

United States Senate

WASHINGTON, DC 20510-4802

October 21, 2009

Douglas W. Elmendorf, Director
Congressional Budget Office
U.S. Congress
Washington, DC 20515

Dear Dr. ^{Doug} Elmendorf:

I am writing to express my grave concerns that the Congressional Budget Office's (CBO) new estimates of the cost-savings associated with federal mandates on medical malpractice reform could have dangerous consequences for consumers in the American health care system. As drafted, CBO's letter to Senator Hatch, dated October 9, 2009, implies that tort reform will provide substantial cost savings to the federal government and to the public through a reduction in the use of health care services, but that we should not be concerned about negative health effects from the reduction of those services due to conflicting research on that issue.

Doctors and hospitals provide such an important service, and we put our trust and our health in their hands. The vast majority of these professionals are careful, service oriented people who are driven by a desire to take care of others. However, Americans who rely on our health care system need to know that there is recourse for them should the tragedy of a medical error strike them or their families. Our tort system serves as a backstop, so that injured patients are not left out in the cold to deal with the negative health effects, loss of quality of life, and increased costs associated with medical errors. That is why I am deeply concerned about the potential ramifications on both costs and consumer health of CBO's new conclusions that medical malpractice reform would result in cost savings through a reduction in the use of health care services. I am also concerned about the way CBO has justified these new conclusions. Not only does CBO's letter overturn several years of CBO analysis without adequate justification, but many of the reports cited either contradict CBO's conclusions or otherwise acknowledge their own limitations as resources for setting policy or making key cost-savings assumptions about tort reforms. Below I have outlined these issues in more detail, which call into question the accuracy of CBO's analysis and its reliability to assist policymakers on this issue.

There is no question that medical negligence is a serious problem in our country. According to CBO, "In 2003, about 181,000 severe medical injuries occurred in U.S. hospitals that were attributable to negligence. Only about 17 percent of affected patients chose to file a malpractice claim."¹ Additional evidence suggests that between 44,000 and 98,000 people die each year due to "preventable" medical errors.² Despite the negative health outcomes associated with medical negligence, and the low instances of patients actually filing suit, several politicians and special interest groups have argued that limiting the legal remedies of those injured or killed from medical negligence will result in substantial cost savings to consumers and the federal government, particularly through reductions in "defensive medicine." But CBO has consistently concluded the opposite.

¹ CBO, *Key Issues in Analyzing Major Health Insurance Proposals*, December 2008

² Institute of Medicine, *To Err Is Human: Building a Safer Health System*, 2000

In 2004, CBO stated that “[E]ven large savings in [medical malpractice] premiums can have only a small direct impact on health care spending – private or governmental – because malpractice costs account for less than 2 percent of that spending.”³ Again in 2008, CBO concluded that “By reducing the average size of malpractice awards, tort limits would ultimately reduce the cost of malpractice insurance premiums. But in CBO’s estimation, the effect would be relatively small – less than 0.5 percent of total health care spending.”⁴

Additionally, on the issue of medical malpractice reform’s indirect effects, including its ability to reduce “defensive medicine,” in 2004, CBO found such evidence to be “weak or inconclusive” and “at best ambiguous.”⁵ In that same report, CBO concluded that, “On the basis of existing studies and its own research, CBO believes that savings from reducing defensive medicine would be very small.”⁶ In 2006, CBO conducted its own empirical analysis on the link between tort reforms and the reduction in the use of health care services and concluded that the results were “mixed” and “inconsistent,” noting that some tort limits reduce spending, whereas others have no effect or actually increase spending.⁷ In December 2008, CBO stated that it “has not found consistent evidence” that tort limits would reduce unnecessary tests, and that:

After carefully considering the economic literature and conducting its own statistical analysis of the data, CBO has not found consistent evidence that changes in the medical malpractice environment would have a measurable impact on health care spending.⁸

Yet, a mere ten months later, CBO’s letter to Senator Hatch overturns several years of CBO analysis without adequately justifying its new conclusions. CBO’s previous analysis found that medical malpractice reforms would result in total savings to the government of \$5.6 billion over 10 years.⁹ But in the letter to Senator Hatch, CBO has found savings of \$54 billion over 10 years, an 864 percent increase.¹⁰ Additionally, despite CBO’s consistent rejection of cost savings associated with reductions in “defensive medicine,” CBO now claims to have found conclusive evidence that such savings will be realized, while at the same time ignoring any possible negative health outcomes for patients due to conflicting evidence.¹¹

Although your letter cites various reports purporting to support CBO’s conclusions, the letter fails to adequately identify how CBO used the data from those reports to justify its cost savings, and CBO has further failed to identify how these reports are more accurate than CBO’s

³ CBO, *Limiting Tort Liability for Medical Malpractice*, January 2004

⁴ CBO, *Budget Options Volume 1: Health Care*, December 2008

⁵ CBO, *Limiting Tort Liability for Medical Malpractice*, January 2004

⁶ *Id.*

⁷ CBO, *Medical Malpractice Tort Limits and Health Care Spending*, April 2006

⁸ CBO, *Key Issues in Analyzing Major Health Insurance Proposals*, December 2008

⁹ CBO, *Budget Options Volume 1: Health Care*, December 2008

¹⁰ CBO, Letter to the Honorable Orrin G. Hatch, October 2009

¹¹ *Id.*

own analysis from 2004, 2006, and December 2008. Furthermore, even among the reports that are cited, the letter has selectively used data to support CBO's conclusion that our government will experience cost savings, while ignoring data indicating that there will be no cost savings or that patients will see adverse health effects as a result of reductions in the use of health care services.

The letter cites the Lakdawalla and Seabury study (2009) as evidence that medical malpractice reforms would reduce costs associated with defensive medicine,¹² but ignored that study's key conclusions that "policies that reduce expected malpractice costs are unlikely to have a major impact on health care spending for the average patient, and are also unlikely to be cost-effective over conventionally accepted ranges for the value of a statistical life."¹³ Or that, based on the value of a statistical life, "malpractice reform is more likely to be cost-ineffective."¹⁴ Or that "reducing malpractice costs is more likely to harm than improve social welfare."¹⁵ Or that "any policymaker wishing to defend tort reform would need to depart from these accepted U.S. regulatory practices, and advocate a lower value of statistical life than conventionally used, in order to justify their case."¹⁶

Similarly, the letter cites the Avraham, Dafny, and Schanzenbach study (2009) as evidence that medical malpractice reforms would reduce costs associated with defensive medicine, but ignored that study's "key disadvantage" that it was "unable to assess how these reforms impact health outcomes."¹⁷ Avraham concludes that "To understand the social welfare implications of these reforms, however, additional research on health outcomes and long-run costs is needed."¹⁸

CBO's letter acknowledges Lakdawalla's conclusion that implementing medical malpractice reforms would increase the nation's mortality rate by .2 percent, but dismisses this as inconclusive based on the existence of other studies that find no adverse health effects for patients.¹⁹ However, this increased mortality rate would result in additional deaths, on top of the hundreds of thousands of injuries and deaths that we already experience due to medical errors. This is something that policymakers cannot take lightly. CBO's analysis also begs the question as to why CBO relied so heavily on one aspect of the Lakdawalla study to show cost savings, but then ignored Lakdawalla's conclusion that implementing these policies would lead to more deaths.

¹² *Id.*

¹³ Lakdawalla and Seabury, *The Welfare Effects of Medical Malpractice Liability*, September 2009

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Avraham, Dafny, and Schanzenbach, *The Impact of Tort Reform on Employer-Sponsored Health Insurance Premiums*, 2009

¹⁸ *Id.*

¹⁹ CBO, Letter to the Honorable Orrin G. Hatch, October 2009

Additionally, CBO's letter cites a study by Sloan and Shadle (2009) to refute Lakdawalla's conclusion that medical malpractice reforms would result in increased deaths in America.²⁰ But at the same time, it ignores Sloan's other conclusion that "[A]ssertions that tort reforms will reduce waste of scarce resources seems, at best, highly premature."²¹ Or that, "[I]t seems inappropriate to conclude that tort reforms implemented to date succeed in reducing non-beneficial care as their proponents would have it."²² These conclusions actually contradict CBO's analysis that medical malpractice reforms will reduce spending associated with a reduction in the use of health care services.

Another report cited in support of CBO's conclusion that we will see cost savings from reductions in the use of health care services, Baicker, Fisher, and Chandra (2007), also states that "Our estimates do not imply that any change in spending was necessarily 'defensive medicine.' To the extent that additional malpractice costs mean greater precautionary testing with some medical value, any additional procedures might be protective of patient health or valued regardless of their therapeutic properties."²³

Finally, the letter also cites a Currie and MacLeod study (2008) for the proposition that "inclusion or exclusion of specific components in a legislative tort reform proposal could affect the proposal's likely impact on health care spending."²⁴ Not mentioned in your letter is one important conclusion from that study, which found that in the context of childbirth one of the most commonly touted tort reform proposals, caps on damages, "are found to increase procedure use, and hence costs. They also increase complications of labor and delivery in some specifications. Hence, in one important example, tort reform that reduces the malpractice risk facing doctors appears to increase rather than decrease procedure use, with potentially harmful effects on patients."²⁵ The study concludes by stating, "Without knowing more about the specific incentives faced by physicians, it is hazardous to predict that a specific tort reform will either reduce unnecessary procedure use or have beneficial impacts on health."²⁶

In conclusion, CBO's recent letter to Senator Hatch creates more questions than it answers. The several cited reports contain conflicting data, which tends to support CBO's prior conclusion that the evidence available on the issue of defensive medicine is "inconsistent" and "mixed." It is impossible for CBO to conclude that we will see cost savings from a reduction in health care services without analyzing the effects on patient health. Many states, including my home state of West Virginia, have already enacted several medical malpractice reforms based on what they think will work best for their doctors and their patients. It would be irresponsible for policymakers at the federal level to override states' policies without knowing whether reductions in health care services will increase deaths or costs associated with negative impacts on health.

²⁰ *Id.*

²¹ Sloan and Shadle, *Is there empirical evidence for "Defensive Medicine"? A reassessment*, 2009

²² *Id.*

²³ Baicker, Fisher, and Chandra, *Malpractice Liability Costs And The Practice of Medicine In The Medicare Program*, 2007

²⁴ CBO, Letter to the Honorable Orrin G. Hatch, October 2009

²⁵ Currie and MacLeod, *First Do No Harm? Tort Reform and Birth Outcomes*, 2008

²⁶ *Id.*

In light of the foregoing, I respectfully request that you answer the following questions:

- 1) CBO has repeatedly concluded that cost savings associated with medical malpractice reforms would be minimal and that evidence concerning defensive medicine is “inconsistent.” In reaching its conclusion that medical malpractice reform will reduce defensive medicine and result in cost savings to the federal government, CBO cites three recent studies (only two of which actually post-date CBO’s December 2008 analysis). Please explain how these studies conclusively prove that medical malpractice reforms will reduce defensive medicine, and further explain why these studies are more accurate than CBO’s own analyses on this issue.
- 2) In December 2008, CBO determined that the effect of medical malpractice reform “would be relatively small – less than 0.5 percent of total health care spending.” In that report, CBO found that the federal government would save \$5.6 billion over 10 years. In your letter to Senator Hatch, it is similarly stated that medical malpractice reforms would reduce health care spending “by about 0.5 percent,” but ultimately concluded that the federal government would save \$54 billion over 10 years. Please explain how CBO calculated savings of \$54 billion, based on a reduction in health care spending of “about 0.5 percent,” when CBO’s December 2008 report calculated savings of \$5.6 billion, based on a “less than 0.5” percent reduction in health care spending.
- 3) Please provide CBO’s complete empirical analysis of the cost savings associated with medical malpractice reforms, including a description of how CBO used the reports of Lakdawalla (2009), Baicker (2007), and Avraham (2009) in conducting the empirical analysis.
- 4) The Lakdawalla (2009) study contains evidence of cost savings associated with medical malpractice reforms, as well as evidence of negative impacts on patients’ health (increased mortality). Please explain CBO’s justification for accepting Lakdawalla’s conclusions regarding cost savings, but rejecting Lakdawalla’s conclusions regarding patients’ health.
- 5) The Sloan (2009) study contains evidence that medical malpractice reforms would have no impact on patients’ health, as well evidence that medical malpractice reforms would not reduce the waste of medical resources. Please explain CBO’s justification for using Sloan’s conclusion that medical malpractice reform does not impacts patients’ health, but ignoring Sloan’s conclusions that medical malpractice reform would not reduce the waste of medical resources.
- 6) The Baicker (2007) study contains evidence of cost savings associated with medical malpractice reform, but also concludes that these cost savings may not come from defensive medicine, but could also come from procedures that are protective of patient health. Please explain CBO’s rationale for relying on Baicker to prove cost savings, but ignoring Baicker’s conclusion that these procedures may improve patient health.

- 7) The Currie (2008) study found that in the context of child births, caps on damages increase the use of medical procedures, and thus increase costs, and potentially harm patients. Please explain how CBO's analysis – which concludes that medical malpractice reforms result in cost savings, but rejects adverse impacts on patients' health – comports with the Currie study.
- 8) Can CBO conclusively say that medical malpractice reforms will result in cost savings without fully analyzing the health effects of reducing medical services? If medical malpractice reforms negatively impact patients' health, as some studies have suggested, would that result in increased costs to the federal government?

In closing, I would like to thank you in advance for your attention to this matter. I appreciate how difficult your job is, and I thank you and your staff for your hard work. However, on this issue, we are talking about modifications to existing protections that all Americans rely on to seek redress for medical errors that can result in tragedies for America's patients and their families. For me, these details matter because there are some that would use newfound savings as a justification for reforms that could prove detrimental to our health care system and the consumers it serves. I look forward to your prompt reply.

Sincerely,



John D. Rockefeller IV

This is a relatively huge matter,

Don't see you will agree.

Thanks.

