



# **Statement**

**of the**

**American Medical Association**

**to the**

**Committee on Energy and Commerce  
Subcommittee on Health  
United States House of Representatives**

**RE: Cost of the Medical Liability System  
Proposals for Reform, including H.R. 5, the  
Help, Efficient, Accessible, Low-cost, Timely  
Healthcare (HEALTH) Act of 2011**

**April 6, 2011**

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On behalf of our physician and medical student members, the American Medical Association (AMA) appreciates the opportunity to submit a statement to the Subcommittee on Health on the need to enact meaningful medical liability reform at the federal level. Growing medical liability system costs are a national problem that require a national solution. Studies show the litigation system to be an ineffective, and often unfair, mechanism for resolving medical liability claims. We believe that the time is ripe for Congress to enact comprehensive medical liability reforms. The AMA strongly supports H.R. 5, the “Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011.” The HEALTH Act includes significant reforms that will help repair our nation’s medical liability system, reduce the growth of health care costs, and preserve patients’ access to medical care. We also support additional federal funding to examine alternative approaches to improving the current medical liability system.

**The Current Medical Liability System Fails Patients and Physicians  
and Drives Up Health Care Costs**

The medical liability system is in desperate need of reform. It is neither fair nor cost effective in compensating injured patients. It has become an increasingly irrational system driven by time consuming litigation and open-ended non-economic damage awards. It is also an extremely inefficient mechanism for compensating patients harmed by negligence where court costs and attorney fees often consume a substantial amount of any compensation awarded to patients.

A number of reports by the AMA and others show that the litigation system is a costly and often unfair mechanism for resolving medical liability claims. For example, an August 2010 AMA

report<sup>1</sup> revealed the litigious nature of our current liability system. Among physicians surveyed, there was an average of 95 medical liability claims filed for every 100 physicians over the course of their careers, almost one per physician. The report also highlighted that:

- Nearly 61 percent of physicians age 55 and over have been sued;
- There is wide variation in the impact of liability claims between specialties. The number of claims per 100 physicians was more than five times greater for general surgeons and obstetricians/gynecologists (ob-gyns) than it was for pediatricians and psychiatrists;
- Before they reach the age of 40, more than 50 percent of ob-gyns have already been sued; and
- Ninety percent of general surgeons age 55 and over have been sued.

A November 2010 AMA report based on data from the Physicians Insurers Association of America (PIAA) highlights other problems with the current liability system. Sixty-four percent of medical liability claims that closed in 2009 were dropped or dismissed. These dropped or dismissed claims are not cost-free. Defense costs on them averaged over \$26,000 per claim and in the aggregate these dropped claims accounted for 35 percent of total defense costs. Among tried claims, defense costs averaged over \$140,000 per claim for defendant victories and over \$170,000 for plaintiff victories. Moreover, a 2006 article in the *New England Journal of Medicine* showed that no error had occurred in 37 percent of medical liability claims. These factors lead to increased costs for physicians, patients, and our health care system overall.

Experts also agree that the practice of defensive medicine adds billions of dollars to our health care costs. Defensive medicine practices include tests and treatments that are performed as precautionary (not sole) measures to reduce exposure to lawsuits. Other defensive medicine practices include avoidance of high risk procedures or not practicing in certain jurisdictions in order to reduce liability exposure. For example, a 2009 American Congress of Obstetricians and Gynecologists (ACOG) survey revealed that 63 percent of ob-gyns said they had made changes to their practice because of the risk or fear of liability claims. Approximately 8 percent have stopped practicing obstetrics altogether, and 60 percent have made changes to their practice because liability insurance is either unavailable or unaffordable.<sup>2</sup>

A Department of Health and Human Services (HHS) report estimated the cost of defensive medicine to be between \$70 and \$126 billion per year.<sup>3</sup> These costs mean higher health insurance premiums and higher medical costs for all Americans as well as higher taxes. Taxpayers bear a substantial burden, given that one-third of the total health care spending in our country is paid by the federal government through the Medicare and Medicaid Programs. HHS' report also estimated that Medicare spending alone would have been reduced by \$17 to \$31

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<sup>1</sup> <http://www.ama-assn.org/resources/doc/health-policy/prp-201001-claim-freq.pdf>.

<sup>2</sup> [http://www.acog.org/from\\_home/publications/press\\_releases/nr09-11-09.cfm](http://www.acog.org/from_home/publications/press_releases/nr09-11-09.cfm).

<sup>3</sup> Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care 11* (2003).

billion per year with comprehensive liability reforms, including but not limited to reasonable limits on non-economic damages. Every dollar that goes toward medical liability costs and defensive medicine is a dollar that does not go to patients who need care, nor toward investment in patient safety and quality improvements or health information technology systems.

In December 2009, the Congressional Budget Office (CBO) estimated that nationwide implementation of medical liability reforms, including caps on non-economic damages, would reduce total U.S. health care spending by about 0.5 percent, or \$11 billion, in 2009, and that these reforms would reduce federal budget deficits by \$54 billion over the next 10 years.<sup>4</sup> In December 2010, the National Commission on Fiscal Responsibility and Reform released its report on recommendations to bring federal spending and the deficit under control, and they included medical liability reforms as part of a solution to reduce the federal budget deficit.<sup>5</sup> Recently in March 2011, the CBO indicated that the enactment of H.R. 5, the HEALTH Act, as amended and approved by the U.S. House Judiciary Committee, would reduce the federal deficit by almost \$40 billion over 10 years. Multiple studies and surveys prove that the U.S. needs a better system for patients and physicians. Our nation's current litigious climate hurts patients' access to physician care at a time when the nation is working to reduce unnecessary health care costs.

Numerous studies show that physicians bring a significant economic value to the communities where they practice medicine. A 2011 AMA report<sup>6</sup> reveals that office-based physicians play a vital role in national and state economies by supporting jobs, purchasing goods and services, and generating tax revenue. In 2009, office-based physicians contributed \$1.4 trillion in economic activity and supported 4 million jobs nationwide. Despite the large impact they have in the aggregate, most patient care physicians operate as small businesses. AMA data show that in 2007-2008, well over 50 percent of patient care physicians worked in practices with fewer than 10 physicians.<sup>7</sup> As with any small business, physician practices generally do not have the economic and other resources necessary to absorb or shift the cost of rapidly increasing insurance premiums. When overhead expenses increase, physicians are unable to increase fees and are forced to cut expenses just to sustain their practices. For physicians, raising fees is becoming more difficult as Medicare, Medicaid, and managed health care plans arbitrarily limit payments for services rendered to patients. Alternatively, if physicians are forced to trim expenses, they are generally limited in their options and must make difficult choices, such as cutting staff, limiting staff benefits (e.g., health insurance), or forgoing the hiring of additional staff or the purchasing of advanced medical equipment. In some cases, physicians must limit certain aspects of their practice in order to find or afford medical liability insurance. For example, numerous family physicians are no longer delivering babies because it is cost prohibitive to insure that component of their practice, and specialists are declining to take call in the emergency department. A comprehensive set of medical liability reforms that brings predictability and stability to the liability insurance market will benefit physician practices,

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<sup>4</sup> [http://www.cbo.gov/ftpdocs/106xx/doc10641/10-09-Tort\\_Reform.pdf](http://www.cbo.gov/ftpdocs/106xx/doc10641/10-09-Tort_Reform.pdf).

<sup>5</sup> <http://www.fiscalcommission.gov/>.

<sup>6</sup> <http://www.ama-assn.org/ama/pub/news/news/ama-economic-impact-study.page>.

<sup>7</sup> <http://www.ama-assn.org/resources/doc/health-policy/prp-200906-phys-prac-arrange.pdf>.

which play an important role as small businesses that support millions of jobs nationwide and significantly contribute to local and state economies.

## **Comprehensive Medical Liability Reforms Work**

### **California**

The AMA strongly supports federal legislation based on California's Medical Injury Compensation Reform Act (MICRA), which proves that comprehensive liability reform works. Enacted in 1975 by overwhelming bipartisan support, MICRA was in response to a significant increase in medical liability costs and the resulting shortage of health care physicians and providers. MICRA has been held up as "the gold standard" of medical liability reform, and a model for repeated attempts at federal reform legislation. A study by the RAND Corporation showed that MICRA was successful at decreasing insurer payouts and redistributing money from trial lawyers to injured patients. MICRA's contingency fee reform and limit on non-economic damages caused plaintiff attorney fees to be reduced by 60 percent. The major provisions in MICRA that would benefit patients, physicians, and the health care system as a whole include:

- Awarding injured patients unlimited economic damages (e.g., past and future medical expenses, loss of past and future earnings, etc.);
- Awarding injured patients non-economic damages up to \$250,000 (e.g., pain and suffering, mental anguish, etc.);
- Establishing reasonable statute of limitations; and
- Establishing a sliding-scale for attorney contingent fees, therefore maximizing the recovery for patients.

Comprehensive liability reforms have stabilized California's medical liability insurance market for three decades – resulting in improved patient access to care. According to the National Association of Insurance Commissioners, while total medical liability insurance premiums in the rest of the U.S. rose 945 percent between 1976 and 2009, the increase in California premiums was less than one third of that amount (261 percent). An ob-gyn in Los Angeles pays \$49,804 per year for liability insurance, while the same ob-gyn could pay \$186,772 in New York (a state that does not have a cap on non-economic damages).<sup>8</sup> With comprehensive reforms comes stable, affordable premiums that will enable physicians practices across the country to contribute to both the health of their patients and also to the economic health of their communities.

### **Texas**

Texas also provides a compelling example of how successful medical liability reforms improve patient access to care and reduce escalations in medical liability premiums. In 2003, the Texas legislature enacted comprehensive medical liability insurance reform, which included a "stacked

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<sup>8</sup> Medical Liability Monitor (October 2010).

cap” on non-economic damages. The Texas reforms created three separate caps, one for health care providers (including physicians) and two for health care institutions (including hospitals). One cap provides a \$250,000 limitation on non-economic damages in lawsuits against all health care providers named as defendants in a lawsuit. For institutions, the Texas law also includes a cap of \$250,000 on non-economic damages against any one institution, while also permitting a third cap of \$250,000 in those instances where more than one institution is found negligent.<sup>9</sup> As a result of comprehensive liability reforms, Texas has enjoyed a 59 percent higher growth rate in newly licensed physicians in the past two years compared to two years preceding reform. Texas has also added 218 obstetricians in the past six years.<sup>10</sup> All major physician liability carriers in Texas have cut their rates since the passage of liability reforms, most by double-digits, and most physicians practicing in Texas have seen their rates slashed by 30 percent or more.

States like California and Texas succeeded in enacting meaningful medical liability reforms, including strong caps on non-economic damages, while others have tried alternative routes to reduce the cost of defensive medicine and eliminate unnecessary litigation from the system. Research shows that over the long term, patients have greater access to physicians in areas with reforms than in areas without. A 2007 AMA review concluded states with caps have about 5 percent more physicians per capita than states without, but that this may be larger for physicians in high risk specialties.<sup>11</sup>

### **A Federal Solution is Necessary**

An ineffective, inefficient, and costly medical liability system requires a national solution. If it were just a matter of physicians obtaining or affording medical liability insurance in one state, we might agree that a national approach would not necessarily be required. However, the problem goes far beyond physicians and other health care professionals and institutions. The medical liability system has become a serious problem for patients and their ability to access health care services that would otherwise be available to them, including services provided to Medicare and Medicaid patients.

The AMA believes that the proven reforms contained in the HEALTH Act would help repair the medical liability system, while ensuring that patients who have been injured receive just compensation. This bill provides the right balance of reforms by promoting speedier resolutions to disputes, maintaining access to courts, maximizing patient recovery of damage awards with unlimited compensation for economic damages, while limiting non-economic damages to a quarter million dollars. In addition, the HEALTH Act protects effective medical liability reforms at the state level. Specifically, the bill (a) allows states to keep/adopt greater procedural and substantive protections for physicians than those provided under the HEALTH Act; (b) protects current and future state cap laws on economic, non-economic, and punitive damages

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<sup>9</sup> On September 13, 2003, Texas voters passed Proposition 12. This ballot initiative amended the state constitution to specifically allow the legislature to enact laws that place limits on non-economic damages in health care liability cases.

<sup>10</sup> <http://www.texmed.org>.

<sup>11</sup> <http://www.ama-assn.org/resources/doc/health-policy/prp2007-1.pdf>.

regardless of whether the amount is greater or lesser than \$250,000; and (c) protects any issue addressed under state law (e.g., standards of care) that is not addressed in the HEALTH Act.

In addition, the AMA supports continued federal funding for states to pursue a wide range of liability and patient safety reforms that complements comprehensive liability reforms including, early disclosure and compensation programs, safe harbors for the practice of evidence-based medicine, and health courts. The AMA also supports amending the Affordable Care Act (ACA) to ensure that any guideline or standard of care under the ACA does not lead to new theories of liability to be used against a physician in a liability claim or lawsuit, which would increase litigation costs and costs to our health care system.

## **Conclusion**

By enacting meaningful federal medical liability reform legislation like the HEALTH Act, Congress has the opportunity to increase access to medical services, reduce the defensive practice of medicine, improve the patient-physician relationship, help prevent avoidable patient injury, support physician practices and the jobs that they create, and curb a wasteful use of precious health care dollars—the costs, both financial and emotional, of health care liability litigation. The AMA applauds the Subcommittee’s continued commitment to repairing America’s medical liability system, and looks forward to working with you to pass federal legislation that would bring about meaningful reforms.