Alliance for Justice
Center for Justice & Democracy
Center for Medical Consumers
Consumer Federation of America
Consumer Watchdog
National Consumers League
National Women's Health Network
Public Citizen
USAction

July 16, 2009

The Honorable Henry A. Waxman
Chairman
House Committee on Energy and Commerce
Washington, DC 20515

Dear Chairman Waxman:

Re: Medical Malpractice Alternatives Act of 2009.

We understand that an amendment to the health care bill will be offered by Mr. Gordon of Tennessee that would encourage states, through payment of incentives, to adopt any number of changes or "alternatives" to medical malpractice litigation. The undersigned consumer and public interest groups strongly oppose this amendment.

First, the basis for the legislation – that defensive medicine is too costly and there are too many frivolous lawsuits – is simply without credible support. No government study, from the GAO to the CBO to the earlier Office of Technology Assessment, has supported the notion that "defensive medicine" is a problem. Most recently, the GAO harshly criticized evidence continuously cited by the American Medical Association that the tort system encourages defensive medicine. As far as there being too many so-called frivolous lawsuits, the Harvard School of Public Health published a 2006 article in the *New England Journal of Medicine*, which put to rest that notion, finding that legitimate claims are being paid, non-legitimate claims are generally *not* being paid, and "portraits of a malpractice system that is stricken with frivolous litigation are overblown."

Second, alternative systems where *both* parties voluntarily agree, after the dispute arises, to take a case out of the civil justice system, are not only appropriate, but currently resolve the vast majority of legitimate medical malpractice claims today through the settlement process. 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 insurance companies that represent health care providers and are fundamentally unfair, as we explain below. The following are a few highlights of problem areas in this bill:

Title I: The Medical Malpractice Alternatives

- **Pre-litigation Certificate of Merit/Medical Review Panels.** Some states have "Certificate of Merit" laws that work, but this provision is onerous, unfair to patients and completely unworkable. Requiring a patient to find a healthcare provider to certify that every act or omission alleged in a *complaint* is the *proximate cause for the injury* is virtually impossible and means legitimate cases will not go forward, especially given that claims will the dismissed "with prejudice" if the certificate is not completed and filed. This level of proof can only be obtained through the discovery process, after a complaint has been filed. The

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medical review panel idea is fundamentally unfair for patients, since the panel members would come from the health care industry, with clear conflicts of interest. Also unfair are the extra burdens, such as undue time and expenses, this process would place on patients in their quest just to get into court.

- **Clinical Practice Guidelines.** There is certainly nothing wrong with bringing "evidence-based medicine" into health care practice. But encouraging states to develop programs where clinical practice guidelines could become a standard for deciding negligence is a bad idea, especially if, as contemplated here, patients would not be allowed the same standard to prove negligence. First, there are already over a thousand such guidelines in existence. Not only are some contradictory, but because patients often present widely varying and complicated conditions, patient safety could suffer from a "one size fits all" approach. Further, conflict of interest and specialty bias are already ongoing problems in the development of these guidelines. If medical societies are allowed to participate in writing guidelines they know could be exculpatory for their members, conflicts of interest and bias will only escalate.

- **Voluntary Alternative Dispute Resolution.** Mediation or arbitration that is truly voluntary and non-binding can be an appropriate way to resolving disputes. However, there is enormous potential for abuse in this vague provision, especially on the issue of consent. For example, patients could be asked to waive their rights to jury trial in order to receive medical care. This is fundamentally unfair. Mediation and arbitration decisions must be made post-dispute, and be truly voluntary and non-binding so that the right to trial by jury is preserved.

Titles II and III: "Disaster Volunteer Liability Protection" and "Health Care Safety Net Enhancement."

Title II is entirely unnecessary, particularly in a health care bill. The Volunteer Protection Act of 1997, which passed the Senate by a solid vote of 99 to 1, already provides legal immunity from negligence to unpaid volunteers working with nonprofits and government agencies. Indeed, that law was a carefully crafted proposal whereby Congress decided, after much consideration, that it was a bad idea to immunize host organizations of volunteers. Title III would provide new liability protections for emergency room doctors. Unfortunately, as the Institute of Medicine has found, the hospital location with the highest proportion of negligent adverse events (52.6 percent) is the emergency department. Patients injured in ER's, no matter their insurance coverage, deserve the same rights to seek justice through the courts as any other injured patient. Further, the preemption provisions are another attempt to restrict patients' rights and protect the providers from accountability. They will remove legitimate causes of action for patients under state law.

Health care should never be accomplished by taking away the legal rights of patients who are injured through no fault of their own, or reducing the accountability of anyone who commits wrongdoing. This amendment is particularly unfair since injured patients whose legal rights would be limited by this bill are also taxpayers who would be asked to fund incentives to encourage states to enact one or more of the bill's provisions. We urge the Committee to reject it.

Sincerely,

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