TESTIMONY OF J. NORMAN ESTES

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BEFORE

THE SENATE SPECIAL COMMITTEE ON AGING

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"MEDICAL LIABILITY IN LONG TERM CARE: IS ESCALATING LITIGATION A THREAT TO QUALITY AND ACCESS?"

Good afternoon Chairman Craig, Ranking Member Breaux, and members of the Committee. I appreciate the opportunity to be with you here today, and to provide you with perspective on the medical malpractice insurance crisis and how it is wreaking havoc upon America's long term care system.

My name is Norman Estes, and I am President and CEO of NHS Management, LLC and affiliate companies, some of which own, operate, manage, and provide services to 39 nursing facilities throughout the Southeast—one of the hardest hit regions of the country from the standpoint of today's topic.

I have also served in various capacities in the trade associations for the states in which NHS operates, including the Alabama Nursing Home Association, the Missouri Health Care Association, the Florida Health Care Association and the Arkansas Health Care Association.

Today, Mr. Chairman, I speak on behalf of the American Health Care Association (AHCA). We are a national organization representing more than 10,000 providers of long term care, who serve more than 1.5 million elderly and disabled people annually, employing more than 1 million caregivers.

I have worked in and around nursing facilities all of my life, and am proud to continue a family tradition started three generations ago. I care deeply about this profession I love, and care deeply for the frail, elderly and disabled who trust us to provide quality care they can depend upon.

I'd like to thank the Chairman for calling this important hearing—and for providing a valuable forum to discuss how the malpractice insurance crisis negatively impacts not just seniors and providers, but also America's taxpayers, and the public at large.

During the course of the broader debate on necessary common sense legal reforms, it has been somewhat frustrating to those of us in long term care as we see a majority of the news media and legislative focus centered upon hospitals and physicians.

In fact, the challenges facing long term care providers mirror, and in some areas, are more acute than those facing physicians and hospitals. We believe it is both necessary and appropriate that our federal officials appreciate that key legislative and policy changes must consider long term care providers if we hope to craft a workable health care system for today's and tomorrow's retirees.

Theresa Bourdon of Aon Risk Consultants will paint in her testimony a grim picture of the problems confronted by patients, providers, and government as we strive to deliver high quality care.

I would like to use my time to discuss the troubling statistics and trends we've now seen in three important, pertinent contexts:

First, to the budgetary challenges you as legislators face here in Washington;

Second, to the demographic challenges we confront as the provider community attempts to invest in the additional long term care capacity and infrastructure America will inevitably require;

Third, how elderly patients are being victimized by the crowding-out and diversion of funds away from improved patient care to pay for the higher costs of lawsuits.

Every way you look at it, Mr. Chairman, the litigation status quo benefits the very, very few at the expense of our elderly, our taxpayers, and our nation's future—and strikes directly at the credibility of our system of justice, fairness and basic sense of right and wrong.

Today's Budgetary Realities and the Diversion of Funds from Seniors ' Care Needs

With so many competing demands on the federal budget, and because we no longer enjoy the benefits of the budget surplus we enjoyed just a few years ago, it is more important than ever to ensure federal tax dollars are used efficiently to serve their specific, intended purpose.

Unfortunately, this is not the case with the nation's Medicaid program.

Those of us here today see Medicaid as the key federal program that funds the care of approximately two-thirds of our nation's nursing home patients. It is an essential lifeline to America's most vulnerable population of seniors and persons with disabilities.

However, in a stark and statistically undeniable manner, the nation's plaintiff lawyer community has targeted Medicaid dollars meant for seniors' long term care. The Aon analysis sheds light on a situation that should be troubling to every taxpayer, federal official and senior citizen reliant upon Medicaid.

Consider this disturbing fact that places this problem into perspective: Between 1995 and 2003, according to the Aon analysis, more than $5 billion in Medicaid resources were diverted away from patient care to pay for the cumulative costs associated with the increasing volume of nursing home litigation. Approximately half of this total has gone directly to litigation costs.

And in many states like Texas, Florida and Arkansas, **nearly half** of the per diem Medicaid rate increases from 1995-2003 have not even reached elderly Medicaid patients because of this diversion of funds.

While the nation's health care system is serving greater numbers of seniors under mounting federal and state budgetary pressure, failure to bring more accountability to Medicaid spending through common sense legal reforms is a disservice to every senior and taxpayer in America.

And the cruelest Catch-22 irony of all is also the most absurd: the rationale for most lawsuits is the allegation of inadequate care—yet the very funds necessary to help improve care are being systematically removed from the health care system.

Contrary to what some may believe, the litigation crisis is very much a problem for the federal government. Although some states have been moderately successful in establishing reforms, plaintiff's attorneys and others who see the long term care profession as a source of income are moving to states without reforms and are wreaking havoc on providers' abilities to maintain access to quality care. A federal remedy would create a national standard that would protect providers from frivolous lawsuits, regardless of geography.

The Demographic Challenge and the Capital Crunch

The number of Americans requiring long-term care is growing rapidly: In 2010, the number of individuals 85 and older will be 3.5 million. Their numbers will double to seven million by 2020 and will double again to 14 million by 2040.

Yet another troubling aspect of the Aon report is that in the face of necessary capacity increases to accommodate certain, growing demand for facility care, the number of available nursing home beds is on the decline.

To the detriment of patients, some of the larger multi-state providers are choosing to leave states because they can no longer afford liability insurance. Beverly Enterprises, for example, has pulled out of Florida completely and has divested facilities in Mississippi, Alabama, Tennessee, and Georgia.

Genesis Health Ventures departed Florida because it cost $7,000 per bed to insure while, comparatively, it cost $700 per bed in the other 12 states in which it operates.

Kindred Healthcare has sold all of its Florida and Texas facilities, and Extendicare Inc. also has divested its Florida facilities and 17 Texas facilities because of the company's need to "eliminate its exposure to litigation." Likewise, Atlanta-based Mariner Health Care Inc. has sold its Florida facilities and its three holdings in Louisiana.

Decisions of this nature are unfortunate for provider and patient alike—and we must keep in mind the human costs associated with patient uncertainty and the other sad aspects of these developments.

Access to capital continues to be a critical problem for our sector, and while this has a variety of causes, the litigation crisis has exacerbated the situation tremendously. Bank loans, bonds and other forms of capital fund the day-to-day operations of most nursing facilities, and are an absolute necessity to maintaining and improving quality of care.

According to a recent Lewin Group analysis of capital formation, nursing homes' capital ratios and other statistics evaluated by lenders have deteriorated to the point that the credit profile of nearly the entire sector is viewed as poor.

Furthermore, a Legg-Mason equity research analysis stated the problem very succinctly by specifying the need for predictability in funding over the long term if our profession is to regain investor confidence, and attract the capital needed to meet the future long term care needs of the Baby-Boomers.

The cash squeeze caused in part by the malpractice insurance crisis has been affecting the capital availability needed to modernize and replenish physical plants and equipment, acquire new technologies, and meet changing community health care needs.

This comes at a time when an aging population will, increasingly, require complex medical services within the nursing facility setting.

As Ms. Bourdon will assert in her testimony, “The longer-term outlook, if reforms are not implemented, is a continued contraction of available nursing home beds, particularly for those Americans who depend on Medicaid funding to provide these services.”

Reform Necessary to Advance Government, Profession-wide Quality Initiatives

With much of the current discussion about federal health care policy centered upon the need to improve care quality in our hospitals, nursing homes and other settings, it is significant and timely that government and profession-wide initiatives to improve the quality of nursing home care are beginning to receive a great deal of national attention.

Those of us in long term care are enormously excited about the federal government’s Nursing Home Quality Initiative (NHQI), and our profession’s Quality First program. There’s no question that an honest and reliable performance measurement system, coupled with a system of public disclosure, provides consumers with the best possible information for comparing quality, and basing their long term care choices and decisions.

But while we move forward on the quality front, we are once again confronted by the fact resources that could be utilized to help improve care are being crowded-out and diverted to pay for unproductive legal expenditures.

It is basic common sense to understand the correlation between improved care quality for our seniors and the extent to which our federal and state governments implement the legal reforms needed to create a more stable environment in which to care for patients.

Every dollar spent on defense attorneys and legal settlements is a dollar directed away from staffing needs, therapies and programs that make qualitative differences not just in care quality, but in seniors’ quality of life itself.

Quality long term care also is at risk when facilities are unable to purchase liability insurance. This means that in unfortunate instances there is no means of recourse for the patient or for his or her family. In many Aon states, such as Florida, liability insurance is commercially unavailable. In Arkansas and Texas, half of the facilities are without insurance.

Today, Mr. Chairman, we can say there has never been a broader recognition by government and the provider community about the importance of quality care, nor a broader commitment to work cooperatively to improve it.

We look forward to working with this Committee, this Congress and this Administration to help restore balance to a legal system run amok—and where federal resources designated to care for frail, vulnerable and disabled Americans is utilized for this noble, necessary purpose.

Thank You.

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