



Statement for the Record from the

Health Coalition on Liability and Access

in response to the

Senate Committee on Health, Education, Labor and Pensions

hearing on the topic

COVID-19: Lessons Learned to Prepare for the Next Pandemic

July 1, 2020

Chairman Alexander, Ranking Member Murray, and members of the committee, thank you for the opportunity to submit this statement following your introspective hearing on lessons learned throughout the COVID-19 pandemic. Since the outbreak began, member organizations of the Health Coalition on Liability and Access (HCLA) have been on at the forefront of a challenge never before experienced by modern medical providers, facilities, and healthcare system stakeholders. This experience offers us the opportunity to revisit medical liability issues and the threats they have posed to physicians, patients and healthcare systems as a whole — and what we can learn and act on ahead of a potential second wave and future pandemics.

Our healthcare professionals and facilities have put themselves at risk each day while facing workforce shortages, inadequate safety supplies, and insufficient information or changing guidance from federal, state, and local government officials. Despite this, throughout the crisis, they have continued to go above and beyond, putting patient treatment and wellbeing above that of their own.

To provide our healthcare providers with protections from unfounded lawsuits, the HCLA has joined a chorus of stakeholders in calling on Congress to pass legislation to safeguard medical professionals, and the facilities in which they practice, from COVID-19-related medical liability lawsuits. To that end, bipartisan legislation has been introduced in the House of Representatives — H.R. 7059, the Coronavirus Provider Protection Act — which would provide targeted relief from the threat of these lawsuits. This bill contains critical language that should be considered by the Senate HELP Committee as it weighs additional COVID-19 legislation.

The earliest signs of a crisis

The earliest signs of a crisis were visible as the current healthcare workforce proved insufficient, safety gear was in short supply, and non-COVID-19 patients were forced into diagnosis and treatment delays. Practitioner shortages have required providers to treat patients outside their general practice areas and prompted retired physicians to return to the workforce. For example, in New Jersey, an epicenter of the pandemic, over 400 retired providers reactivated their licenses as of mid-April.¹ The existing and returning practitioner workforce initially faced the reality of inadequate protective safety gear that is likely to have resulted in the inadvertent transmission of the virus. Facilities have scrambled to treat patients in the wake of a lack of essential medical equipment, including ventilators, which has spurred discussions and questions on rationing of care.² And not only did early efforts at testing fall short, causing insufficient or flawed diagnoses, but non-COVID-19 patients were also forced to delay elective and other unrelated medical treatments to save protective equipment and hospital beds. Patients across Texas have now seen non-urgent surgeries paused twice during the pandemic, causing an

¹ “More than 10K out-of-state health care workers approved to help N.J. fight the coronavirus,” *NJ.com*, April 14, 2020. <https://www.nj.com/coronavirus/2020/04/more-than-10k-out-of-state-health-care-workers-approved-to-help-nj-fight-the-coronavirus.html> (accessed on May 11, 2020).

² “The coronavirus pandemic is forcing U.S. doctors to ration care for all patients,” *Time*, April 22, 2020. <https://time.com/5825145/coronavirus-rationing-health-care/> (accessed on May 11, 2020).

escalation in severity.³ All of these situations increased the possibility of adverse patient outcomes. At the same time, health professionals coped with overwhelming circumstances and personal risk, and learning from this crisis must include acknowledging and mitigating this continued vulnerability.

Knowing this has not stopped our heroic healthcare providers and facilities from marching on. Nor were these actions or decisions the result of wrongdoing by caregivers or the facilities in which they operate. These were unavoidable circumstances as healthcare professionals and facilities shifted limited resources to address urgent needs, including under the recommendations or guidance by government officials. In other situations, providers were limited by the tools at their disposal, even when already facing circumstances that are less than ideal. The result is that pandemic responders are now susceptible to the threat of substantial liability.⁴

The threat of medical lawsuit abuse

There is early evidence — based on personal injury attorney advertisements and aggressive domain name marketing — that solicitations for medical liability cases are on the rise.⁵ These advertisements aim to, among other things, recruit as plaintiffs family members of those who became sick or died from COVID-19.⁶ Anecdotal evidence from medical liability insurers cites notices received each week, informing them of potential claims being filed against their insureds.

³ “Gov. Greg Abbott pauses Texas’ reopening, bans elective surgeries in four counties to preserve bed space for coronavirus patients,” *Texas Tribune*, June 25, 2020. <https://www.texastribune.org/2020/06/25/texas-elective-surgeries-coronavirus-greg-abbott/> (accessed on June 28, 2020)

⁴ “U.S. doctors on coronavirus frontline seek protection from malpractice suits,” *Reuters*, April 2, 2020. <https://www.reuters.com/article/us-health-coronavirus-usa-lawsuits/u-s-doctors-on-coronavirus-frontline-seek-protection-from-malpractice-suits-idUSKBN21K2IQ> (accessed on May 11, 2020).

⁵ “COVID-19: Malpractice Risks When Treating Patients,” *Medscape*, April 29, 2020. <https://www.medscape.com/viewarticle/929635> (accessed on May 11, 2020).

⁶ “Stopping a Lawsuit Epidemic,” *The Wall Street Journal*, April 23, 2020. <https://www.wsj.com/articles/stopping-a-lawsuit-epidemic-11587683263> (accessed on May 11, 2020).

The very healthcare professionals and facilities that have been so dedicated to preserving and protecting the health of the American public should not face unwarranted legal action for their efforts to respond to the COVID-19 crisis. Already, public memory of their sacrifices is fading, as patients look to legal recourse for closed offices and delayed elective surgeries or procedures as a result of government directives. This is seen as public commentary calls COVID-19 liability lawsuits a “straw man,”⁷ and suggests that efforts to protect those who endured numerous burdens while caring for their patients without question are “shameless.”⁸

Congress can help deter meritless lawsuits related to COVID-19 by adopting protections such as those outlined in H.R. 7059. The readiness of our healthcare system is only attainable when healthcare professionals and facilities know that their good faith efforts to deliver care will not threaten them with future lawsuits.

Protecting patients — now and in the future

While nearly half of the states took steps to protect pandemic responders and ensure their vital work could continue without the threat of medical liability lawsuits, a comprehensive pandemic response now and tomorrow is unattainable if it is based on protections that vary from state to state.⁹ The tremendous burden on our healthcare system created by COVID-19 required many healthcare providers to practice across state lines, without the luxury of choosing to practice only in a state that has provided liability protections.

⁷ “COVID-19 Lawsuit Immunity: When Nobody is Accountable, Nobody is Safe,” *Texas Lawyer*, June 25, 2020. <https://www.law.com/texaslawyer/2020/06/25/covid-19-lawsuit-immunity-when-nobody-is-accountable-nobody-is-safe/?slreturn=20200529212633> (accessed June 29, 2020)

⁸ “Push to Expand Doctors’ Legal Immunity for Virus Draws Ire,” *Bloomberg Law*, June 25, 2020. <https://news.bloomberglaw.com/health-law-and-business/push-to-expand-doctors-legal-immunity-during-crisis-draws-ire> (accessed June 29, 2020)

⁹ “COVID-19 Liability Initiatives by State,” *Health Coalition on Liability and Access*. <http://protectpatientsnow.org/covid-19-resources/> (accessed on June 29, 2020).

Additionally, not only are state liability waivers — whether through executive order or legislation — subject to challenge from personal injury attorneys, but many governors lacked the legal authority to waive state laws, even during a situation as severe as the COVID-19 pandemic.

If we've learned one thing from the COVID-19 pandemic, it's that a national emergency of this size and scale needs a federal solution. Today, we are stating our unequivocal support for the Senate to adopt legislation that incorporates a targeted approach for healthcare providers modeled after H.R. 7059, the Coronavirus Provider Protection Act. The HCLA supports incorporating language granting *targeted immunity from liability for healthcare professionals and the facilities in which they serve* in any future pandemic response legislation. The House version of this bill has attracted bipartisan support, and we urge the Senate to take similar steps to craft an immunity bill that would be triggered if:

- The act or omission occurred during the declared COVID-19 public health emergency or within 60 days of termination of the emergency;
- The act or omission occurred while providing or arranging care;
- The services were within the provider's scope of licensure/certification, without regard as to whether the service fell within the usual scope of practice; and
- The services were provided in good faith.

These medical liability protections should also apply to actions taken based on directives or guidance from any Federal, State, or local official/department/agency, as well as situations involving a lack of resources attributable to the declared emergency. Importantly, under the House bill, healthcare professionals and the facilities in which they work would not be protected for gross negligence or willful misconduct. Furthermore, such protections are also distinctly

different from liability issues faced by the business community, and in many ways, more urgent given the front-line role these pandemic responders have played from day one.

Conclusion

The COVID-19 pandemic has tested our healthcare system and public health policies like no other crisis in recent memory, leaving our patients, providers and facilities in a grave position through current peaks in diagnoses and a likely second wave. This has left front-line providers, and the facilities in which they work, facing hundreds of medical liability lawsuits that will only grow exponentially before the coronavirus subsides. Members of this committee, and your constituents, have been outspoken in support of healthcare providers in the wake of the COVID-19 pandemic with a thorough approach to future pandemic preparation. You can incorporate these lessons by passing medical liability legislation that will protect our nation's health care providers' ability to continue to be there for patients when they are needed most.

Thank you for considering our comments and recommendations.

For more information, contact:

Michael C. Stinson, JM, HCLA Chair
Vice President of Government Relations and
Public Policy
Medical Professional Liability Association
Direct: 240-813-6139
Cell: 202-250-4258
Email: mstinson@MPLassociation.org

Katie O. Orrico, JD, HCLA Vice-Chair
Director, Washington Office
American Association of Neurological
Surgeons/Congress of Neurological Surgeons
Direct: 202-446-2024
Cell: 703-362-4637
Email: korrico@neurosurgery.org

Appendix A: HCLA Membership 2020

AMDA-The Society for Post-Acute and Long-Term Care Medicine
American Academy of Dermatology Association
American Academy of Orthopaedic Surgeons
American Academy of Otolaryngology - Head and Neck Surgery
American Association of Neurological Surgeons
American College of Emergency Physicians
American College of Obstetricians and Gynecologists
American College of Surgeons
American Health Care Association
American Hospital Association
American Medical Association
American Osteopathic Association
American Society of Anesthesiologists
American Society of Plastic Surgeons
American Tort Reform Association
American Urological Association
Californians Allied for Patient Protection
Congress of Neurological Surgeons
Cooperative of American Physicians
COPIC Insurance Company
Federation of American Hospitals
ISMIE Mutual Insurance Company
MAG Mutual Insurance Company
Medical Assurance Company of Mississippi
Medical Insurance Exchange of California
Medical Professional Liability Association
Medical Protective Company
MLMIC Insurance
National Association of Spine Specialists
NORCAL Group
Physicians Insurance A Mutual Company
Piedmont Liability Trust
Premier health alliance
ProAssurance
Society for Vascular Surgery
SVMIC
Texas Alliance for Patient Access
Texas Medical Liability Trust
The Doctors' Company