, whereas the rest of the United States have experienced a 1,089% rate of increase, a rate of increase 281% larger than that experienced in California, as shown in the following chart:

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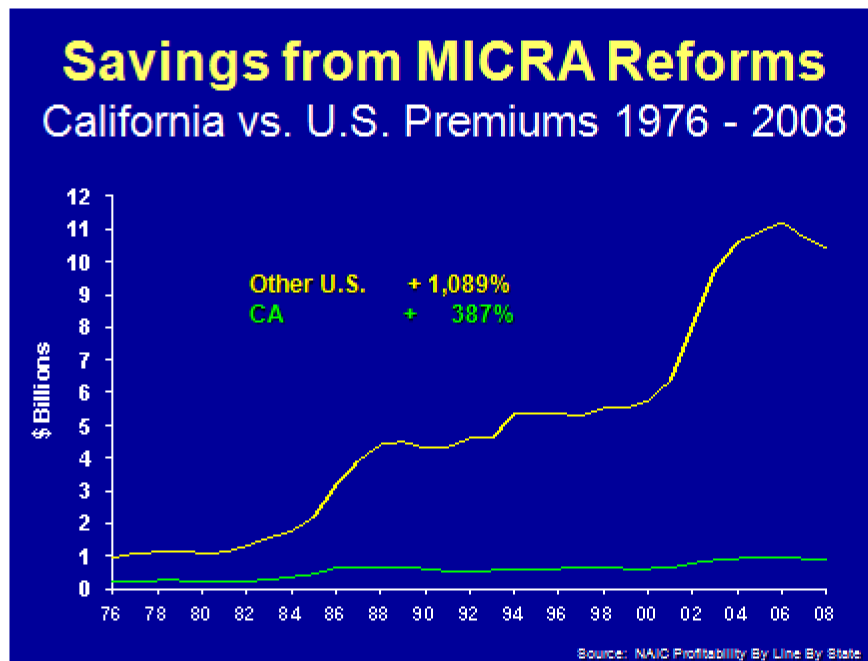
[1] KevinMD.com "How Much Unnecessary Testing Goes On in the ER?" (September 30, 2009). And in 2003, the Florida Governor's Select Task Force on Health Care Professional Liability Insurance made its official recommendations to Governor Bush. The Task Force concluded as follows: "the most important [recommendation] is a cap on noneconomic damages in the amount of $250,000." Governor's Select Task Force on Healthcare Professional Liability Insurance (January 29, 2003) at xvi (Executive Summary).



By incorporating MICRA's time-tested reforms at the Federal level, the HEALTH Act will make medical malpractice insurance affordable again, encourage health care practitioners to maintain their practices, and reduce health care costs for patients.

Its enactment will particularly help traditionally under-served rural and inner city communities, and women seeking obstetrics care.

MICRA's reforms, which have been the law in California for over 30 years, include a $250,000 cap on noneconomic damages, limits on the contingency fees lawyers can charge; authorization for defendants to introduce evidence showing the plaintiff received compensation for losses from outside sources (to prevent double recoveries); and authorization for courts to require periodic payments for future damages instead of lump sum awards that prevent bankruptcies in which plaintiff's would receive only pennies on the dollar. The HEALTH Act also includes provisions creating a "fair share" rule, by which damages are allocated fairly, in direct proportion to fault, and reasonable guidelines -- but not caps -- on the award of punitive damages.

Finally, the HEALTH Act will accomplish reform without in any way limiting compensation for 100% of plaintiffs' economic losses (anything to which a receipt can be attached), including their medical costs, their lost wages, their future lost wages, rehabilitation costs, and any other economic out of pocket loss suffered as the result of a health care injury. The HEALTH Act also does not preempt any State law that otherwise caps damages.

IV. Section-by-Section

Section 1. Short Title.

Section 2. Findings and Purpose.

Section 3. Provides for a 3-year statute of limitations with certain exceptions for minors, fraud, intentional concealment, and the presence of a foreign body.

Section 4. Provides for a $250,000 cap on noneconomic damages and a “fair share” rule, by which damages are allocated fairly, in direct proportion to fault.

Section. 5. Provides for a sliding scale limits on the contingency fees lawyers can charge.

Section 6. Provides authorization for defendants to introduce evidence showing the plaintiff received compensation for losses from outside sources (to prevent double recoveries).

Section 7. Provides guidelines for the award of punitive damages, including guidelines for punitive damages awards not to exceed the greater of $250,000 or twice economic damages. Also provides a safe harbor from punitive damages for products that meet applicable FDA safety requirements, with exceptions for cases in which information required to be given to the FDA was withheld and cases in which illegal payments were made to the FDA. Also includes a provision protecting pharmacists and doctors from being named in lawsuits for forum-shopping purposes.

Section 8. Provides authorization for courts to require periodic payments for future damages.

Section 9. Definitions.

Section 10. Provides that except as provided in the Act nothing in the Act shall affect any federal vaccine-related injury or any defense available to a defendant in a health care lawsuit or action under any other provision of Federal law.

Section 11. Provides a savings clause that saves from preemption state laws that limit damages to specific amounts.

Section 12. Provides that the Act shall apply to any health care lawsuit brought in a federal or State court that is initiated on or after the date of the enactment of this Act, except that any health care lawsuit arising from an injury occurring prior to the date of the enactment of this Act shall be governed by the applicable statute of limitations provisions in effect at the time the injury occurred.

V. The Need for Federal Legislation

Many State supreme courts have judicially nullified reasonable litigation management provisions enacted by State legislatures, many of which sought to address the crisis in medical professional liability that reduces patients' access to health care. Consequently, in such States, passage of federal legislation by Congress may be the only means of addressing the State's current crisis in medical professional liability and restoring patients' access to health care.

Further, federal legislation is needed to stem the flow of doctors from one state to another, as they flee states to avoid excessive liability costs. Doctors should feel free to practice medicine wherever they want in this country, and patients everywhere should be able to obtain the medical care they need.

Laws passed by States that have already provided for, or may in the future provide for, different limits on damages in health care lawsuits will be preserved under the HEALTH Act, as the HEALTH Act provides that “No provision of this Act shall be construed to preempt ... any State law (whether effective before, on, or after the date of the enactment of this Act) that specifies a particular monetary amount of compensatory or punitive damages (or the total amount of damages) that may be awarded in a health care lawsuit, regardless of whether or not such monetary amount is greater or lesser than is provided for under this Act ...” Some States have limited noneconomic damages in medical malpractice actions, but at levels higher than $250,000. Some States place aggregate limits on medical malpractice awards. Those limits would be preserved under the HEALTH Act.

VI. Support for the HEALTH Act by the Congressional Budget Office (CBO)

On October 9, 2009, the Congressional Budget Office (CBO) pronounced that a legal reform package modeled on the HEALTH Act would reduce the federal budget deficit by an estimated $54 billion over the next 10 years.[2] CBO recognizes that civil justice reforms also have an impact on the practice of "defensive medicine." Defensive medicine is when doctors order more tests or procedures than are truly necessary just to protect themselves from frivolous lawsuits. Studies show that defensive medicine does not advance patient care or enhance a physician's diagnostic capabilities.

These billions of dollars in savings from tort reform could be used to provide health insurance for the uninsured without raising taxes or penalties on those who already have insurance policies.

According to another CBO report, “CBO estimates that, under [the HEALTH Act], premiums for medical malpractice insurance ultimately would be an average of 25 percent to 30 percent below what they would be under current law.”[3] Lower health care lawsuit liability premiums would reduce health care costs for everyone and increase the supply of vital doctors.

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[2] *See* http://cboblog.cbo.gov/?p=389.

[3] Congressional Budget Office Cost Estimate of H.R. 4600 (the HEALTH Act) (September 24, 2002).

Further, CBO observed that an “analysis [of the HEALTH Act] indicated that certain tort limitations, primarily caps on awards and rules governing offsets from collateral-source benefits, effectively reduce average premiums for medical malpractice insurance. Consequently, CBO estimates that, in States that currently do not have controls on malpractice torts, [the HEALTH Act] would significantly lower premiums for medical malpractice insurance from what they would otherwise be under current law ...”[4]

VII. Support for the HEALTH Act by the Government Accountability Office (GAO)

The Government Accountability Office (GAO) found that rising litigation awards are responsible for skyrocketing medical professional liability premiums. The report stated that “GAO found that losses on medical malpractice claims – which make up the largest part of insurers’ costs – *appear to be the primary driver of rate increases in the long run ...*”[5]

The GAO also concluded that insurer profits “are not increasing, indicating that insurers are not charging and profiting from excessively high premium rates” and that “in most states the insurance regulators have the authority to deny premium rate increases they deem excessive.”[6] The HEALTH Act would reduce those premiums.

VIII. Support for the HEALTH Act by the National Commission on Fiscal Responsibility and Reform

The National Commission on Fiscal Responsibility and Reform, which was created by President Obama, supports health care litigation reform in its final December 2010 report. As the Commission states in a report that was endorsed by 61% of its members (by a vote of 11-7):

> Most experts agree that the current tort system in the United States leads to an increase in health care costs. This is true both because of direct costs – higher malpractice insurance premiums – and indirect costs in the form of over-utilization of diagnostic and related services (sometimes referred to as “defensive medicine”). The Commission recommends an aggressive set of reforms to the tort system.
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> Among the policies pursued, the following should be included: 1) Modifying the “collateral source” rule to allow outside sources of income collected as a result of an injury (for example workers’ compensation benefits or insurance benefits) to be considered in deciding awards; 2) Imposing a statute of limitations – perhaps one to three years – on medical malpractice lawsuits; 3) Replacing joint-and-several liability with a fair-share rule, under which a defendant in a lawsuit would be liable only for the percentage of the final award that was equal to his or her share of responsibility for the injury …

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[4] Congressional Budget Office Cost Estimate of H.R. 4600 (the HEALTH Act) (September 24, 2002).
[5] General Accounting Office, “Medical Malpractice Insurance,” GAO-03-702 (June 2003) at “Highlights,” 4, and 25 (emphasis added).
[6] *Id.* at 32.

Many members of the Commission also believe that we should impose statutory caps on punitive and non-economic damages, and we recommend that Congress consider this approach and evaluate its impact.[7]

All these recommended reforms are included in the HEALTH Act.

IX. Support for Health Care Lawsuit Reform by *USA Today*

The *USA Today* editorial board also recently came out supporting tort reform, stating:

> A study last month by the Massachusetts Medical Society found that 83% of its doctors practice defensive medicine at a cost of at least $1.4 billion a year. Nationally, the cost is $60 billion-plus, according to the Health and Human Services Department. [And a] 2005 study in the Journal of the American Medical Association found 93% of Pennsylvania doctors practice defensive medicine. The liability system is too often a lottery. Excessive compensation is awarded to some patients and little or none to others. As much as 60% of awards are spent on attorneys, expert witnesses and administrative expenses … The current system is arbitrary, inefficient and results in years of delay.[8]

The editors of *USA Today* concluded that "one glaring omission" from the Democrats' health care law "was significant tort reform, which was opposed by trial lawyers and their Democratic allies. CBO estimates that restricting malpractice suits would save $54 billion over 10 years by curbing tests and procedures that patients don't really need. So why not add it?"[9]

X. Support for the HEALTH Act by the American Medical Association

Discussing the need for tort reform, the President of the American Medical Association said "If the [health care] bill doesn't have medical liability reform in it, then we don't see how it is going to be successful in controlling costs."[10]

[7] The National Commission on Fiscal Responsibility and Reform, "The Moment of Truth" (December 2010) at 34-35.
[8] USA Today editorial, "Our View on 'Defensive' Medicine: Lawyers' Bills Pile High, Driving Up Health Care Costs," *USA Today* (December 29, 2008).
[9] *USA Today* editorial, "Don't try to repeal the new health care law – improve it" (November 18, 2010) at 9A.
[10] Carrie Budoff Brown, "Trial Lawyers Plan Tort Reform Fight," *Politico* (March 16, 2009).