Testimony of

The Honorable Patrick Leahy

February 11, 2003

Today I am pleased to introduce the "Medical Malpractice Insurance Antitrust Act of 2003" along with Senators Kennedy, Durbin, Edwards, Rockefeller, Reid, Boxer, Feingold, and Corzine. In the deafening debate about medical malpractice, I believe this legislation is a clear and calm statement about fixing one significant part of the system that is broken - skyrocketing insurance premiums for medical malpractice.

Our health care system is in crisis. We have heard that statement so often that it has begun to lose the force of its truth, but that truth is one we must confront and the crisis is one we must abate.

Unfortunately, dramatically rising medical malpractice insurance rates are forcing some doctors to abandon their practices or to cross state lines to find more affordable situations. Patients who need care in high-risk specialties - like obstetrics - and patients in areas already under-served by health care providers - like many rural communities - are too often left without adequate care.

We are the richest and most powerful nation on earth. We should be able to ensure access to quality health care to all our citizens and to assure the medical profession that its members will not be driven from their calling by the manipulations of the malpractice insurance industry.

The debate about the causes of this latest insurance crisis and the possible cures grows shrill. I hope today's hearing will be a calmer and more constructive discussion. My principal concerns are straightforward: That we ensure that our nation's physicians are able to provide the high quality of medical care that our citizens deserve and for which the United States is world-renowned, and that in those instances where a doctor does harm a patient, that patient should be able to seek appropriate redress through our court system.

To be sure, different states have different experiences with medical malpractice insurance, and insurance remains a largely state-regulated industry. Each state should endeavor to develop its own solution to rising medical malpractice insurance rates because each state has its own unique problems. Some states - such as my own, Vermont - while experiencing problems, do not face as great a crisis as others. Vermont's legislature is at work to find the right answers for our state, and the same process is underway now in other states. To contrast, in states such as West Virginia, Pennsylvania, Florida, and New Jersey, doctors are walking out of work in protest over the exorbitant rates being extracted from them by their insurance carriers.

Thoughtful solutions to the situation will require creative thinking, a genuine effort to rectify the problem, and bipartisan consensus to achieve real reform. Unfortunately, these are not the characteristics of the Administration's proposal. Ignoring the central truth of this crisis - that it is a problem in the insurance industry, not the tort system - the Administration has proposed a plan that would cap non-economic damages at $250,000 in medical malpractice cases. The notion that such a one-size-fits-all scheme is the answer runs counter to the factual experience of the states.

Most importantly, the President's proposal does nothing to protect true victims of medical malpractice. A cap of $250,000 would arbitrarily limit compensation that the most seriously injured patients are able to receive. The medical malpractice reform debate too often ignores the men, women and children whose lives have been dramatically - and often permanently - altered by medical errors

The President's proposal would prevent such individuals - even if they have successfully made their case in a court of law - from receiving adequate compensation. We are fortunate in this nation to have many highly qualified medical professionals, and this is especially true in my own home state of Vermont. Unfortunately, good doctors sometimes make errors. It is also unfortunate that some not-so-good doctors manage to make their way into the health care system as well. While we must do all that we can to support the men and women who commit their professional lives to caring for others, we must also ensure that patients have access to adequate remedies should they receive inadequate care.

High malpractice insurance premiums are not the result of malpractice lawsuit verdicts. They are the result of investment decisions by the insurance companies and of business models geared toward ever-increasing profits. But an insurer that has made a bad investment, or that has experienced the same disappointments from Wall Street that so many Americans have, should not be able to recoup its losses from the doctors it insures. The insurance company should have to bear the burdens of its own business model, just as the other businesses in the economy do.

But another fact of the insurance industry's business model requires a legislative correction - its blanket exemption from federal antitrust laws. Insurers have for years - too many years - enjoyed a benefit that is novel in our marketplace. The McCarran-Ferguson Act permits insurance companies to operate without being subject to most of the federal antitrust laws, and our nation's physicians and their patients have been the worse off for it. Using their exemption, insurers can collude to set rates, resulting in higher premiums than true competition would achieve - and because of this exemption, enforcement officials cannot investigate any such collusion. If Congress is serious about controlling rising premiums, we must objectively limit this broad exemption in the McCarran-Ferguson Act.

That is why today I introduce the "Medical Malpractice Insurance Antitrust Act of 2003." I want to thank Senators Kennedy, Durbin, Edwards, Rockefeller, Reid, Boxer, Feingold, and Corzine for cosponsoring this essential legislation. Our bill modifies the McCarran-Ferguson Act with respect to medical malpractice insurance, and only for the most pernicious antitrust offenses: price fixing, bid rigging, and market allocations. Only those anticompetitive practices that most certainly will affect premiums are addressed. I am hard pressed to imagine that anyone could object to a prohibition on insurance carriers' fixing prices or dividing territories. After all, the rest of our nation's industries manage either to abide by these laws or pay the consequences.

Many state insurance commissioners police the industry well within the power they are accorded in their own laws, and some states have antitrust laws of their own that could cover some anticompetitive activities in the insurance industry. Our legislation is a scalpel, not a saw. It would not affect regulation of insurance by state insurance commissioners and other state regulators. But there is no reason to continue a system in which the federal enforcers are

precluded from prosecuting the most harmful antitrust violations just because they are committed by insurance companies.

Our legislation is a carefully tailored solution to one critical aspect of the problem of excessive medical malpractice insurance rates. I hope that quick action by the Judiciary Committee and then by the full Senate, will ensure that this important step on the road to genuine reform is taken before too much more damage is done to the physicians of this country and to the patients they care for.

Only professional baseball has enjoyed an antitrust exemption comparable to that created for the insurance industry by the McCarran-Ferguson Act. Senator Hatch and I have joined forces several times in recent years to scale back that exemption for baseball, and in the Curt Flood Act of 1998 we successfully eliminated the exemption as it applied to employment relations. I hope we can work together again to create more competition in the insurance industry, just as we did with baseball.

If Congress is serious about controlling rising medical malpractice insurance premiums, then we must limit the broad exemption to federal antitrust law and promote real competition in the insurance industry.

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