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July 19, 2012

To: Supervisor Zev Yaroslavsky, Chairman
Supervisor Gloria Molina
Supervisor Mark Ridley-Thomas
Supervisor Don Knabe
Supervisor Michael D. Antonovich

From: William T Fujioka
Chief Executive Officer

MOTION BY SUPERVISOR ANTONOVICH TO SUPPORT FEDERAL LEGISLATION BASED ON CALIFORNIA'S MEDICAL INJURY COMPENSATION REFORM ACT (ITEM NO. 12, AGENDA OF JULY 24, 2012)

Item No.12 on the July 24, 2012 Agenda is a motion by Supervisor Antonovich recommending that the Board support Federal legislation, based on California's Medical Injury Compensation Reform Act, and instruct the Chief Executive Officer to: 1) prepare a five-signature letter to the California Congressional Delegation and the leadership of the United States Senate and House of Representatives; and 2) instruct the County's Washington lobbyists to work with Congressional offices to support this legislation.

The Medical Injury Compensation Reform Act (MICRA) was enacted in 1975 to reform how medical liability claims are litigated and resolved in hope of reducing health care costs and keeping medical liability insurance affordable while preserving protections for patients. Its reforms included imposing a $250,000 cap on non-economic damages, limiting plaintiffs' attorney fees, and authorizing courts to require periodic payments for future damages instead of requiring a larger lump sum payment.

Its supporters cite that MICRA is the main reason why medical liability insurance premiums have increased at a far lower rate in California than nationally since 1976. In a study of 257 medical malpractice verdicts from 1995 to 1999, the Rand Corporation found that MICRA significantly reduced the amount of non-economic awards, defendant liabilities, and attorney fees. The Rand study did not address MICRA's impacts on insurance premiums, quality of health care, defensive medicine, and/or the adequacy of compensation for plaintiffs.

Since its enactment, MICRA has been widely cited as a model for both state and federal medical malpractice reform efforts. In fact, it currently is cited as the model for the medical malpractice provisions in H.R. 5, the Help Efficient, Accessible, Low-cost, Timely Healthcare Act, which the House passed, 223 to 181, on March 22, 2012. Similar to MICRA, the bill would impose a $250,000 cap on non-economic damages, limit attorney fees, and authorize periodic payments of damages.

H.R. 5 was passed largely along party lines. In California's House delegation, all Republicans voted "aye," and all Democrats voted "no" except for Representatives Lee and Bono Mack, who did not vote. The Obama Administration opposes the entire bill, including an unrelated provision which would eliminate the Independent Payment Advisory Board (IPAD) established by the Affordable Care Act to develop recommendations on how Congress can control the rate of growth of Medicare costs.

Much of the opposition to the bill's medical malpractice provisions, including from the National Conference of State Legislatures (NCSL), is based on opposition to Federal preemption of state tort and medical malpractice laws. Even the California Medical Association (CMA), which strongly supports MICRA and the elimination of the ACA's IPAD, opposes H.R. 5 unless amended to delete its language which preempts states, such as California, from providing for joint and several liability in medical liability cases and from imposing punitive damages on medical product and device manufacturers, distributors, and suppliers. While the bill is modeled after MICRA, it also differs from MICRA by imposing a cap on punitive damages and extending liability protections to nursing homes, insurance companies, and health maintenance organizations. The NCSL opposes H.R. 5 and any other Federal medical malpractice legislation because such legislation preempts states which historically have regulated tort and medical practices with a "one-size, fits all" approach that would be imposed on all states.

The Heritage Foundation and some other conservative commentators which support the kinds of reforms included in H.R. 5, nevertheless, oppose such Federal legislation because they believe that it is not appropriate for Federal government to preempt states. The constitutionality of Federal preemption on tort and malpractice laws also is being questioned on the grounds that, under the U.S. Constitution, the Federal government only has powers explicitly granted to it and that the Commerce Clause does not authorize the Federal government to regulate tort and medical malpractice. They contend that arguing that the Commerce Clause covers medical malpractice is similar to the Obama Administration's unsuccessful argument that the Commerce Clause authorized the Federal government to impose the ACA's individual insurance mandate.

There is no existing Board-approved policy relating to MICRA or medical malpractice. However, there is an overall policy in the County's Federal Legislative Agenda to oppose Federal preemption of State and local government authority, which could be the basis for a pursuit of County position to oppose Federal legislation which would preempt

the State's tort and medical malpractice laws. This office, however, has not recommended that your Board oppose H.R. 5 because it is modeled after California law. However, this law does not have a chance of being enacted because the President would veto such legislation even if it were to pass the Senate. When medical malpractice bills passed the House in 2002, 2003, and 2005, they never moved in the Senate, even when the Senate had a Republican majority. **Therefore, support for Federal legislation, which is based on MICRA, is a matter for your Board's determination.**

We will continue to keep you advised.

WTF:RA
MR:MT:ma

c: Executive Office, Board of Supervisors
County Counsel