January 10, 2005

The Honorable Michael E. Busch
Speaker of the House
State House
Annapolis, MD 21401

Dear Mr. Speaker:

In accordance with Article II, Section 17 of the Maryland Constitution, I have today vetoed House Bill 2 of the Extraordinary Session of 2004 - *Maryland Patients' Access to Quality Care Act of 2004.*

INTRODUCTION

This extraordinary session of the General Assembly was called to address the health care access crisis in the State resulting from the rise in medical malpractice liability insurance costs. I appreciate the efforts of many members of the General Assembly who are committed to enacting meaningful reforms. I know that there are legitimate philosophical differences on this issue, and I want to thank all of the members who came to Annapolis during the holiday season to work on this matter of vital importance.

Unfortunately, the bill that has been presented to me fails to address the underlying long-term problem, fails to contain adequate legal reforms, threatens the stability of the State's largest insurer of physicians, threatens the existence of other commercial medical malpractice insurers in the State, contains constitutional flaws, has technical defects that will present major difficulties in implementing parts of the bill, hinges on a harmful tax that will serve to increase the cost of health care, and contains other policies which will harm the citizens, health care providers, and insurers of the State. For these reasons I have no choice but to veto the bill.

BACKGROUND

I will address the above items in detail below, but I will first discuss the background on this issue. There is no need to go into great detail on the problem. The full panoply of health care providers in the State has been faced with extraordinary increases in malpractice insurance premiums. These increases have been caused by large verdicts (and the resulting large settlements because of these verdicts) in medical malpractice cases. The result is that physicians and other providers are electing to close or limit their practices, causing a crisis in access to health care in the State.

During the 2004 session, I introduced legislation in the General Assembly to address the looming crisis in health care access. This legislation was defeated in the respective committees in both chambers. The House of Delegates did pass House Bill 1299 in an attempt to address some aspects of the problem and would have established a task force to study and make recommendations concerning the issue. This bill passed the House but was defeated in the Senate Judicial Proceedings Committee.

In June 2004 I appointed the Governor's Task Force on Health Care Access and Medical Malpractice. I requested that both you and President Miller appoint two members to the task force. You appointed two members, although Delegate Brown was unable to serve. You failed to appoint a replacement for Delegate Brown despite requests to do so. President Miller refused to appoint any members. President Miller also appointed his own Senate Special Commission on Medical Malpractice. I spent much of the summer and fall traveling around the State visiting hospitals and other health care facilities, hearing from the providers first-hand the extent of their problems. You have also visited many facilities during this time. I became even more convinced that this was an urgent problem that should be addressed immediately.

Early in the fall I began to have discussions with you and President Miller to explore whether we could reach common ground that would allow us to convene an extraordinary session to address the problem. I met with you individually and together and also met with many interested parties. I presented you with two different drafts of a bill for your review and consideration. On December 17, 2004, you, President Miller, and I met and reached agreement on all of the substantive issues that should be in a bill. These issues were contained in a one-page list of issues that we reviewed in detail. We also added two items suggested by you that had not been the subject of previous discussions. The only issue on which there was no agreement was the funding source for the short-term relief. It was very clear that the Administration would sponsor the legislation. With the exception of those items you submitted and those items proposed by President Miller, virtually the entire bill contained provisions that you had previously reviewed.

As with all negotiations, each side had to make compromises. I would have preferred many additional legal reforms, specifically periodic payments of large judgments, changes to the collateral source rule, and possibly limited immunity for emergency room providers. In accordance with our agreement, the bill did contain other legal reforms, such as establishing a single cap on noneconomic damages in death cases and sensible limitations on economic damages relating to past medical bills, future medical bills, and lost wages. It made procedural changes, including changes relating to expert witnesses. It made changes to patient safety laws and insurance reforms. It also provided short-term assistance to health care providers. On the whole, I believed that the bill would have a positive impact on malpractice insurance premiums, would not harm plaintiffs, and overall represented significant progress. It would have sent a clear message to the health care community that we were serious about addressing their concerns.

I was aware that Senator Brian Frosh, the chairman of the Senate Special Commission on Medical Malpractice, would introduce a bill during the special session. From our discussions and because of the deal that was struck, however, I believed there was a commitment that the Administration bill would be the primary bill considered by the General Assembly. It was not until I was sitting at the witness table in the Joint Hearing Room waiting to testify on my bill that I became aware that you also had your own bill. If this were my only objection, I would have been delighted to sign this bill. Unfortunately, as stated above, House Bill 2 is woefully inadequate. I will now detail my objections to the bill.

POLICY OBJECTIONS

Legal Reforms

The bill that I introduced would have made the following changes. It would have provided a single cap on noneconomic damages, the so-called pain and suffering damages, in death cases. This would have made the cap in death cases the same as it is in all cases, including those involving serious permanent injuries. Although the bill that passed does reduce the cap in death cases, it does not make it a single cap. Rather, it makes the cap 125% in death cases if there is more than one beneficiary.

With regard to economic damages, the bill I introduced would have made the following changes. First, for past medical bills the plaintiff would have been entitled to the amount actually paid or owing by the plaintiff, not the billed amount. Second, for lost wages, because a judgment or settlement is not considered income which is subject to taxation the plaintiff would not be compensated for taxes that would have been paid. Under the current system, the plaintiff receives a windfall to the extent that he receives a judgment or settlement for any amount that would have been paid in taxes. Third, the bill would have established a rebuttable presumption that future medical bills would be compensated at the Medicare rate of reimbursement. This would have established a fair objective standard that the plaintiff could rebut in the event that this standard was unfair in a particular case.

The bill that passed made only one of the three changes in the area of economic damages, that being for past medical bills. No changes were made concerning tax consequences of lost wages and no changes were made concerning future medical bills. The provision of the bill that allows a court to appoint a neutral expert is a mere redundancy because current law already allows a court to appoint an expert in any case. This provision provides absolutely no relief.

The bottom line is that House Bill 2 does not solve the long-term problem. When the tort reform becomes fully effective in three to five years, it will reduce an average doctor's medical

malpractice premium by less than 3%. When the rate stabilization fund ends in four years, health care providers will be back clamoring for more taxpayer assistance or more legal reforms (which will take another three to five years to become fully effective) to address the problem. This bill does nothing but nibble around the edges of the problem to the detriment of taxpayers.

Constitutional Issues

Article II, Section 17 of the Maryland Constitution states that one of the reasons for granting the Governor the power to veto legislation is "to guard against hasty or partial legislation." It is clear that this bill falls into this category.

The Attorney General's bill review letter dated January 3, 2005, has identified two portions of the bill that may not be given effect because they are not reflected in the bill's title in violation of Article III, Section 29 of the Maryland Constitution. These provisions address limitations on commissions paid by a medical malpractice liability insurer and a prohibition on reductions in reimbursements by a health insurer. Relying in part on notes prepared by various staff persons, the letter opines that Conference Committee likely intended that the body of the bill reflect what was in the title, not vice versa. Even if this is true, these errors are prime examples of the haste in which the bill was adopted. Rather than allowing just one more day to get the bill right and give legislators time to read and debate it, the decision was made to stay in session until the early hours of the morning to force a resolution. The final product reflects this haste.

Article II, Section 17 of the Maryland Constitution also states that one of the grounds for a veto is "to guard against…encroachment of the Legislative Department upon the co-ordinate Executive and Judicial Departments." The separation of powers doctrine is contained within Article 8 of the Maryland Declaration of Rights. Special Section 14 of House Bill 2 violates these provisions. Special Section 14 states: "...That the Governor shall propose legislation during the 2006 Session of the General Assembly to provide an alternative mechanism for distribution of the money in the Maryland Medical Professional Liability Insurance Rate Stabilization Fund." This is a violation of the separation of powers between the General Assembly and the Governor. Simply put, the General Assembly has no business telling the Governor what legislation he must introduce. If this were allowed, the General Assembly would next be considering legislation to prohibit the Governor from proposing legislation on certain topics. This is truly offensive and cannot be allowed to stand.

The Attorney General's bill review letter recognizes that Special Section 14 is "unusual". The letter does cite a recent instance where this was done and states that the provision in House Bill 2 is "directory rather than mandatory", particularly because there is no legal consequence for a violation. I would simply point out that the word "shall" is the term that is used to require an

act; it is not a request. The Court of Appeals has stated that the term "shall" when used in legislation constitutes a "statutory mandate." Further, to imply that the Governor can violate the law because there are no legal consequences is not a sound argument.

People's Counsel

People's Insurance Counsel is an unnecessary and costly addition to medical professional liability insurance as well as homeowners insurance. The Maryland Insurance Administration (MIA) already does what People's Insurance Counsel purports to do. As an example, and much to the displeasure of Medical Mutual, this past summer the MIA denied Medical Mutual's requested 41% rate increase and only allowed a 33% increase. This additional cost will be passed on to Maryland citizens, makes the Maryland marketplace less attractive for carriers to do business in and could potentially threaten the MIA's accreditation with the National Association of Insurance Commissioners which is essential for Maryland insurance companies.

Rate Stabilization Fund

On the concept of a rate stabilization fund, I agreed that a short-term fix was necessary to avert a health care crisis in the State. It does trouble me, however, that this money will essentially go to physicians to pay malpractice premiums that will eventually be paid to trial lawyers. Coupled with a long-term solution I was willing to agree to this; however, as House Bill 2 makes this virtually the only such solution, a fund alone is unacceptable.

As proposed in House Bill 2, the Medical Professional Liability Insurance Rate Stabilization Fund ("the Fund") contains a multitude of technical drafting errors and is virtually impossible to implement. Nor will the Fund, as drafted, serve the purposes it is supposed to, as the 2% HMO tax will not provide the amount of funds the bill requires. This tax will not generate the $80 Million projected, but will be closer to $65 Million (assuming that 100% of the tax may be implemented for Medicaid HMOs and MCOs). Thus, the shortfall to the medical professional liability insurers will be even greater than anticipated.

It should be pointed out that even if one uses the figures in the Fiscal and Policy Note (with the exception of the incorrect figure on page 15 of the note that leads to the erroneous conclusion that the Fund is fully funded), the HMO tax does not fully fund the Rate Stabilization Fund. In fiscal year 2007, there will be a deficit of more than $2 million in the Fund. This does not include the nearly $3 million that will be lost to the General Fund and the Transportation Trust Fund. If the goal of the bill was to be fully funded, it clearly has failed in this regard.

Further, it should be noted that the medical professional liability insurers writing in Maryland, aside from Medical Mutual, consider this Fund unworkable and may not participate. Two of the three of these carriers have expressed serious reservations about the bill, one of

which, The Doctor's Company, has expressly urged a veto. If the bill becomes effective, these insurers will then have to evaluate whether they will continue to issue policies in the State. Rather than attracting medical professional liability insurers to the State, which would encourage competition in rate setting, this bill may have the effect of driving insurers to leave the State.

Impact on Medical Mutual Liability Insurance Society of Maryland

This Bill threatens the solvency of The Medical Mutual Liability Insurance Society of Maryland ("Medical Mutual"). As written, the Bill requires the company to absorb a large portion of the approved rate increase from its surplus (25.5%). Additionally, the funds available to it under the Fund are limited with the shortfall to again come from Medical Mutual's surplus. Further, the Bill requires rate increases to be reviewed with an eye toward the company's financial resources (i.e., surplus) before rate increases are granted. This approach is fiscally irresponsible and could result in making the company insolvent in a short period of time due to the very volatile nature of this line of insurance, medical professional liability. MIA did projections and determined that for Medical Mutual to fund a portion of its rate increases through the use of its surplus, the company would be below the required risk based capital (RBC) within two years. This would require the MIA to take immediate action, up to taking control of the company because of its potential insolvency.

The solvency of Medical Mutual is further threatened by the fact that the other commercial carriers have expressed concern about House Bill 2 and the impact it will have on their ability to generate profitable business in the State. Should the other three carriers insuring physicians withdraw from the Maryland marketplace, then Medical Mutual will be the only company available to Maryland physicians and this will further threaten Medical Mutual's surplus. The company, in all likelihood, could not sustain the additional risks it would be asked to absorb. The end result could be the collapse of Medical Mutual, a company originally established because there were no commercial carriers in the State. This would mean that Maryland physicians would have no insurance options available to them. This is unacceptable from a public policy standpoint.

Other Insurance Issues

House Bill 2 arbitrarily limits producers' incomes by capping the amount of commission that can be paid to producers of medical professional liability insurance. It further requires Medical Mutual to become a direct writer with the commission, less 1% for overhead, to be credited to the doctors' premiums which essentially cuts producers out all together and will increase the costs of operating the company in excess of the 1% authorized to cover these costs.

One aspect of the limitation on commissions that is particularly troubling is that there was no public notice of this issue. This provision was first seen when the bill was distributed to the

House members on Monday evening, December 27 after 6 p.m. By the early hours of Thursday morning it had passed the General Assembly. It is of great concern that this provision could become law without the ability of any of the individuals who may be affected by it to be heard until after the fact, particularly those whose livelihoods would be impacted.

HMO Tax

As I stated above, the one issue on which we did not agree was how to fund the Rate Stabilization Fund and the increases to the Medicaid program. I was willing to explore a variety of alternatives. We discussed these alternatives over the course of the negotiations, during the extraordinary session, and even presented them to the conference committee. The over attainment from the Delaware Holding Company law, which has brought in around $150 million in one-time funds to the State general fund, $142 million more than anticipated, seemed to me to be an appropriate use of these one-time funds for this short-term fix. The Cigarette Restitution Fund was also considered and was offered as an amendment to the bill in the Senate. The use of these funds to ensure access to health care seemed particularly appropriate. The possibility of imposing a surcharge on drunk drivers and other motor vehicle offenses was discussed, as was the diversion of some of the corporate tax money from the Transportation Trust Fund.

Because of the affordability of Health Maintenance Organizations (HMO's), they are the most attractive plans to many working class and middle class families. HMO plans are among the most affordable type of private health coverage available in the State. For this reason the one area that I was adamant could not be considered as a funding source was a tax on health care plans. This of course is the tax that is included in the bill. This tax will be passed on by HMO's through higher premiums and will be paid by both businesses and the people of the State. The largest HMO's in the State have already indicated their intention to increase premiums because of this tax. It has been estimated that this tax will cost the average family approximately $200 annually. This of course is in addition to increases in premiums due to rising health care costs. The Fiscal and Policy Note to House Bill 2 estimates that HMO premiums will increase by 12.4% annually. In a time when providing health care to all of the citizens of the State is one of our goals, this bill will increase the costs on the most affordable plans with the likely result that more people will decide to go without health care coverage because they cannot afford it.

The Maryland Health Care Commission supports this conclusion. The commission notes that studies by the Lewin Group and the Congressional Budget Office reached the unsurprising conclusion that increases in premiums lead to reductions in the numbers of people with health insurance since the price increase would lead some people to drop their coverage. This means that the 1.2 million Marylanders with health coverage through HMO's will have to choose between paying higher premiums or possibly reducing or dropping coverage. This certainly is not a desirable result.

The Maryland Health Care Commission has also expressed concerns with this tax and its effect on the Comprehensive Standard Health Benefit Plan. You were instrumental in having this plan enacted and in fact were the prime sponsor of the crossfile of the bill that was eventually enacted in the 2003 session. The commission states that this tax will force it to review the cost of the plan and possibly adjust the plan either by reducing benefits or increasing costs in order to stay within the plan's statutory requirements. In other words, the 260,000

Maryland citizens in the small group market who have HMO coverage may be subject to a double penalty of paying more while the commission is forced to reduce their coverage benefits. The HMO tax is poor public policy.

Miscellaneous Issues

Cancellation of Medical Professional Liability Insurance - Section 27-501 of the Insurance Article has been amended to allow a medical professional liability insurer to cancel or refuse to renew an insured who has been licensed as a health care provider in the State for more than three years without having to justify the action based on "standards that are reasonably related to the insurer's economic and business purposes." This means that a malpractice insurer may for any reason or for no reason cancel a physician or other provider who has been licensed in the State for more than three years. I cannot fathom the public policy argument that would justify this result. I can only think that this again reflects the haste with which this bill was drafted.

Expert Witnesses- I also note that many of the provisions dealing with expert witnesses have either been removed or watered down. These provisions were designed to prevent the prevalent use of "hired gun" experts who do not practice medicine but instead have become experts for hire. Even the provision codifying the *D'Angelo* decision of the Court of Special Appeals, which held that the plaintiff must file a certificate of qualified expert for each defendant, has been stricken. This was designed to ensure that plaintiffs know their cases when they file them and do not sue 29 doctors without having good reason, as was the case in *D'Angelo*. The addition of this requirement in the supplemental certificate of qualified expert does not achieve the desired result, as this occurs only many months into the process after discovery is completed.

The conference committee removed the provision that would have adopted the *Daubert* decision, a United States Supreme Court case concerning qualifications of experts, which was in the bill passed by the House. Although it is difficult to quantify the effect of these changes that were originally proposed in the bill, they clearly would have improved the system and likely would have reduced costs.

SUMMARY

I am committed to ensuring that Maryland maintains its position as a leader in providing health care to its citizens. We have world-class medical institutions in this State. I will do everything in my power to ensure quality health care in the State.

Accordingly, I will add $18.5 million to the fiscal 2006 budget for the State Medicaid program. Combined with federal matching funds, this will total $37 million that will go to increase reimbursements for providers whose rates are well below standard. I will further budget $30 million to be used to help stabilize the medical malpractice insurance rates of providers, while we work toward a long-term solution to this problem.

What I will not do is sign this bill and declare victory. It is not a victory. It is a loss for the patients, the health care providers, and the taxpayers of this State. When the General Assembly meets in its regular session in two days time I urge the members to work with my Administration to adopt meaningful, long-term reform.

Yours very truly,

Robert L. Ehrlich, Jr.
Governor