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Medical Association of Georgia

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October 30, 2009

Honorable Lynn A. Westmoreland
U.S. House of Representatives
1213 Longworth House Office Building
Washington, D.C. 20515-1003

Dear Rep. Westmoreland:

Thank you for requesting our assessment of the impact of Section 3531 of H.R. 3962 related to Incentive Payments for Medical Liability Alternatives. I very much appreciate the opportunity to provide you with input on this issue.

In short, this section of the bill cannot be taken as a serious attempt to enact meaningful tort reform measures. In fact, as I explain below, the section is constructed in a way that actually makes it difficult to even qualify for the incentive payments.

In my opinion this section of the bill will not pre-empt Georgia's tort reform laws (such as the caps on non-economic damages) that have been proven effective in reducing costs and improving access to care. The bill does have the potential of causing an extremely negative impact on Georgia should the State of Georgia decide to pursue the financial incentives authorized. However, I believe the likelihood of Georgia pursuing the incentives is unlikely for reasons described below.

Type of Law that Must be Enacted to Make State Eligible for Payments: In order for the state to be eligible for the incentive payment, the new state law must consist of either a "certificate of merit" or "early offer" and may not contain limits on attorneys' fees or a cap on damages. In Georgia, we already have both a "certificate of merit" law and an "offer of judgment" law which I assume would qualify as an "early offer" law set forth in the bill. However, Georgia would not be eligible for the incentive payment because a condition of eligibility for payment is that the new law must be enacted after HR 3962 is enacted.

The question remains as to whether the amount of the incentive would be enough to induce the Georgia legislature to modify our current laws related to certificate of merit and early pay. In addition, an interesting question arises as to whether a new Georgia law addressing certificate of merit or early pay would require the repeal of Georgia's existing law that caps non-economic damages. A strict reading of the bill would not require repeal, but it is clear that caps on damages and attorneys' fees are disqualifying factors. One could argue that, since the intent of the bill is to "disincentivize" caps on damages, a state with such caps would not qualify for the incentive payment, even if it enacts the certificate of merit or early pays laws. In the end, I think it is unlikely that the Georgia legislature would amend its current tort reform laws to obtain the incentive payments.

Incentive Payments: This section requires the Secretary of HHS to make incentive payments to each state that has an "alternative medical liability law." The amount of the payment is completely discretionary and subject to appropriation. The duration of the payment is not addressed.

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In addition, the Secretary of HHS must determine that the laws are "effective." To be effective, the law must:

1. *Prevent or dispense of disputes promptly.* (Probably relative easy to demonstrate.)
2. *Encourage the disclosure of health care errors.* Demonstrating that either the certificate of merit law or the early pay law encourages disclosure of health errors would be very difficult. The very nature of these two laws does not encourage disclosure. The certificate of merit law would exclude claims that did not have the certificate, thus limiting disclosure. [Note, such cases would be without merit anyway. Currently, even with a certificate of merit law, 85% of Georgia's claims are resolved without any payment to the claimant.] Early settlement of claims may also tend to limit disclosure. Certainly new state statutes could be crafted to include enhanced disclosure provisions in an attempt to meet this requirement. However, if the intent is disclosure, other common tort reform provisions (such as the "I'm sorry" rule also enacted in Georgia) are more effective in promoting disclosure. But those laws do not qualify the state for incentive payments under the bill. Thus, pure certificate of merit and early pay laws without enhanced disclosure provisions would render it very difficult for the state to qualify for the incentive payment.
3. *Maintain access to affordable liability insurance.* Certificates of merit with strong expert witness requirements (i.e. Daubert standard) have proven to be an effective means of weeding out frivolous lawsuits thereby keeping the costs of liability insurance low. A strong construct of the bill's ill-defined "early payment" provision, such as in Georgia's "offer of judgment" law, do have some beneficial effect on liability premiums.

Caps on Attorneys' Fees: The bill disincentivizes states from enacting laws that cap attorneys' fees. Georgia does not have a statutory cap on attorneys' fees. I have to say that it is **incredibly disingenuous that the base bill, H.R. 3692, contains hundreds of pages of statutory language that 'caps' physicians' fees, but in one short phrase disincentivises caps on attorneys' fees.** I would urge the authors of the bill to demonstrate the same courtesy to physicians as they do to trial lawyers by repealing current laws that cap physician fees.

I hope this analysis is helpful to you. Thanks again for contacting me and let me know if I can be help in any other way.

Sincerely,



David A. Cook
Executive Director/CEO

DAC/dg

cc: Members of the Georgia Congressional Delegation
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