The Honorable Michael Burgess
United States House of Representatives
Washington, DC 20515

Dear Congressman Burgess:

The undersigned organizations represent Texas physicians, hospitals, clinics, and other medical providers. We write to you to express our concerns with HR 1215, the Protecting Access to Care Act of 2017, as passed out of the House Judiciary Committee on February 28, 2017.

In June of 2003, the Texas Legislature passed a sweeping package of medical lawsuit reforms. These reforms are considered by many to be the “gold standard” in state medical liability law. The lynchpin of these landmark reforms is a non-economic damage cap that ranges from $250,000 to $750,000 depending upon the variety of defendants in a suit. There are many other provisions in the reform bill which also have contributed to its success. Texas tort reform has been highly successful in reducing frivolous lawsuits and bringing physicians to Texas in large numbers from across the country. Both hospitals and nursing homes have been much better able to expand services in the years after passage of Texas’ landmark medical lawsuit reforms.

It is in this context that we write you today regarding HR 1215. While the current version of this legislation incorporates some of the same liability protections as Texas law we are concerned that state flexibility language in the bill will be amended or omitted from the bill and thus put Texas’ long-standing medical lawsuit reforms in jeopardy of federal pre-emption.

Fourteen years after its passage, most elements of Texas’ landmark reforms have been upheld by Texas courts. HR 1215 would apply to both federal and state court actions involving the provision of health care goods or services with a federal nexus. We are concerned that many of the issues that have been challenged and affirmed by Texas courts will be re-litigated in jurisdictions outside of Texas. Not only will this process be costly, it could subject Texas healthcare providers to case law from out of state which we believe will be less favorable than what currently exists.

We urge that federal legislation should have strong state flexibility language and be as closely aligned as possible to the Texas law. One concern currently held by your Texas constituents is that the state flexibility language could be later amended or deleted. Any language that would make an amendment of the state
flexibility language more difficult to amend or delete would go a long way in addressing these concerns. Furthermore, we specifically urge amending two provisions, so that HR 1215 would better align with Texas law.

**Amendment #1**

Clarifying that “health care liability claim(s)” covered by the legislation include safety, professional or administrative services directly related to health care.

**Administrative and Safety Claims**

Not all of the claims asserted against providers arise from the direct provision of medical care. A popular theory is to sue hospitals and those serving on professional committees for negligent credentialing. In those cases, the plaintiff typically is not a patient of those physicians serving on the committee. It nevertheless represents a real exposure to the committee members and the definition of health care liability claim needs to be very clear that this type of liability is covered under the definition of administrative claims. This term would also cover negligence associated with the formulation of a hospital’s policies and procedures.

Another necessary component are safety claims. Unfortunately, in the mental health area there may be an assault by one patient on another. This does not arise out of the rendition of health care but pertains to the safety of the patient. Or in the case of a nursing home, a patient may wander out of the home and be injured. This would also be addressed under the term “safety.”

**Amendment #2**

1. Specifying that the statute of limitations for commencement of health care lawsuit shall be three years not from the “date of the injury” which is often uncertain -- but from

   A. The occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim is completed or
   B. One year after the claimant discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first.

**The Date of the Injury Begs the Question of how you Define Injury**

In Texas, for open courts purposes, we define injury as the date one recognizes an injury so as to put the patient on notice of the need to investigate its cause and commence legal proceedings. Retained sponge cases are among the most common examples.

The federal bill would commence the statute of limitations from the date of the “injury.” On its face this seems very reasonable and certain but in practical application it is not. In cases where there is a surgical mishap, such as a nicked artery, the date of the injury is very easy to determine. However, in other cases, particularly those pertaining to misdiagnosis or the prescription of medication that results in harm, the date of injury is very difficult to ascertain. One example involves Haldol or Navane, medications sometimes prescribed for psychiatric and neurologic disorders.
The prolonged use of these neuroleptics is believed to cause a condition called tardive dyskinesia; a neurological syndrome characterized by repetitive, involuntary, and purposeless movements. At what point would the injury occur? When the drugs are first prescribed? The date of last prescription? In the middle of the process? In many cases, it is difficult to pinpoint the exact date of the injury. If a person has cancer and there is a failure to diagnose, when is the injury? The patient already had cancer when they came to the doctor or hospital. Is the injury when the cancer became no longer treatable by chemotherapy or radiation therapy? These are some examples of the difficulty in using “injury” as an accrual date.

In Texas, the statute of limitations begins to run from the date the alleged negligence occurs or date of last treatment. This is a certain date that does not leave room for controversy. In some instances, the proposed Language in Section 3, Encouraging Speedy Resolutions of Claims, makes it more difficult to identify the date of the injury. For example, if a radiologist misses a tumor on an x-ray, Texas law would identify the date the physician read the x-ray as the date limitations began to run. However, if the limitations period commences on the date of injury, when did the injury occur in the above scenario? Did the patient’s injury occur when the radiologist read the x-ray or when the tumor became symptomatic? Having an exact event that starts the limitations period is very beneficial to healthcare providers because they can plan for and address potential exposure with more certainty.

As HR 1215 makes its way through the legislative process, we will be requesting your help in improving the bill. We offer our organizations as resources as to how medical malpractice reforms in Texas have benefited patients and doctors, and look forward to working with you and your staff on this important legislation.

Sincerely,

Don R. Read, MD
President
Texas Medical Association

Howard Marcus, MD
Chairman of the Board
Texas Alliance for Patient Access