

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004

10865 HOUSE JUDICIARY

OKLAHOMA

1995—SB 263

Codified factors that the jury must consider in awarding punitive damages.

Provided that when a jury finds by “clear and convincing” evidence that the defendant:

- 1) Acted in “reckless disregard for the rights of others,” the award is limited to the greater of \$100,000 or actual damages awarded; or
- 2) Acted intentionally and with malice, the award is limited to \$500,000; two times the award of actual damages; or the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing injury.

The limit does not apply if the court finds evidence *beyond a reasonable doubt* that the defendant acted intentionally and with malice in conduct life-threatening to humans.

1986—SB 488

Limited the award of punitive damages to the award of compensatory damages, unless a plaintiff establishes her case by “clear and convincing” evidence, in which case no limit applies.

OREGON

1995—SB 482

Required 40% of punitive damages awards to be paid to the prevailing party, 60% to the state fund, and no more than 20% to the attorney of the prevailing party.

Required a plaintiff to show by “clear and convincing” evidence that a defendant “acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.”

Provided for court review of jury-awarded punitive damages.

Barred the claiming of punitive damages in an original complaint. Required a plaintiff to show a *prima facie* case for liability before amending a complaint to include a punitive damages claim.

1987—SB 323

Required a plaintiff to prove punitive damages by “clear and convincing” evidence.

Provided an FDA standards defense to punitive damages.

SOUTH CAROLINA

1988

Required a plaintiff to prove punitive damages by “clear and convincing” evidence.

SOUTH DAKOTA

1986—SB 280

Required a plaintiff to prove by “clear and convincing” evidence that a defendant acted with “willful, wanton, or malicious” conduct.

NONECONOMIC DAMAGES

Damages for noneconomic losses are damages for pain and suffering, emotional distress, loss of consortium or companionship, and other intangible injuries. These damages involve no direct economic loss and have no precise value. It is very difficult for juries to assign a dollar value to these losses, given the minimal guidance they customarily receive from the court. As a result, these awards tend to be erratic and, because of the highly charged environment of personal injury trials, excessive.

ATRA believes that the broad and basically unguided discretion given juries in awarding damages for noneconomic loss is the single greatest contributor to the inequities and inefficiencies of the tort liability system. It is a difficult issue to address objectively because of the emotions involved in cases of serious injury and because of the financial interests of plaintiffs' lawyers.

Eighteen states have modified the rules for awarding noneconomic damages. Five states have had reforms struck down as unconstitutional and have not enacted additional reforms.

ALABAMA

1987

Limited the award of noneconomic damages to \$250,000 in medical liability cases.

The Supreme Court of Alabama found the limit on noneconomic damages unconstitutional in Moore v. Mobile Infirmary Association, 592 So. 2d 156 (1991).

ALASKA

1997—HB 58

Limited the award of noneconomic damages to the greater of \$400,000 or the injured person's life expectancy in years multiplied by \$8,000, unless the plaintiff "suffers severe permanent physical impairment or severe disfigurement," in which case noneconomic damages are limited to the greater of \$1,000,000 or the injured person's life expectancy multiplied by \$25,000.

1986—SB 337

Limited the award of noneconomic damages for injuries other than physical impairment or disfigurement to \$500,000.

COLORADO

2003—HB 1012

Limited the award of noneconomic damages to \$300,000 in medical liability cases.

1988—SB 143

Limited the total award of damages to \$1,000,000, of which no more than \$250,000 can be for noneconomic damages.

1990—HB 574

Removed the 1992 sunset to the \$400,000 limit on noneconomic damages enacted in 1987.

1987—SB 1223

Limited the award of noneconomic damages to \$400,000; provided a sunset in June 1992.

ILLINOIS

1995—HB 20

Limited the award of noneconomic damages in all civil actions to \$500,000 per plaintiff, indexed for inflation.

Held unconstitutional by the Illinois Supreme Court in Best v. Taylor Machine Works, Inc., December 1997.

KANSAS

1988—HB 2692

Limited the award of noneconomic damages to \$250,000.

1987

Limited the award of damages for pain and suffering to \$250,000. The reform does not limit the award of other noneconomic damages.

MARYLAND

2001—HB 714

Provided that an individual driving a motor vehicle that is not covered by insurance is considered to have waived the right to recover noneconomic damages under specified circumstances.

1994—SB 283

Limited the award of noneconomic damages in wrongful death actions to \$500,000, where there is one beneficiary, and \$700,000, where there are two or more beneficiaries. (The legislation somewhat countered the effect of the *Streidel* decision, which held that Maryland's \$350,000 limit on noneconomic damages did not apply in wrongful death actions.)

1987—SB 237

Limited the award of noneconomic damages in public entity lawsuits to \$200,000 per person and \$500,000 per incident.

1986—SB 558

Limited the award of noneconomic damages to \$500,000.

The Court of Special Appeals of Maryland upheld the constitutionality of the noneconomic damages limit in Potomac Electric Co. v. Smith, 79 Md. App. 591, 558 A.2d 768 1989.

OHIO

2003—SB 281

Limited the award of noneconomic damages in medical malpractice cases to \$350,000, with a provision to allow the cap to rise to \$1 million, depending on the severity of the injuries and the number of plaintiffs involved in the suit.

1997—HB 350

Limited the award of noneconomic damages to the greater of \$250,000 or three times economic damages to a maximum of \$500,000, unless there is a finding that a plaintiff suffered:

- 1) a permanent and severe physical deformity; or
- 2) a permanent physical functional injury that permanently prevents her from being able to independently care for herself and perform life sustaining activities.

If a plaintiff establishes the criteria set forth above, noneconomic damages are limited to the greater of \$1 million or \$35,000 times the number of years remaining in the plaintiff's expected life.

Held unconstitutional by the Ohio Supreme Court in Ohio Academy of Trial Lawyers v. Sheward, August 1999.

OKLAHOMA

2003—SB 629

Limited the award of noneconomic damages to \$350,000 in cases involving pregnancy (labor, delivery, and post partum period) as well as emergency care.

OREGON

1987—SB 323

Limited the award of noneconomic damages to \$500,000.

The Oregon Supreme Court declared the \$500,000 limit on noneconomic damages unconstitutional in the case of Larkin v. Senco Products, Inc. — P.2d. —, 1999 WL 498088 Or. July 15, 1999.

TEXAS

2003—H.J.R. 3 (PROPOSITION 12)

Constitutional amendment that provided the Texas Legislature with the authority to place limits on noneconomic damages.

2003—HB 4

Limited the award of noneconomic damages in medical malpractice cases to \$250,000 against all doctors and health care practitioners and a \$250,000 per-facility cap against health care facilities such as hospitals and nursing homes, with an overall cap of \$500,000 against health care facilities, creating in effect an overall limit of noneconomic damages in medical malpractice cases of \$750,000.

PREJUDGMENT INTEREST

In the absence of an applicable statute or rule, the courts generally applied the traditional common law rule that prejudgment interest was not available in tort actions since the claim for damages was unliquidated. In an effort to compensate tort plaintiffs for the often-considerable lag between the event giving rise to the cause of action, or filing of the lawsuit, and the actual payment of the damages, many state legislatures have enacted laws that provide for or allow prejudgment interest in particular tort actions or under particular circumstances. In addition to seeking to compensate the plaintiff fully for losses incurred, the goal of such statutes is to encourage early settlements and to reduce delay in the disposition of cases, thereby lessening congestion in the courts. Although well-intended, the practical effects of prejudgment interest statutes can be inequitable and counter-productive. Prejudgment interest laws can, for example, result in over-compensation, hold a defendant financially responsible for delay it may not have caused, and impede settlement.

At a time when policymakers are attempting to lower the cost of the liability system in an equitable and just manner, prejudgment interest laws that currently exist and new proposals should be reviewed to ensure that they are structured fairly and in a way designed to foster settlement. At a minimum, the interest rate should reflect prevailing interest rates by being indexed to the treasury bill rate at the time the claim was filed and an offer of judgment provision should be included.

Fourteen states have enacted prejudgment interest reforms.

ALASKA

1997—HB 58

Set prejudgment interest rates at the Twelfth Federal Reserve District's discount rate plus 3%.

Prohibited the assessment of prejudgment interest for future damages and punitive damages.

COLORADO

1995—SB 165

Limited the amount of prejudgment interest that can be assessed between accrual of the action and filing of the claim to below the \$1,000,000 limit on the total amount recoverable in medical liability claims.

GEORGIA

2003—HB 792

Set prejudgment interest rates at the Federal Reserve's prime interest rate plus 3%.

IOWA

1997—HF 693

Set prejudgment interest rates at the U.S. Treasury Rate plus 2%.

1987—SF 482

Prohibited the assessment of prejudgment interest for future damages. (Other interest accrues from the date of commencement of the actions at a rate based on the U.S. Treasury Bill.)

1986—SB 488

Prohibited the assessment of prejudgment interest on punitive damages awards.

Set the prejudgment interest rate at 4% above the rate on the U.S. Treasury Bill.

RHODE ISLAND

1987—HB 5885

Set the prejudgment interest rate at the U.S. Treasury Bill rate. Provided that interest accrues from the date the lawsuit is filed.

TEXAS

2003—HB 4

Set the prejudgment interest rate to the New York Federal Reserve prime rate, with a floor of 5% and a ceiling of 15%.

1987—SB 6

Limited the period during which prejudgment interest may accrue if the defendant has made an offer to settle.

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PRODUCT LIABILITY

Product liability law is meant to compensate persons injured by defective products and to deter manufacturers from marketing such products. It fails, however, when it does not send clear signals to manufacturers about how to avoid liability or holds manufacturers liable for failure to adopt a certain design or warning even if the manufacturers neither know, nor could have anticipated, the risk.

Fifteen states have enacted laws specifically to address product liability. Three states have had reforms struck down as unconstitutional and have not enacted additional reforms.

CALIFORNIA

1986—SB 241

Confirmed that under California law, products like foods high in cholesterol, alcohol, and cigarettes, which are inherently unsafe and which ordinary consumers know to be unsafe, should not be the basis for product liability lawsuits.

COLORADO

2003—SB 03-231

Provided that a product liability action could not be taken against a manufacturer or seller of a product if the product was used in a manner other than which the product was intended and which could not reasonably have been expected.

Provided for an innocent seller provision which prohibits product liability action against parties who were not the manufacturer of the product.

FLORIDA

1999—HB 775

Provided a 12-year statute of repose for products with a useful life of 10 years or less, unless the product is specifically warranted a useful life longer than 12 years.

Provided a 20-year statute of repose for airplanes or vessels in commercial activity, unless the manufacturer specifically warranted a useful life longer than 20 years.

The reform does not apply to cases involving improvements to real property, including elevators and escalators; latent injury cases; and cases where the manufacturer, acting through its officers, directors or managing agents, took affirmative steps to conceal a known defect in the product.

GEORGIA

1987—HB 1

Permitted only one award of punitive damages to be assessed against any given defendant in product liability cases.

Provided that a manufacturer of a product shall not be liable for damages proximately caused by a characteristic of the product's design, if the manufacturer proves that at the time the product left his control:

- 1) he did not know and, in light of then-existing reasonably available scientific and technological knowledge, could not have known of the design characteristic that caused the damage;
- 2) he did not know and, in light of then-existing reasonable available scientific and technological knowledge, could not have known of the alternative design identified by the plaintiff; or
- 3) the alternative design identified by the plaintiff was not feasible, in light of then-existing reasonably available scientific and technological knowledge or existing economic practicality.

MAINE

1996—LD 346

Provided that "subsequent remedial measures" or steps taken after an accident to repair or improve the site of injury are not admissible as evidence of negligence.

MICHIGAN

1995—SB 344

Barred application of the rule of joint and several liability in product liability cases.

Provided statutory defenses to product liability claims, including adherence to government standards, FDA standards, and sellers' defenses. Provided an absolute defense, where the plaintiff was found to be at least 50% at fault due to intoxication or a controlled substance.

Limited the award of noneconomic damages in product liability cases not involving death or loss of vital bodily function to \$280,000; Limited the award of noneconomic damages in such cases to \$500,000.

1995—HB 4508

Provided venue control in product liability cases.

MISSISSIPPI

1993—HB 1270

Required product liability cases to be based on a design, manufacturing or warning defect, or breach of an express warranty, which caused the product to be unreasonably dangerous.

Provided that a product that contains an inherently dangerous characteristic is not defective if the dangerous characteristic cannot be eliminated without substantially reducing the product's usefulness or desirability and the inherent characteristic is recognized by the ordinary person with ordinary knowledge common to the community.

Provided that a product's design is not defective if the harm results from an inherent characteristic of the product that is known to the ordinary person who uses or consumes it.

Provided that a manufacturer or seller is not liable for a design defect if the harm results from an *unavoidably unsafe aspect* of a product and the product was accompanied by an *adequate warning*.

Provided that the state of the art provision does not apply if the court makes all of the following determinations:

- 1) that the product is egregiously unsafe;
- 2) that the user could not be expected to have knowledge of the product's risk; and
- 3) that the product has little or no usefulness.

Provided that a manufacturer or seller in a warning-defect case is not liable if an *adequate warning* is given. (An adequate warning is one that a reasonably prudent person in the similar circumstances would have provided.) Established a rebuttable presumption that a government (FDA) warning is adequate.

NORTH CAROLINA

1995—HB 637

Expressly provided that there shall be no strict liability in tort for product liability actions.

Provided statutory defenses to product liability claims, including assumption of the risk.

NORTH DAKOTA

1995—HB 1369

Established a ten-year statute of repose in product liability actions.

Provided a government standards defense.

Prohibited the award of punitive damages, when a manufacturer complies with government standards.

The 10-year statute of repose was found unconstitutional in Dickie v. Farmers Union Oil Co., 2000 ND 111 (N.D. May 25, 2000).

OHIO

1996—HB 350

Amended product liability law to include additional requirements for establishing liability.

Prohibited expanding theories of liability, including enterprise liability.

Adopted a fifteen-year statute of repose in product liability cases, absent latent harm or fraud.

Held unconstitutional by the Ohio Supreme Court in Ohio Academy of Trial Lawyers v. Sheward, August 1999.

CLASS ACTION REFORM

Once considered a tool of judicial economy that aggregated many cases with similar facts, or similar complaints into a single action, class actions are now often considered a means of defendant extortion. Today, some class actions are meritless cases in which thousands, or millions, of plaintiffs are granted class status, sometimes without even notifying the defendant. In many of these cases, the victimized consumers often receive pennies, or nearly-worthless coupons, while plaintiffs' counsel receives millions in legal fees. State class action reform can more equitably balance the interests of plaintiffs and the defendant.

Six states have reformed their laws pertaining to class actions

ALABAMA

1999—SB 72

Set procedures to certify class actions.

Codified Supreme Court rulings to ensure that a defendant receives adequate notice prior to class certification.

Provided for an immediate appeal of any order certifying a class or refusing to certify a class, and for an automatic stay of matters in the trial court pending such appeal.

COLORADO

2003—HB 03-1027

Provided for the interlocutory appeal of class action certification.

GEORGIA

2003—HB 792

Updated Georgia class action laws by providing for detailed procedures for class action cases.

Specified factors under which a court may decline to exercise jurisdiction in a cause of action of a nonresident occurring outside the state.

LOUISIANA

1997—HB 1984

Updated Louisiana class action laws by providing objective definitions of class action terms, and detailed procedures for class action cases.

OHIO

1998—HB 394

Provided for the interlocutory appeal of class action certification.

ATTORNEY RETENTION SUNSHINE

In state recoupment litigation against the tobacco industry, most states retained plaintiffs' personal injury lawyers on a contingent fee basis to assist them with their litigation. Unfortunately, many of these contracts, inked without competitive bidding, and with little or no outside oversight, were rife with political favoritism, inside dealing, and in at least one case, amid the stench of corruption. Many of these billion-dollar fees (which bore little or no relation to the value of the work performed) are being strategically reinvested into the political process, and into still more litigation. Attorney "sunshine" legislation requires legislative approval of most large contingent fee contracts, and reasserts the legislature's oversight of "regulation through litigation."

Five states have adopted this proposal.

COLORADO

2003—SB 03-086

Required monthly reports by outside counsel to include number of hours worked, court costs incurred, and to provide such data in aggregate from the effective date of the contingent fee contract.

Required, at the conclusion of representation, outside counsel to provide the state with a statement of hours worked and fees recovered through a contract for legal services between the state and outside counsel. Provided that in no instance shall the state pay fees, even on a contingent fee basis, in excess of \$1,000 per hour.

KANSAS

2000—HB 2627

Required open and competitive bidding for all contingent fee contracts for legal services between the state and outside counsel, where fees and services exceed \$7,500

Required proposed contracts for legal services between the state and outside counsel in excess of \$1,000,000 to be submitted to the legislative budget committee for approval.

Required, at the conclusion of representation, outside counsel to provide the state with a statement of hours worked and fees recovered through a contract for legal services between the state and outside counsel. Provided that in no instance shall the state pay fees, even on a contingent fee basis, in excess of \$1,000 per hour.

NORTH DAKOTA

1999—SB 2047

Required an emergency commission of the legislature to approve the attorney general's appointment of a special assistant attorney general in a case in which the amount of the controversy exceeds \$150,000.

APPEAL BOND REFORM

According to Lawyer's Weekly USA, the total amount of 1999's top ten jury verdicts was three times higher than 1998's level, and 12 times higher than the 1997 total. While many of these verdicts are overturned or reduced on appeal, defendants in many states are required to post an appeal bond sometimes equal to 150 percent of the verdict in question. In an era when billion-dollar verdicts are no longer uncommon, appealing an outrageous verdict can force a company or an industry into bankruptcy. Appeal bond waiver legislation limits the size of an appeal bond when a company is not liquidating its assets or attempting to flee from justice.

Twenty-five states have adopted this proposal.

ARKANSAS

2003—HB 1038

Limited the amount a defendant can be required to pay to secure the right to appeal to \$25 million.

CALIFORNIA

2003—AB 1752

Limited the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to \$150 million and applies to all judgments in civil litigation regardless of legal theory.

COLORADO

2003—HB 1366

Limited the amount a defendant can be required to pay to secure the right to appeal to \$25 million.

FLORIDA

2003—S 2826

Limited the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to \$100 million.

2000—HB 1721

Limited the amount a defendant can be required to pay to secure the right to appeal punitive damages awards in class actions to the lesser of 10% of the defendants net worth or \$100 million.

The reform applies in out-of-state judgments during the stay period only.

Provided that a court will rescind the limit if an appellee proves by a preponderance of the evidence that the party for whom the bond to stay execution has been limited is purposefully dissipating or diverting assets outside of the ordinary course of business for the purpose of avoiding ultimate payment of the judgment.

MINNESOTA

2003—HF 750

Limited the amount a defendant can be required to pay to secure the right to appeal to \$25 million.

MISSISSIPPI

2001

The Mississippi Supreme Court, acting on its own motion, imposed a \$100 million limit on the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal large punitive damages verdicts.

MISSOURI

2003—SB 242

Limited the amount a defendant can be required to pay to secure the right to appeal to \$50 million.

NEVADA

2001 —AB 576

Limited the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to \$50 million.

NEW JERSEY

2003—SB 2738

Limited the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to \$50 million.

NORTH CAROLINA

2003 —SB 784

Limited the amount a defendant can be required to pay to secure the right to appeal to \$25 million regardless of legal theory. Provided that foreign judgments cannot be executed in North Carolina if appeal is pending in a foreign jurisdiction or the judgment has been stayed by the court that rendered it and a bond has been posted.

2000 —SB 2

Limited the amount a defendant can be required to pay to secure the right to appeal to \$25 million.

Provided that limits on bond appeals for out-of-state judgments apply during the stay period only.

WEST VIRGINIA

2001—SB 661

Limited the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to \$200 million.

Provided that an appeal bond may not exceed \$100 million for compensatory damages and \$100 million in punitive damages.

WISCONSIN

2003—AB 548

Limited the amount a defendant can be required to pay to secure the right to appeal to \$100 million.

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JURY SERVICE REFORM

The right to a trial by a jury of one's peers is one most Americans support and take for granted. Recently, however, our juries are becoming less and less representative of the community. Some studies indicate that up to 20% of those summoned for jury duty do not respond and some jurisdictions have an even higher no-show rate. Occupational exemptions, flimsy hardship excuses, lack of meaningful compensation, long terms of service and inflexible scheduling results in a jury pool that makes it difficult for working Americans to serve on a jury and disproportionately excludes the perspectives of many people who understand the complexity of issues at play during trial. ATRA supports legislation to improve the jury system so that defendants and plaintiffs alike receive a fair trial.

- Eliminating occupational exemptions that give allow members of certain professions to opt-out from jury service.
- Ensuring that only those who experience true hardship are excused from jury service.
- Providing jurors flexibility in scheduling their service and guaranteeing potential jurors they will not spend more than one day at the courthouse unless they are selected to serve on a jury panel.
- Protecting employees from any adverse action in the workplace due to their responding to a juror summons.
- Establishing a lengthy trial fund, financed by a nominal court filing fee, to pay jurors who serve on long civil trials.

Three states have enacted reform.

ARIZONA

2003—H.B. 2520

Required all people to serve on juries unless they experience undue or extreme physical or financial hardship.

Established a lengthy trial fund from a modest filing fee to compensate jurors a minimum of \$40 and a maximum of \$300 per juror, per day for trials lasting more than 10 days, starting on the eleventh day of trial. In such circumstances, jurors would also be eligible to retroactively collect at least \$40 but not more than \$100 per day from the fourth day to the tenth day of service.

Provided for employee protection by prohibiting an employer to require an employee to use annual or sick leave for the time spent in the jury service process. In addition, it prohibited employers to dismiss or in any other way penalize employees for responding to a jury service summons.

Provided for protection of small business owners by requiring the court to postpone the service of an employee if another employee of that business is already serving on a jury.

Allowed for one automatic postponement from service.

HB

472

(File 5 of 7)

American Medical Association

Physicians dedicated to the health of America



1101 Vermont Avenue, NW
Washington, DC 20005

Statement

to the

Subcommittee on Health
Committee on Energy and Commerce
U.S. House of Representatives

**RE: Assessing the Need to Enact Medical
Liability Reform**

Presented by: Donald J. Palmisano, MD, JD

February 27, 2003

Division of Legislative Counsel
202 789-7426

**Statement
of the
American Medical Association
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**Committee on Energy and Commerce
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RE: Assessing the Need to Enact Medical Liability Reform

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February 27, 2003

On behalf of the physician members of the American Medical Association (AMA), I appreciate the opportunity to testify before you today regarding an issue that is seriously threatening the availability of and access to quality health care for patients. I would especially like to express our gratitude to you, Mr. Chair, and Representatives Jim Greenwood (R-PA), Chris Cox (R-CA), Billy Tauzin (R-LA), and other cosponsors of H.R. 5 for providing a much needed focus for action at the national level.

I am Donald Palmisano, MD, JD, President-elect of the AMA and a general and vascular surgeon from New Orleans, LA. The policy of the AMA is decided through its democratic policy-making process in the AMA House of Delegates, which meets twice a year. Our House is comprised of physician delegates representing every state, nearly 100 national medical specialty societies, federal service agencies (including the Surgeon General of the United States), and six sections representing hospital and clinic staffs, resident physicians, medical students, young physicians, medical schools, and international medical graduates. AMA policy dictates support for national medical liability reform. In particular, the AMA supports H.R. 5, the HEALTH Act.

Mr. Chair, you know that our health care system is facing a crisis when patients have to leave their state to receive urgent surgical care. You know that our health care system is facing a crisis when pregnant women cannot find an OB/GYN to monitor their pregnancy and deliver their baby. You know that our health care system is facing a crisis when community health centers have to reduce their services or close their doors because of liability insurance concerns. You know that our health care system is facing a crisis when dedicated professionals, who have trained for years, want to give up the work of a lifetime and retire. You know that our health care system is facing a crisis when physicians and other health care professionals believe they work in a culture of fear, rather than a culture of safety. You know that our health care system is facing a crisis when efforts to improve patient safety and quality

We must bring common sense back to our courtrooms so that patients have access to their emergency rooms, delivery rooms, operating rooms, and physicians' offices.

THE LITIGATION SYSTEM IS CAUSING THE CRISIS

The primary cause of the growing liability crisis is the unrestrained escalation in jury awards that are a part of a legal system that in many states is simply out of control. While there have been several articles published since the mid-1990s indicating that increases in jury awards lead to higher liability premiums, in the last year a growing number of government and private sector reports show that increasing medical liability premiums are being driven primarily by increases in lawsuit awards and litigation expenses.

In his State of the Union Address last month, President Bush stressed that we all are threatened by a legal system that is out of control. The President stated that "Because of excessive litigation, everybody pays more for health care and many parts of America are losing fine doctors." The President's remarks are substantiated in several recent government and private sector reports—reports making clear that the medical liability litigation system in the United States has evolved into a "lawsuit lottery," where a few patients and their lawyers receive astronomical awards and the rest of society pays the price as access to health care professionals and services are reduced.

RECENT FEDERAL GOVERNMENT REPORTS

In a July 2002 report released by the U.S. Department of Health and Human Services (HHS), the federal government concluded that the excesses of the litigation system are threatening patients' access to health care. This federal government report states that insurance premiums are largely determined by the litigation system, and that the litigation system is inherently costly, unpredictable, and slow to resolve claims. **Just to defend a claim now costs on average over \$24,000. Further, the fact that about 70 percent of claims end with no payment to the patient indicates the degree to which substantial economic resources are being squandered on fruitless legal wrangling—resources that could be used to reduce health costs so that more Americans could find health insurance.**

Even when there is a large award in favor of an injured patient, a large percentage of the award never reaches the patient. Attorney contingent fees, added with court costs, expert witness costs, and other "overhead" costs, can consume 40-50 percent of the compensation meant to help the patient.

On September 25, 2002, HHS issued an update on the medical liability crisis. This update reported on the results of a survey conducted by Medical Liability Monitor (MLM), an independent reporting service that tracks medical professional liability trends and issues. According to MLM, the survey determined that the crisis identified in HHS's July report had become worse. The federal government reported that:

The cost of the excesses of the litigation system are reflected in the rapid increases in the cost of malpractice insurance coverage. Premiums are spiking across all specialties in 2002.

medical liability insurance rates. The Task Force ultimately concluded that "the centerpiece and the recommendation that will have the greatest long-term impact on healthcare provider liability insurance rates, and thus eliminate the crisis of availability and affordability of healthcare in Florida, is a \$250,000 cap on non-economic damages."

RECENT PRIVATE SECTOR REPORTS

Evidence that the litigation system is broken, and that the medical liability crisis is growing, is further established in a study released by Tillinghast-Towers Perrin on February 11, 2003. Tillinghast reported that "The cost of the U.S. tort system grew by 14.3% in 2001, the highest single-year percentage increase since 1986," which is "equivalent to a 5% tax on wages." This is the only study that tracks the cost of the U.S. tort system from 1950 to 2001 and compares the growth of tort costs with increases in various U.S. economic indicators. Some of the key findings of this study are stunning:

- The U.S. tort system is a highly inefficient method of compensating injured parties, returning less than 50 cents on the dollar to people it is designed to help and returning only 22 cents to compensate for actual economic loss.
- As of 2001, U.S. tort costs accounted for slightly more than 2% of GDP, signaling an increase after a 13-year decline in the ratio of tort costs to GDP.
- While the cost of the U.S. tort system has increased one hundred fold over the last fifty years, GDP has grown by a factor of only 34.
- Medical malpractice costs have risen an average of 11.6% a year since 1975 in contrast to an average annual increase of 9.4% for overall tort costs, outpacing increases in overall U.S. tort costs.

The study also adds that "These trends continued in 2002, with no sign of abatement in the near future." In a press release accompanying this study, a Tillinghast principal stated that, "Absent sweeping tort reform measures, we expect most of these trends to continue in 2003 and beyond."

In a 2001 report by Jury Verdict Research, data show that in just a one year period (between 1999 and 2000) the median jury award increased 43 percent. Further, median jury awards for medical liability claims grew at 7 times the rate of inflation, while settlement payouts grew at nearly 3 times the rate of inflation. Even more telling, however, is that **the proportion of jury awards topping \$1 million increased from 34 percent in 1996 to 52 percent in 2000. More than half of all jury awards today top \$1 million, and the average jury award has increased to about \$3.5 million.**

These are just a few examples of growing evidence that reveal that out-of-control jury awards are inexorably linked to the severe increases in medical liability insurance premiums. It is clear that corrective action through federal legislation is urgently needed.

conclusions about how state-specific changes in premiums may be related to state-specific changes in payouts. **Conclusions about what has or has not caused recent premium escalation without accounting for the state-level factors listed above are unsupported.**

In addition to claiming that the current medical liability crisis is an insurance issue, there have been attempts to argue that medical liability insurance premium rates in California have remained stable because of Proposition 103, not because of the successful medical liability reforms (known as MICRA—discussed later) that have been in place in California since 1975. Such claims are misguided. Proposition 103, also known as the Insurance Rate Reduction and Reform Act, applies to all lines of insurance, not just medical liability insurance. It was passed as an initiative by the voters in 1988 (thirteen years after MICRA), yet did not take effect until 1989. This is when the state's high court struck down its rate rollback provisions while maintaining the remainder of the law.

Proposition 103 implemented a basic standard that "no rate shall be approved or remain in effect which is excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter." However, Proposition 103 provides that "every insurer which desires to change any rate shall file a complete rate application with the commissioner." Proposition 103 also requires that the Department of Insurance grant a hearing for a challenge to any increase above 15 percent for commercial lines of insurance.

According to Californians Allied for Patient Protection, "Insurers have regularly applied for and obtained significant rate increases in all lines of insurance, except medical liability where MICRA has kept the rates from rising astronomically. Between September and the end of October, 2002, for instance, the Insurance Department approved more than 75 applications for double-digit increases in insurance rates." **None of these approved increases included medical liability insurance.** This illustrates that Proposition 103 is not responsible for keeping medical liability premiums down. Rather, as we discuss later, it is MICRA that has been the force behind California's success.

Such misdirected claims as discussed above are a disservice to patients who are losing access to health care services, and an affront to the physicians and other health care professionals who dedicate their lives to healing and caring for the sick and working to find ways to improve the quality of care. America's medical liability crisis is too serious and the consequences of inaction too grave for the public and Congress to use anything but the facts to make decisions about reform. In short, these claims are counterproductive to the debate on resolving the medical liability crisis.

FEDERAL SOLUTION

The medical liability crisis is a growing national problem that requires a national solution. If the crisis was 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 crisis has become a serious problem for patients and their

provide quality care in recent years, and nearly all physicians and hospital administrators feel that unnecessary or excessive care is provided because of litigation fears. It also shows that an overwhelming majority of physicians (83%) and hospital administrators (72%) do not trust the current system of justice to achieve a reasonable result to a lawsuit.

The Harris study found that a majority (59%) of physicians believe ("a lot") that the fear of liability discourages open discussion and thinking about ways to reduce health care errors. The AMA has long believed that health professionals and organizations should be encouraged to report and evaluate health care errors and to share their experiences with others in order to prevent similar occurrences. However, this "culture of fear" caused by our over-litigious society suppresses such information.

The AMA strongly supports the principle underlying the 1999 Institute of Medicine (IOM) report entitled, *To Err is Human: Building a Safer Health System*, that the health care system needs to transform the existing culture of blame and punishment, which suppresses information about errors, into a "culture of safety" that focuses on openness and information-sharing to improve health care and prevent adverse outcomes. The AMA also supports the IOM's focus on the need for a system-wide approach to eliminating adverse outcomes and improving safety and quality, instead of focusing on individual components of the health system in an isolated or punitive way.

Toward this end, the AMA supports H.R. 663, the "Patient Safety and Quality Improvement Act," which was favorably reported by the House Energy & Commerce Committee on February 12, 2003. H.R. 663 would provide a framework to create a "culture of safety" by establishing a confidential, non-punitive, and evidence-based system for reporting health care errors. There is a very broad and strong consensus of agreement on this legislative approach within the health care community. By implementing this approach, errors can be identified and analyzed to improve patient safety by preventing future errors.

In addition to patient safety and quality improvement, the fear of litigation stifles the advancement of new medical treatments and medications, encourages physicians to practice defensive medicine, overwhelms the health care system with paperwork—leaving less time for patient care, and discourages qualified candidates from pursuing a career in medicine or from moving to a state with a bad liability climate.

THE PRACTICAL SOLUTION

The AMA recognizes that injuries due to negligence do occur in a small percentage of health care interactions, and that they can be as devastating or worse to patients and their families than injury due to natural illness or unpreventable accident. When injuries occur and are caused by a breach in the standard of care, the AMA believes that patients are entitled to prompt and fair compensation.

This compensation should include, first and foremost, full payment of all out of pocket "economic" losses. The AMA also believes that patients should receive reasonable

MICRA-type reforms are effective, especially at controlling non-economic damages. Several economic studies substantiate this point. One study looked at several types of reforms and concluded that capping non-economic damages reduced premiums for general surgeons by 13% in the year following enactment, and by 34% over the long term. Similar results were shown for premiums paid by general practitioners and OB/GYNs. It was also shown that caps on non-economic damages decrease claims severity (i.e., amount of the claim) (Zuckerman et al. 1990).

Another study published in the *Journal of Health Politics, Policy and Law* concluded that caps on non-economic damages reduced insurer payouts by 31%. Caps on total damages reduced payouts by 38% (Sloan, et al. 1989). Another study concluded that states adopting direct reforms experienced reductions in hospital expenditures of 5% to 9% within three to five years. If these figures are extrapolated to all medical spending, a \$50 billion reduction in national health spending could be achieved through such reforms (Kessler and McClellan, *Quarterly Journal of Economics*, 1997).

Further, as discussed above, a 2002 Congressional Budget Office study on H.R. 4600 (107th Congress) asserts caps on non-economic damages have been extremely effective in reducing the severity of claims and medical liability premiums. Conversely, a 1996 American Academy of Actuaries study shows that medical liability costs rose sharply in Ohio after the Ohio Supreme Court overturned a liability reform law in the 1990s that set limits on non-economic damages. (Ohio recently enacted a new liability reform law.)

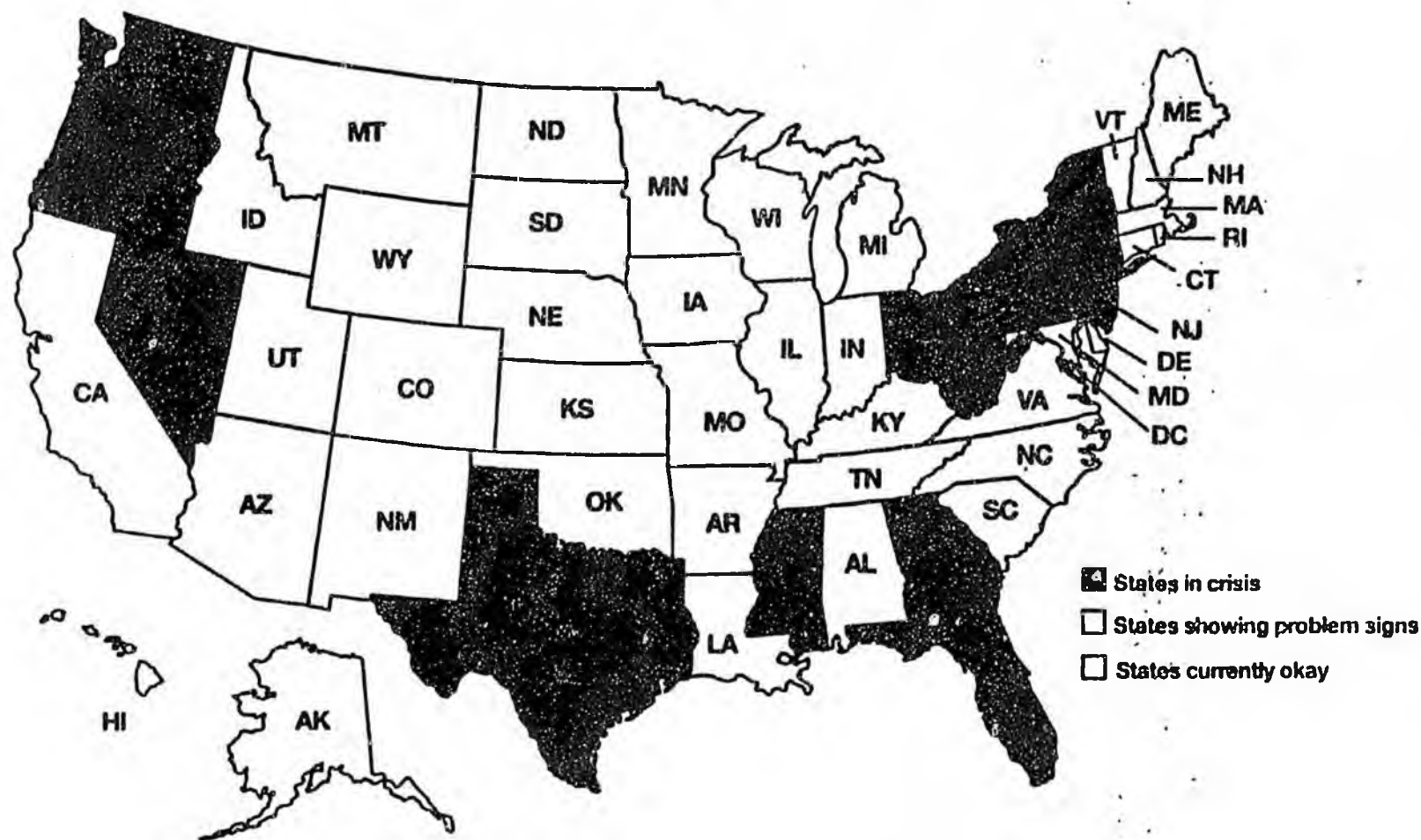
Furthermore, a Gallup poll released on February 5, 2003, show that 72% of those polled favor a limit on the amount patients can be awarded for pain and suffering. This Gallup poll is consistent with a 2002 survey conducted by Wirthlin Worldwide showing that three-quarters of Americans understand the detrimental effect that excess litigation has on our health care system. The Wirthlin survey shows that the vast majority of Americans agree we need common sense medical liability reform. In addition to the 78 percent discussed above who said that they are concerned about access to care, the survey found that:

- 71 percent of Americans agree that a main reason health care costs are rising is because of medical liability lawsuits.
- 73 percent support reasonable limits on awards for "pain and suffering" in medical liability lawsuits.
- More than 76 percent favor a law limiting the percentage of contingent fees paid by the patient.

CONCLUSION

Physicians and patients across the country realize more and more every day that the current medical liability situation is unacceptable. Unless the hemorrhaging costs of the current medical liability system are addressed at a national level, patients will continue to face an

Medical Liability Crisis: A National View



APPENDIX B

Medical Liability Crisis Affects Access to Care
Crisis States

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

Florida

- Women are facing waiting lists of four months before being able to get an appointment for a mammogram because at least six mammography centers in South Florida alone have stopped offering the procedure as a result of increasing medical liability insurance premiums. "This trend is troubling. There are a growing number of older people and less and less people to provide mammograms," said Joleen McPherson, a Florida spokeswoman for the American Cancer Society. *South Florida Sun Sentinel*, Nov. 4, 2002.
- Aventura Hospital in South Florida closed its maternity ward and cited \$1,000 in insurance premiums for each delivery as the prime factor. Aventura is one of six maternity wards to close in recent months. Now, patients will be forced to drive to other counties and other facilities. "There may be waits getting into a labor-room floor," said OB/GYN Aaron Elkin, MD. *Miami Herald*, Oct. 19, 2002.
- "Without a doubt, access to health coverage is being affected. Some of our emergency rooms are losing their effectiveness," said Dr. Greg Zorman, neurosurgery chief at Memorial Regional Hospital in Hollywood. His unit gets several patients a week from smaller ERs that have lost neurosurgery coverage. *South Florida Sun Sentinel*, February 5, 2003.
- Port Charlotte cardiologist Leonardo Victores, MD, left for Kansas in the face of medical liability premiums that were going to increase 100 percent. "He's moving to Kansas because that state has caps on malpractice awards," said colleague Mark Asperilla, MD. *Sun Herald*, Jan. 1, 2003.
- Despite having no malpractice claims or disciplinary actions on his record, Lakeland OB/GYN John Kaelber, MD, was forced to close his practice and leave the state in the wake of insurance premiums that doubled. *Lakeland Ledger*, Nov. 21, 2002.
- More than 50 Bradenton patients had to postpone elective surgeries and more than 100 office visits were canceled because two physicians were unable to obtain liability insurance. The insurer may leave the state altogether. *Bradenton Herald*, Jan. 24, 2003.
- After recently receiving notice of a premium spike coming in July 2002, Vladimir Grnja, MD, decided that he would "go bare" and drop all medical liability insurance coverage. Rates for the Hollywood, FL radiologist were to rise to \$112,000 from \$35,000 a year (a 220% increase), mainly because of litigation over mammograms. "No doctor wants to go bare," said Dennis Agliano, MD, chairman of the Florida Medical Association's special task force on the Florida medical liability crisis. But with significant premium hikes in Florida for specialties like OB/GYN, neurosurgery, thoracic surgery, radiology and even primary care, "some doctors have no choice," he says. Some neurosurgeons in

- American Physicians Assurance announced on July 17, 2002 that it is leaving the state
- Farmer's Insurance has announced its intent to leave the state. Among other insurers, MAG is still writing policies, while Medical Protective and ProNational are being very selective. FPIC, the largest medical liability carrier in the state, endorsed by FMA, is only writing very selectively. Both Clarendon and St. Paul have pulled out entirely.
- According to the FMA's General Counsel, Florida's existing caps simply do not work and are never used. The caps only apply in cases where the physician agrees to arbitration and in order for the case to go to arbitration the physician must admit liability. In addition, the original intent of this Florida provision was to have the cap apply to each incident, but it has been interpreted to apply to per claimant, which obviously also decreases its effectiveness. The lack of a straight cap is the primary reason for the current crisis in Florida. Unlike such States as Kansas, Florida has not seen an increase in frequency of claims, but there has been an increase for severity in jury awards.
- In a presentation before FMA, the medical liability insurance carrier, EPIC, presented facts that demonstrate the medical liability crisis in Florida. During 1975, there were 380 health care lawsuits in Florida, resulting in \$10.8 million in jury awards and costing \$1.5 million to defend. In 2000 there were 880 lawsuits alleging malpractice, resulting in awards of \$219 million and costing \$36 million to defend.
- Dr. Oliver Bayouth says his medical-malpractice premiums are skyrocketing. The Orlando obstetrician is paying about \$100,000 for insurance this year, up at least 25 percent from two years ago. Frustrated, Bayouth says he is thinking about moving his practice out of Florida. *Orlando Sentinel, January 20, 2002.*
- In South Florida, where insurers say litigation is the heaviest, ob/gyns pay as much as \$202,949 a year--the highest rates in the country, according to Medical Liability Monitor, a Chicago-based newsletter. *Orlando Sentinel, January 20, 2002.*
- Dr. Alan Appley, an Orlando neurosurgeon, moved his practice to Lafayette, Louisiana, last year in part to escape Florida's soaring malpractice rates. *Orlando Sentinel, January 20, 2002.*
- Dr. Joseph Boyer, an Orlando cardiologist, says his rates rose 64.6 percent, to \$99,000, in 2002. *Orlando Sentinel, January 20, 2002.*
- Central Florida Cardiothoracic Surgery in Orlando says it will pay about \$140,000 to insure two surgeons in 2002, compared with about \$54,000 last year. *Orlando Sentinel, January 20, 2002.*
- Dr. Alexander Jungreis, an Orlando neurosurgeon, said his liability insurance premiums tripled this year. *Orlando Sentinel, January 20, 2002.*

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

Georgia

- According to a Georgia Board for Physician Workforce study released in January 2003, 2,800 physicians in Georgia are expected to stop providing high-risk procedures to limit medical liability.
- The study also indicated that 1,750 physicians reported that have stopped or plan to stop providing ER coverage and 630 physicians plan to quit practicing or leave the state. In addition, 1 in 5 family physicians and 1 in 3 OB-GYNs reported plans to stop providing high-risk procedures, including delivering babies.
- But numbers alone do not tell the whole story; there is a very human side to this crisis. For instance, although she is only in her first year of medical school at Medical College of Georgia, the liability crisis has already caused Thandeka Myeni, 26, to reconsider her preference for obstetrics, one of the specialties hardest hit by medical liability increases. "I definitely think it could be discouraging," she said. *The Augusta Chronicle, Nov. 13, 2002.*
- Evans Memorial, a rural hospital in Claxton, decided to "go bare"—have no coverage at all—instead of paying what it considered an exorbitant medical liability premium. Only one insurer offered a malpractice policy for the hospital and its nursing home, and the annual premium for \$1 million in coverage would have been \$581,000, up from \$216,000 last year. "We just thought it was outrageous," said Eston Price, Evans Memorial administrator. *The Atlanta Journal-Constitution, Oct. 7, 2002.*
- The largest hospital in the state's health system has bought a new policy—with a deductible of \$15 million—covering 953-bed Grady Memorial, a nursing home and clinics. On each paid claim below that mark, Grady is responsible for every dollar. The \$15 million deductible starts again with each claim. "Grady faces open-ended liability," said Timothy Jefferson, Grady Health System executive vice president and chief counsel. *The Atlanta Journal-Constitution, Oct. 7, 2002.*
- Knowing that malpractice premiums were rising for everyone in the industry, Ty Cobb Health System CEO, Chuck Adams earmarked enough money for a 100 percent increase. The bill arrived by fax this summer, just 24 hours before a check was due. Not only was the insurance company increasing his deductible tenfold, but the premium jumped from \$553,000 to \$3.15 million – a 469 percent increase. "We were numb," said Adams, who eventually got an extension and another cheaper policy at \$1.65 million. "There goes our expansions, like a renovation of the Hart County Emergency Room." *The Atlanta Journal-Constitution, Aug. 11, 2002.*
- "Dr. Edmund Wright, a Fitzgerald family practitioner who performed Caesarian sections, has given up that part of his practice. His premiums quadrupled to \$80,000 in

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

Mississippi

- Although Mississippi enacted some medical liability reforms late last year, it is still too early to see if this will stem the exodus of physicians from the State. The reason: the Mississippi cap on non-economic damages has broad exceptions and the trial bar is looking for ways to get around its limits. In short, Mississippi remains in crisis.
- The Mississippi State Medical Association still estimates that the state could lose as many as 10 percent of its 4,000-4,500 physicians.
- Obstetricians in Mississippi still worry about what is going to happen to their patients who face longer trips to the hospital while already in labor. Women who used to walk or make a short drive for both prenatal visits and delivery now face a 45-minute drive by car to the only physician in their area who can still treat OB patients.
- Pregnant women who are considered high-risk, such as someone with diabetes, cannot be treated at the Kosciusko Medical Clinic because it is too risky for physicians, where seven physicians formerly practiced obstetrics and gynecology. Only three were predicted to remain in January 2003. *The Clarion-Ledger, Aug. 26, 2002.*
- Only two neurosurgeons remain in practice in the Gulf Coast-area of Mississippi, and general surgeons are in short supply because of the state's medical liability crisis. "Everybody is reduced to the same low level of trauma care that we had 20 years ago," said Steve Delahousey, vice president of operations at American Medical Response ambulance service. *Jan. 29, 2003 Biloxi Sun Herald*
- Neurologist Terry Smith, MD said he had applied with 14 companies, and Medical Assurance was his last hope to find coverage before his current policy expired on Aug. 4, 2002. His premium went from \$55,000 a year to potentially \$150,000 with a \$132,000 tail to his old insurer. "I'm looking at writing a check for \$300,000," said Smith, who does brain surgery at three hospitals in Jackson and Harrison counties. *Associated Press, July 11, 2002.*
- Four rural hospitals in Ocean Springs faced closure, as their insurer, Medical Assurance Company of Alabama, was not renewing their coverage because the insurer was leaving Mississippi.
- Greenwood Hospital – the only trauma center in a 55-mile radius – was unable to keep its Level-II trauma center rating because area neurosurgeons have left, citing the high cost of liability insurance. Greenwood also has lost 2 of its 4 Ob-Gyns.
- At least 15 insurers, including St. Paul, have left Mississippi in the previous five years.

- In the northern half of the state last year there were nine practicing neurosurgeons: now there are just three on emergency call. *The Wall Street Journal, May 1, 2002*
- In 1998, 227 Mississippians filed malpractice suits. Based on the suits filed during the first quarter of 2002, the Medical Association Company of Mississippi predicts over 550 medical liability suits will be filed this year.
- Across the State, there is a veritable litigation explosion, in Jefferson County, for example, there are only about 9,740 residents - but the number of lawsuits filed in 1999 numbered 10,000. A year later, in 2000, the number of plaintiffs on the docket increased to 27,000, or nearly three times the number of residents: *The Washington Times, May 11, 2002.*

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

Nevada

- In August, Nevada Governor Guinn called a special legislative session to address medical liability issues. In just four days, Nevada legislators enacted a meaningful liability reform bill.
- Unfortunately, while Nevada passed needed reforms, the crisis there has not yet been averted due to continued lack of availability and affordability of medical liability insurance. Insurers in Nevada have not yet reduced their premiums and physicians are still leaving the state, particularly in Southern Nevada.
- Why? Because the trial bar has threatened to institute legal challenges to this new law that could thwart and delay its implementation. Without the full force and effect of reforms right now, the scenario that has crippled access to medical care in Nevada will continue.
- 60 percent of Las Vegas-area Ob-gyns have said they would stop delivering babies in 2002 because of the out-of-control legal system and skyrocketing liability premiums.
- Las Vegas' only trauma center, which treated more than 11,000 patients in 2001, closed for 10 days in July 2002 because it did not have enough surgeons to staff the center.
- When a trauma center closes, "some patients are going to die that wouldn't die . . . the quicker you're at the trauma center, the better chance you have of survival," a Las Vegas surgeon told NPR. The next closest trauma center is at least 5 hours away.
- "There is an unavailability of [medical liability] insurance," said Nevada State Insurance Commissioner Alice Molasky-Arman, at a March 4, 2002 hearing where insurance officials testified they would no longer insure any new obstetricians, surgeons and other high-risk specialists.
- A Las Vegas Ob-gyn was forced to close her practice and leave 30 pregnant patients behind because her liability insurance increased from \$37,000 to \$150,000 in one year. She now practices in Los Angeles and pays only \$17,000. Some Nevada women have had to call as many as 50 Ob-gyns just to find one who is accepting new patients.
- Nevada ranks 5th among states with the highest physician liability premiums (at \$94,820 per year), but only 47th out of 50 states in the number of physicians for its population, according to the American College of Obstetricians and Gynecologists. An ACOG survey concludes that 6 out of 10 Nevada Ob-gyns will no longer practice obstetrics.
- "Approximately 100 Las Vegas physicians have already left Nevada to practice elsewhere, announced they will be closing their practices, or retire early because they

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

New Jersey

- A multi-physician practice in Teaneck, NJ, was forced to layoff employees and reduce the number of deliveries it performed because of medical liability insurance premium increases of more than 120 percent. "All of my colleagues are experiencing the same pressures," said George Ajjan, MD. *Bergen Record, May 22, 2002.*
- One out of every four hospitals—nearly 27 percent—has been forced to increase payments to find physicians to cover Emergency Departments: Physicians are increasingly reluctant to take on such assignments because of the greater liability exposure. Hospitals report that more and more physician specialties are being hit by the crisis. While a previous New Jersey Hospital Association survey in March 2002 found that OB/GYNs and surgeons were primarily affected, the new survey finds a deepening impact for neurologists/neurosurgeons, radiologists, orthopedists, general practitioners and emergency physicians. *New Jersey Hospital Association, Jan. 28, 2003 news release.*
- "We have as much to lose as they have," said Joan Hamilton, a patient who attended a recent rally in New Jersey in support of her physician. *Bergen Record, Oct. 6, 2002.*
- Physicians, nursing homes and hospitals are all in jeopardy. Liability premiums for hospitals increased more than 150% over the past 3 years. A N.J. American Hospital Association survey found that nearly 2/3 of hospitals had one or more instances where physicians were forced out of medicine because of high premiums.
- 64.8 percent of all New Jersey hospitals said they have had physicians stop practicing medicine or plan to stop because of the state's liability crisis.
- New Jersey's largest insurer, the MIIX company, declared May 9, 2002, it is getting out of the medical liability business. Previously, MIIX insured 7,000 physicians – nearly 40% of the state. MIIX previously left the medical liability insurance markets in Ohio, Pennsylvania and Texas, citing those states' out-of-control legal climates as an unacceptable business risk.
- After years of only a few large jury awards, New Jersey had 26 greater than \$1 million in 2001, and is averaging one a week in 2002, MIIX President Patricia Costante told the *Philadelphia Inquirer* June 4. New Jersey has no limits on non-economic damages in medical liability cases.
- New Jersey physicians are also facing difficulty finding new insurance because PHICO, which insured 9%, and St. Paul, with 6% of the market, have pulled out.

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

New York

- New York physicians still pay, in most instances, the highest medical liability premiums in the country. Ob-gyns' average premium is \$144,973, according to the American College of Obstetricians and Gynecologists.
- New York continues, by far, to lead the country in total medical liability payouts, with \$633 million total in 2000. That is 80% more than the state with the second highest total, Pennsylvania (at \$352 million), and 300% more than California (at \$200 million). Average medical liability verdicts have skyrocketed recently, going from an average of \$1.7 million in 1994 to \$6 million in 1999.
- "The number of doctors leaving Erie County last year doubled from the previous year, a trend that continues in 2002," wrote Donald Copley, MD, an officer of the Erie County Medical Society in *Business First of Buffalo*. "I've watched sadly as valued colleagues have left Erie County and even the profession. A competent young specialist recently quit doing high risk diagnostic procedures to become a business consultant. Several local obstetricians have stopped delivering babies to reduce their insurance expenses. A half dozen nationally-known doctors have quietly left Western New York. The number of doctors leaving Erie County last year doubled from the previous year, a trend that continues in 2002." *Buffalo Business First, April 15, 2002*.
- The Medical Society of New York says the trend of physicians leaving New York State or retiring early is happening across the state.
- "The rising cost of malpractice coverage is becoming one of the most important factors driving inflation for physicians' services," said a managing director of the Carlyle Group, the investment group for *The New York Times*.

- After not replacing a retiring office manager and moving to a smaller office, a 55-year old Cleveland-area surgeon who was only sued once quit practicing medicine rather than accept an 80% liability premium insurance increase. Another surgeon, who has never been sued, no longer performs high-risk procedures and saw his insurance rates jump from \$40,000 to \$90,000 in one year.
- "If I were advising medical students now, I would tell them to take a real hard look at going into some of these high-risk specialties," John Bastulli, MD, told the *Plain Dealer*.
- Ohio ranked among the top five states for premium increases according to the *Medical Liability Monitor*.
- "My premium jumped this year from \$14,000 to \$35,000. I can't afford to continue obstetrics at that price. I'll have to give up delivering babies as of Jan. 1, 2003. I practice in a primarily rural area, and there isn't any other obstetrical care here, so expectant women will have to drive long distances to receive prenatal care. Some 75% of my patients don't have the financial resources to do so. Yet, studies have shown that proper prenatal care fosters healthier newborns and healthier newborns cost society less money. I find it difficult to accept that my liability insurance premiums will force me to give up a side of my practice that has meant a lot to me and to my patients, but I'll have no recourse." – A Mt. Gilead family practitioner.
- "We've done the math: If we're going to take care of this debt (our annual insurance payment will increase from \$100,000 to more than \$500,000), our service is going to go out the window. To recoup the loss, we'd have to add 400 patient visits a month. You can't turn ob-gyn into a factory." – A Columbus obstetrician-gynecologist.
- "I just sat down with paper and pencil, and it became not financially rewarding to stay." – An Athens obstetrician-gynecologist, in reference to why he retired from his practice early.
- "I practice in southern Ohio in a town of 7,000. We have a small community hospital with a family birth center. There are three of us who do obstetrics – two family practitioners and one OB/GYN. In order to break even, our unit needs 150 deliveries a year. That is 50 deliveries each. If we go over 30 deliveries now, our premiums are in the \$40-60,000 range, which is impossible financially. We are struggling with limiting our ob to 30 each, but that will cause the OB unit to go under and close. We all love ob, and are well trained in providing high-risk OB care, but we're going to be forced to stop. If this occurs, there will be no OB care between Athens and Lancaster, Ohio. Tort reform needs to occur yesterday!" – A Logan family practitioner
- "I'm just postponing the inevitable. If the situation doesn't change, I could be insolvent in five years and have to close my practice. I'm only 49. Who will care for my patients? Discontinuing obstetrics is not an option. We need help!" – A Dayton obstetrician

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

Oregon

- Rural families in John Day, Hermiston, and Roseburg counties, Oregon have either lost obstetric care or have seen services drastically reduced. *The Business Journal of Portland, Jan. 10, 2003.*
- Only by dropping obstetrics were two Hermiston physicians able to afford their liability insurance premiums. "It's something you don't like to tell patients," said Doug Flaiz, MD. *The Oregonian, Oct. 29, 2002.*
- "No one with \$100,000 in debt from medical school wants to start a practice in a place where they could find themselves completely broke and having to pick up and go somewhere else to start all over again," said Rosemari Davis, CEO of Willamette Valley Medical Center, who has seen three of her center's family practitioners stop delivering babies. *The News Register, Jan. 28, 2003.*
- In 1999, the Oregon Supreme Court overturned the State's law capping non-economic damages. Since then, multi-million dollar claims have become commonplace, according to the Oregon Medical Association.
- Since the 1999 decision, Oregon physicians are experiencing rapidly rising premiums and insurers becoming more reluctant to offer policies to physicians, such as Ob-gyns and surgeons, who perform high-risk procedures.
- Recent jury verdicts include: \$8 million, \$8.5 million, \$10 million and \$17 million.
- Rural patients in Oregon are being particularly hard hit. A small town clinic, Roseburg Women's Healthcare, which delivered 80% of the babies for the area, closed its doors in May 2002 because its liability insurance was canceled after one large lawsuit. "We consider this a medical crisis for the community," Mercy Medical CEO Vic Fresolone told the Associated Press.
- The Roseburg clinic physicians paid \$17,000 per physician per year in 2001 for medical liability insurance and are now receiving quotes for \$80,000 -100,000 per physician.
- Oregon's only academic health center – the Oregon Health & Science Center – reports fewer medical students are applying for its Ob-gyn residency positions. Ob-gyn residents elsewhere reportedly are increasingly concerned about setting up practice in Oregon due to the state's broken liability system.
- A major liability insurer, Northwest Physicians Mutual Insurance Company, announced in 2002 it would not write new policies to obstetricians. Remaining insurers are raising rates by 60% or more.

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

Pennsylvania

- According to the Pennsylvania Medical Society Alliance, 919 doctors have decided to leave the Keystone State or have scaled back their practices as premiums spiraled upward over the past three years. *The Baltimore Sun, Feb. 5, 2003.*
- Dr. Anthony Clay never thought he would have to leave Philadelphia. He has spent his whole life there—growing up and attending college, medical school, and residency to become a cardiologist. He treats families he has known since boyhood. He likes knowing where his patients live, work, and shop. All nine of his siblings still live there. But, Dr. Clay is leaving his practice in Philadelphia this Spring because of surging malpractice insurance rates. He is starting over in Delaware, where his insurance costs will drop from roughly \$70,000 a year to \$8,000. "It's been terrible," said Dr. Clay, 40. "In this field, you've been with the patient, and also the family, in some of their most life-defining moments - in the throes of a heart attack with no blood pressure. Wrongly or rightly, the patient credits you with being there when they weren't doing so well. You realize you've created a bond. I take that very seriously." *Baltimore Sun, February 5, 2003.*
- Brian Holmes, MD, is one of an estimated 18 percent of Pennsylvania neurosurgeons to have left the state, retired, or limited his or her practices because of the medical liability crisis. "It saddened me to move, but I had no choice. It was either move or go out of business." *Philadelphia Business Journal, Sept. 25, 2002.*
- After 25 years of practice, OB/GYN Michael Horn, MD, stopped delivering babies in 2002 because of the fear of getting sued. "It's just the potential, the not knowing if someone will seek an outlandish reward. I don't want to expose myself or my family." *Burlington County Times, Oct. 2, 2002.*
- Medical students are less likely to seek residencies in Philadelphia, and residents are less likely to stay and practice in the area because of "prohibitively high" medical liability insurance rates, according to Jefferson Medical College professor Stephen L. Schwartz, MD. *Associated Press, Oct. 4, 2002.*
- OB/GYN Lawrence Glad, MD, used to deliver about 500 babies a year—40 percent of all the babies born in Fayette County annually. After his premiums skyrocketed from \$57,000 to \$135,000, however, he closed his practice in the fall of 2002. *Pittsburgh Business Times, Nov. 18, 2002.*
- Mercy Hospital chief of surgery Charles Bannon, MD, has watched numerous physicians leave Scranton and Lackawanna County—creating a shortage of surgeons, fewer medical school applications and residencies. "It will take generations to get back the quality of medicine in Philadelphia." *Scranton Times, Nov. 20, 2002.*

- 414 medical liability lawsuits were filed in Philadelphia County in February 2002 – five times the average number filed during the month over the previous decade, reported the *Philadelphia Inquirer*.
- One-quarter of respondents to an informal poll conducted by the American College of Obstetricians and Gynecologists say they have stopped or are planning to stop practicing obstetrics.
- Statistics compiled for the Pennsylvania Medical Association by Caso Consulting indicate it costs \$96,199 to cover an orthopedic surgeon in Pennsylvania, compared with \$37,783 in Delaware, and \$36,291 in New Jersey. *Best's Insurance News, January 7, 2002*.
- Howard A. Richter, a neurosurgeon and president of the Pennsylvania Medical Society, said a 2001 survey by the medical society showed that 72% of doctors have either deferred the purchase of new medical equipment or have not hired needed staff because of "sudden and sharp increases" in insurance rates. *Best's Insurance News, January 21, 2002*.
- "To lower their risk and insurance premiums, doctors who normally would take on high-risk medical procedures are opting not to do so. For example, we've seen obstetrician/gynecologists give up delivering babies. Virtually every medical liability insurance carrier increased their rates in recent years. From the beginning of 1997 through September 2001, major liability insurance carriers writing in Pennsylvania increased their overall rates between 80.7 percent and 147.8 percent." *York Daily Record, January 20, 2002*.
- Driving premiums through the roof are excessive sums awarded in malpractice suits. Medical liability payments for physicians in 2000 totaled \$3,908,113,303. *York Daily Record, January 20, 2002*.

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

Texas

- In the "Lone Star State" medical liability insurance premiums for physicians have skyrocketed as much as 300 percent in some regions and for some specialties, according to the Texas Medical Association. As a result, there is only one neurosurgeon serving 600,000 people in the McAllen area.
- In the past two years, four South Texas patients with head injuries died before they could be flown out of the area for medical attention. As reported in a July 10, 2002, article in *The Courier*, a community family practice clinic in Conroe (just north of Houston) was recently forced to turn away half of its normal patient load because its liability insurance provider would not provide coverage while "highly lawsuit-risky obstetrics training was conducted."
- Even though the Texas legislature has passed medical liability reforms, the Texas Supreme Court has regularly overturned them.
- Medical liability premiums were expected to increase by at least 20 percent and perhaps as much as 75 percent in 2002, according to the Texas Department of Insurance. *San Antonio Express-News*, April 8, 2002.
- In 1999, 17 companies offered malpractice coverage to doctors in Texas. Today, the field has dwindled to only four, and Texas is considered the least profitable state for liability carriers. *The Dallas Morning News*, September 1, 2002.
- Moreover, premiums this year have climbed at triple-digit rates for many of Texas' 36,000 physicians. That's on top of double-digit increases in prior years. Now it's not uncommon for doctors in high-risk specialties such as trauma surgery, emergency medicine, and orthopedic surgeries and obstetrics to pay more than \$ 100,000 annually for coverage. This means that some 6,100 Texas physicians are scrambling to find liability insurance.
- The Doctor's Company, a national insurer, told the *Dallas Morning News* the company is selective about which types of physicians it will cover. "Texas is a very dangerous venue, and we don't really encourage . . . [growth] from there - not without tort reform," said senior vice president Jack Myer.
- In South Texas, one jury awarded \$43 million to a woman who claimed a diabetes drug damaged her liver, while another gave \$15 million to three women who received faulty hip implants. *The Wall Street Journal*, May 1, 2002.
- 6 of every 7 medical liability claims in Texas are closed with no fault found on the doctor's part. Nonetheless, tens of millions of dollars are spent fighting these cases.

- In Texas, about 85 percent of cases are closed without payment to plaintiff, yet they still cost money to resolve, said Texas Medical Liability Trust president W. Thomas Cotton. *The Dallas Morning News, January 20, 2002.*
- Insurance carriers in Texas paid more than \$381 million in claims in 2000, according to the Texas Department of Insurance--costs passed on to policyholders. That's an 87 percent increase since 1995. Nationally, the median malpractice award more than doubled from 1994 to 1999, to \$800,000. *The Dallas Morning News, January 20, 2002.*
- Texans filed 4,501 claims in 2000, up 51 percent from 1990, according to the Texas Medical Examiners Board. More troublesome is the rise in expenses involved in resolving a case. Each claim cost an average of \$68,681 to litigate in 2000, compared with \$46,079 in 1995. The figure does not include the amount of settlement or award. *The Dallas Morning News, January 20, 2002.*
- Meanwhile, physicians in the Rio Grande Valley are in crisis, said Texas Medical Liability Trust president W. Thomas Cotton. An OB-GYN in North Texas pays \$47,500 annually for \$500,000 in coverage, while his Rio Grande Valley counterparts pay \$82,300. Neurosurgeons pay even higher premiums. *The Dallas Morning News, January 20, 2002.*
- Seven in 10 Rio Grande Valley doctors have had medical liability claims filed against them. A February 2001 survey by the Texas Medical Association found that 1 in 3 Valley doctors say their insurance providers have stopped writing liability insurance. *The Dallas Morning News, January 20, 2002.*
- In Rio Grande Valley, half of the physicians admitted to being inclined to leave the area or to retire, according to a survey conducted in February 2001 by the Texas Medical Association. Many doctors in the Valley said they profile patients and refuse to treat some, because they fear the patients are prone to sue. They said they deny care for people who pay with cash, because the patients are most likely poor and may look at a lawsuit like a lottery opportunity. Some physicians are even hesitant to respond to a "code blue," which indicates a medical crisis, in a hospital. Dr. Carlos Cardinez, a gastroenterologist in McAllen, said he doesn't want to respond anymore because of the legal uncertainty. *The Dallas Morning News, January 20, 2002.*
- Increases in medical practice costs have outstripped revenue increases over the last 10 years, according to the Medical Group Management Association's 2000 cost survey. Operating costs for multispecialty groups went up an average of 35 percent over the past 10 years, while revenue increased 21 percent over that same period. *The Dallas Morning News, January 20, 2002.*

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

Washington

- "There is a growing crisis in medical malpractice in Washington state and nationally," state insurance commissioner Mike Kriedler said in an April 2002 news release.
- "Patients in many communities are finding that their physicians have either started limiting their services or have closed their doors completely due to rising malpractice premiums," said Dr. Maureen Callaghan, president of the Washington State Medical Association. *PR Newswire, Feb. 3, 2003.*
- "I went through my mourning and my grieving, and now I have to find a place for my [380] patients," said a South Bend internist who has not been sued but can no longer afford liability insurance coverage.
- The cost of medical malpractice insurance has soared so high that Mount Vernon obstetrician Robert Pringle, MD, has stopped delivering babies, according to the *Puget Sound Business Journal*.
- So have his two colleagues at the North Cascade Women's Clinic, and so have others: "Of the nine obstetricians in our community, six have stopped delivering babies or left the area," Pringle said.
- When he began his practice 20 years ago, Pringle paid a premium of \$1,000 for medical malpractice insurance, which covers physicians against claims of injury resulting from negligent medical care. "Now it's in the neighborhood of \$60,000," he said. "From an economic standpoint, you would have to be a lunatic to continue private practice of obstetrics." *Puget Sound Business Journal*.
- The severe premium hikes besetting many doctors "could not come at a worse time," said Dr. Sam Cullison, president of the Washington State Medical Association. Cullison said the high cost of malpractice insurance has combined with low reimbursement rates from Medicaid, Medicare and private insurers to clamp many doctors in a financial squeeze. As a result more physicians are retiring early, or leaving the State, he said. Also, it's increasingly difficult to recruit doctors from other states." *Puget Sound Business Journal*.
- "Everyone is in the same situation in terms of increasing premiums, increasing overhead and decreasing reimbursement," said Olympia neurologist Maureen Callaghan, MD. "The final end point," she added, "is that people are not to be able to get in to see a doctor." *Puget Sound Business Journal*.
- During the past five years, medical liability premiums paid by orthopedic surgeons increased 30 percent, to nearly \$40,000, and premiums paid by family physicians who

- *The World* cites the example of a Tulsa pediatrician whose malpractice insurance doubled this year. *The Oklahoman*, July 17, 2002
- Oklahoma pediatricians have far less to worry about than the State's obstetricians and surgeons, whose rates in Oklahoma in 2003 are expected to rise by 25 percent to 30 percent, says the Oklahoma State Medical Association.

South Carolina

- The medical liability crisis is rapidly spreading to the Palmetto State.
- A 10-physician OB/GYN group in Columbia had to take out a \$400,000 loan this year to continue to provide OB services *and* pay malpractice premiums.
- In rural Oconee County, just four physicians deliver babies now, down from 11 physicians one year ago.
- A family practice group in Seneca was forced to drop OB coverage for four of their six physicians because of skyrocketing premiums. There are currently a total of four physicians in Seneca treating pregnant women.
- A solo practitioner practicing geriatrics in Charleston has had to quit treating patients in nursing homes because of high premiums.

Tennessee

- Professional liability premiums for physicians in Tennessee have been steadily rising in recent years.
- According to State Volunteer Mutual Insurance Company, which covers most practitioners in Tennessee, premiums have increased by 45% over the past three years, in order to keep up with rapidly escalating losses in medical liability lawsuits.
- Only approximately 4% of this 45% increase was related to lower investment yield, with the remainder being due to increasing medical malpractice losses. (State Volunteer Mutual Insurance Company is a policyholder owned mutual company with no outside investors).
- In recent years both juries and judges in Tennessee have made multi-million dollar awards for non-economic damages, over and above a patient's actual economic losses.

THE MEDICAL LIABILITY CRISIS – A NATIONWIDE PROBLEM

West Virginia

- The "Mountaineer State" was one of the first states to experience wide-spread medical liability insurance problems.
- According to the West Virginia State Medical Association, some 100 doctors have already retired early or moved out of the state within the previous two years.
- That has helped drive 1 out of every 20 doctors out of West Virginia or into early retirement in the past two years. *CNN, Jan. 2, 2003.*
- General surgeon Gregory Saracco, MD, only 49 years old, was forced to borrow money twice in 2002 to pay \$73,000 for his liability insurance. His premiums for 2003 are expected to rise to \$100,000. He is considering leaving West Virginia and while he has taken time away from his practice this year to decide what his options are, he said "my job is to help people—I couldn't drive past an accident on the road and not stop. I don't know any doctor that could." *Associated Press, Jan. 2, 2003.*
- Although orthopedic surgeon George Zakaib, MD, was raised and went to school in Charleston, WV, he and his family left because of the state's medical liability crisis. Dr. Zakaib's premiums had increased to \$80,000 plus \$94,000 in "tail" coverage. *Charleston Daily Mail, July 27, 2002.*
- Fourth-year medical school student Jennifer Knight isn't sure she'll stay in West Virginia. The Charleston Area Medical Center says fewer medical students are applying to its residency programs, and fewer students are applying to Marshall University's medical school. "I think the problem is, we have too many frivolous lawsuits," said Ms. Knight. *Sunday Gazette-Mail, Nov. 24, 2002.*
- The state legislature has been trying for more than a year to come up with a solution that will prevent more physicians from curtailing services or leaving the state. A state medical association poll found that 40% of the State's doctors are considering similar action to stop practicing or leave the State.
- "It's a 'code blue' emergency" threatening the state's trauma centers and other health care services in the state, WVSMA President Ahmed D. Fahecn, MD, told *The New York Times*.
- Wheeling, West Virginia, has no remaining neurosurgeons, forcing closure of its only trauma center. Trauma patients must be flown by helicopter for care elsewhere.
- Across the State, the pattern is the same. trauma centers are closing or headed in that direction, and there is incredible difficulty in recruiting high-risk specialty residents.

APPENDIX C

Medical Liability Crisis Affects Access to Care

Selected States Showing Problem Signs

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

Alabama

- The severe liability crisis in the neighboring States of Mississippi, Georgia and Florida has not left Alabama untouched.
- Atmore Community Hospital has had to close its maternity ward because of soaring medical liability premiums, forcing pregnant mothers to travel 15 miles to the nearest hospital with an obstetrics department.

Arizona

- Arizona has not been immune to the medical liability crisis. Serious access problems are already developing.
- The Copper Queen Community Hospital, was forced to stop delivering babies in January after a group of family physicians said they could no longer afford medical liability insurance.
- Pregnant mothers in this part of Arizona must now travel over 35 miles to the nearest hospital – the only hospital left in that County that is still delivering babies.

Connecticut

- The crisis may be spreading to Connecticut as evidenced by the recent decisions of 28 OB/GYNs to stop delivering babies.
- Some OB/GYNs in Connecticut are now paying between \$120,000-\$160,000 per year in insurance premiums, according to state medical society executive Tim Norbeck.
- Connecticut already is on a "watch" list issued by the American College of Obstetricians and Gynecologists. *Hartford Courant, Jan. 3, 2003.*
- The average payment made by one of Connecticut's major insurers to resolve a claim rose from \$271,000 in 1995 to \$536,000 in 2001.
- OB/GYN Jose Pacheco, MD's, insurer stopped offering medical liability insurance, and he had to seek another carrier. However, because of the high cost of new insurance—estimated around \$60,000—combined with "tail" coverage of \$80,000, Dr. Pacheco retired after a 27-year career. *Hartford Courant, Nov. 17, 2002.*

- A recent survey completed by the Missouri State Medical Association found that 31.4 percent of the responding physicians were considering leaving their practice, and 28.6 percent said they would consider limiting their practice because of rising liability insurance premiums.
- This same survey showed an average premium increase for medical liability insurance of 61.2 percent for 2002, on top of a 22.4 percent average increase last year.
- Neurosurgeons in Kansas City are facing an increase in premiums of \$12,000 to \$42,000 this year, with further increases expected next year.
- The 2002 premiums for Ob-gyns have increased by as much as \$50,000 from 2001. Again, further increases are expected next year.
- According to a separate survey by the Metropolitan Medical Society of Greater Kansas City, 40% of practices are looking for new coverage because their insurer has stopped writing medical liability coverage.
- Predictably, an access crisis to needed health care is developing. The St. Joseph Health Center in Kansas City recently lost another trauma doctor. It is now down to three. The situation is even worse because a local nearby trauma center has been virtually shut down, meaning St. Joseph's must treat double the number of patients, and it is having trouble finding other surgeons willing to cover trauma.
- According to the *St. Louis Business Journal*, access issues are spreading. Dr. John Anstey, an obstetrician/gynecologist, recently faced a difficult choice. He knew he had to cut expenses after learning his medical malpractice insurance premium, which cost about \$26,000 this year, would jump to \$50,000 next year. Consequently, he closed his office in St. Ann effective July 30th. Previously, Anstey and his partner, Dr. Fred Monterubio, Jr., deliver about 400 babies a year through their practice, St. Ann OB/GYN. As a stopgap measure, Drs. Anstey and Monterubio were forced to move their practice to a hospital-based setting where they await news of their 2003 premium by October.
- The current medical liability insurance market in Missouri is extremely tight, with at least three insurers having pulled out of the market over the past year.
- Intermed Insurance Company, based in Springfield, is the largest provider of medical liability insurance coverage in Missouri. The Missouri Department of Insurance said the company had a 34 percent market share in 2001. The company imposed an 18 percent hike, effective July 1, and also put a moratorium on writing new business in Missouri.
- Andy Bennett, president and chief executive of Intermed, said rates went up because the severity, or average amount paid per settlement or verdict, has continued to go up fairly dramatically in Missouri. *St. Louis Business Journal*.

- A case in point is Manuel Belandres, MD, a general surgeon who was in the twilight of his career but still practicing until recently when he was unable to obtain tail coverage. He subsequently closed his practice rather than expose himself to open-ended future liability.
- In Virginia's western border, many physicians are no longer treating West Virginia patients who cross the State-line due to aggressive personal injury attorneys attempting to bring suit against Virginia physician in West Virginia courts. This has further aggravated the access problem for pregnant West Virginia Medicaid patients, in particular, and their access to needed care.

American Medical Association

Physicians dedicated to the health of America



1101 Vermont Avenue, NW
Washington, DC 20005

Statement

to the

Committee on the Judiciary
U.S. House of Representatives

**RE: Legislative Hearing on H.R. 5, to Improve
Patient Access to Health Care Services and
Provide Improved Medical Care by Reducing
the Excessive Burden the Liability System
Places on the Health Care Delivery System**

Presented by Donald J. Palmisano, MD, JD

February 28, 2003

Division of Legislative Counsel
202 789-7426

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February 28, 2003

On behalf of the physician members of the American Medical Association (AMA), I appreciate the opportunity to testify before you today regarding an issue that is seriously threatening the availability of and access to quality health care for patients. I would especially like to express our gratitude to you, Mr. Chair, and other Members of the Committee who are cosponsors of H.R. 5, for providing a much needed focus for action at the national level.

I am Donald Palmisano, MD, JD, President-elect of the AMA and a general and vascular surgeon from New Orleans, LA. The policy of the AMA is decided through its democratic policy-making process in the AMA House of Delegates, which meets twice a year. Our House is comprised of physician delegates representing every state, nearly 100 national medical specialty societies, federal service agencies (including the Surgeon General of the United States), and six sections representing hospital and clinic staffs, resident physicians, medical students, young physicians, medical schools, and international medical graduates. AMA policy dictates support for national medical liability reform. In particular, the AMA supports H.R. 5, the HEALTH Act.

Mr. Chair, you know that our health care system is facing a crisis when patients have to leave their state to receive urgent surgical care. You know that our health care system is facing a crisis when pregnant women cannot find an OB/GYN to monitor their pregnancy and deliver their baby. You know that our health care system is facing a crisis when community health centers have to reduce their services or close their doors because of liability insurance concerns. You know that our health care system is facing a crisis when dedicated professionals, who have trained for years, want to give up the work of a lifetime and retire. You know that our health care system is facing a crisis when physicians and other health care professionals believe they work in a culture of fear, rather than a culture of safety. You know

We must bring common sense back to our courtrooms so that patients have access to their emergency rooms, delivery rooms, operating rooms, and physicians' offices.

THE LITIGATION SYSTEM IS CAUSING THE CRISIS

The primary cause of the growing liability crisis is the unrestrained escalation in jury awards that are a part of a legal system that in many states is simply out of control. While there have been several articles published since the mid-1990s indicating that increases in jury awards lead to higher liability premiums, in the last year a growing number of government and private sector reports show that increasing medical liability premiums are being driven primarily by increases in lawsuit awards and litigation expenses.

In his State of the Union Address last-month, President Bush stressed that we all are threatened by a legal system that is out of control. The President stated that "Because of excessive litigation, everybody pays more for health care and many parts of America are losing fine doctors." The President's remarks are substantiated in several recent government and private sector reports—reports making clear that the medical liability litigation system in the United States has evolved into a "lawsuit lottery," where a few patients and their lawyers receive astronomical awards and the rest of society pays the price as access to health care professionals and services are reduced.

RECENT FEDERAL GOVERNMENT REPORTS

In a July 2002 report released by the U.S. Department of Health and Human Services (HHS), the federal government concluded that the excesses of the litigation system are threatening patients' access to health care. This federal government report states that insurance premiums are largely determined by the litigation system, and that the litigation system is inherently costly, unpredictable, and slow to resolve claims. **Just to defend a claim now costs on average over \$24,000.** Further, the fact that about 70 percent of claims end with no payment to the patient indicates the degree to which substantial economic resources are being squandered on fruitless legal wrangling—resources that could be used to reduce health costs so that more Americans could find health insurance.

Even when there is a large award in favor of an injured patient, a large percentage of the award never reaches the patient. Attorney contingent fees, added with court costs, expert witness costs, and other "overhead" costs, can consume 40-50 percent of the compensation meant to help the patient.

On September 25, 2002, HHS issued an update on the medical liability crisis. This update reported on the results of a survey conducted by Medical Liability Monitor (MLM), an independent reporting service that tracks medical professional liability trends and issues. According to MLM, the survey determined that the crisis identified in HHS's July report had become worse. The federal government reported that:

The cost of the excesses of the litigation system are reflected in the rapid increases in the cost of malpractice insurance coverage. Premiums are spiking across all specialties in 2002.

medical liability insurance rates. The Task Force ultimately concluded that "the centerpiece and the recommendation that will have the greatest long-term impact on healthcare provider liability insurance rates, and thus eliminate the crisis of availability and affordability of healthcare in Florida, is a \$250,000 cap on non-economic damages."

RECENT PRIVATE SECTOR REPORTS

Evidence that the litigation system is broken, and that the medical liability crisis is growing, is further established in a study released by Tillinghast-Towers Perrin on February 11, 2003. Tillinghast reported that "The cost of the U.S. tort system grew by 14.3% in 2001, the highest single-year percentage increase since 1986," which is "equivalent to a 5% tax on wages." This is the only study that tracks the cost of the U.S. tort system from 1950 to 2001 and compares the growth of tort costs with increases in various U.S. economic indicators. Some of the key findings of this study are stunning:

- The U.S. tort system is a highly inefficient method of compensating injured parties, returning less than 50 cents on the dollar to people it is designed to help and returning only 22 cents to compensate for actual economic loss.
- As of 2001, U.S. tort costs accounted for slightly more than 2% of GDP, signaling an increase after a 13-year decline in the ratio of tort costs to GDP.
- While the cost of the U.S. tort system has increased one hundred fold over the last fifty years, GDP has grown by a factor of only 34.
- Medical malpractice costs have risen an average of 11.6% a year since 1975 in contrast to an average annual increase of 9.4% for overall tort costs, outpacing increases in overall U.S. tort costs.

The study also adds that "These trends continued in 2002, with no sign of abatement in the near future." In a press release accompanying this study, a Tillinghast principal stated that, "Absent sweeping tort reform measures, we expect most of these trends to continue in 2003 and beyond."

In a 2001 report by Jury Verdict Research, data show that in just a one year period (between 1999 and 2000) the median jury award increased 43 percent. Further, median jury awards for medical liability claims grew at 7 times the rate of inflation, while settlement payouts grew at nearly 3 times the rate of inflation. Even more telling, however, is that the proportion of jury awards topping \$1 million increased from 34 percent in 1996 to 52 percent in 2000. More than half of all jury awards today top \$1 million, and the average jury award has increased to about \$3.5 million.

These are just a few examples of growing evidence that reveal that out-of-control jury awards are inexorably linked to the severe increases in medical liability insurance premiums. It is clear that corrective action through federal legislation is urgently needed.

conclusions about how state-specific changes in premiums may be related to state-specific changes in payouts. **Conclusions about what has or has not caused recent premium escalation without accounting for the state-level factors listed above are unsupported.**

In addition to claiming that the current medical liability crisis is an insurance issue, there have been attempts to argue that medical liability insurance premium rates in California have remained stable because of Proposition 103, not because of the successful medical liability reforms (known as MICRA—discussed later) that have been in place in California since 1975. Such claims are misguided. Proposition 103, also known as the Insurance Rate Reduction and Reform Act, applies to all lines of insurance, not just medical liability insurance. It was passed as an initiative by the voters in 1988 (thirteen years after MICRA), yet did not take effect until 1989. This is when the state's high court struck down its rate rollback provisions while maintaining the remainder of the law.

Proposition 103 implemented a basic standard that "no rate shall be approved or remain in effect which is excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter." However, Proposition 103 provides that "every insurer which desires to change any rate shall file a complete rate application with the commissioner." Proposition 103 also requires that the Department of Insurance grant a hearing for a challenge to any increase above 15 percent for commercial lines of insurance.

According to Californians Allied for Patient Protection, "Insurers have regularly applied for and obtained significant rate increases in all lines of insurance, except medical liability where MICRA has kept the rates from rising astronomically. Between September and the end of October, 2002, for instance, the Insurance Department approved more than 75 applications for double-digit increases in insurance rates." **None of these approved increases included medical liability insurance.** This illustrates that Proposition 103 is not responsible for keeping medical liability premiums down. Rather, as we discuss later, it is MICRA that has been the force behind California's success.

Such misdirected claims as discussed above are a disservice to patients who are losing access to health care services, and an affront to the physicians and other health care professionals who dedicate their lives to healing and caring for the sick and working to find ways to improve the quality of care. America's medical liability crisis is too serious and the consequences of inaction too grave for the public and Congress to use anything but the facts to make decisions about reform. In short, these claims are counterproductive to the debate on resolving the medical liability crisis.

FEDERAL SOLUTION

The medical liability crisis is a growing national problem that requires a national solution. If the crisis was 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 crisis has become a serious problem for patients and their

provide quality care in recent years, and nearly all physicians and hospital administrators feel that unnecessary or excessive care is provided because of litigation fears. It also shows that an overwhelming majority of physicians (83%) and hospital administrators (72%) do not trust the current system of justice to achieve a reasonable result to a lawsuit.

The Harris study found that a majority (59%) of physicians believe ("a lot") that the fear of liability discourages open discussion and thinking about ways to reduce health care errors. The AMA has long believed that health professionals and organizations should be encouraged to report and evaluate health care errors and to share their experiences with others in order to prevent similar occurrences. However, this "culture of fear" caused by our over-litigious society suppresses such information.

The AMA strongly supports the principle underlying the 1999 Institute of Medicine (IOM) report entitled, *To Err is Human: Building a Safer Health System*, that the health care system needs to transform the existing culture of blame and punishment, which suppresses information about errors, into a "culture of safety" that focuses on openness and information-sharing to improve health care and prevent adverse outcomes. The AMA also supports the IOM's focus on the need for a system-wide approach to eliminating adverse outcomes and improving safety and quality, instead of focusing on individual components of the health system in an isolated or punitive way.

Toward this end, the AMA supports H.R. 663, the "Patient Safety and Quality Improvement Act," which was favorably reported by the House Energy & Commerce Committee on February 12, 2003. H.R. 663 would provide a framework to create a "culture of safety" by establishing a confidential, non-punitive, and evidence-based system for reporting health care errors. There is a very broad and strong consensus of agreement on this legislative approach within the health care community. By implementing this approach, errors can be identified and analyzed to improve patient safety by preventing future errors.

In addition to patient safety and quality improvement, the fear of litigation stifles the advancement of new medical treatments and medications, encourages physicians to practice defensive medicine, overwhelms the health care system with paperwork—leaving less time for patient care, and discourages qualified candidates from pursuing a career in medicine or from moving to a state with a bad liability climate.

THE PRACTICAL SOLUTION

The AMA recognizes that injuries due to negligence do occur in a small percentage of health care interactions, and that they can be as devastating or worse to patients and their families than injury due to natural illness or unpreventable accident. When injuries occur and are caused by a breach in the standard of care, the AMA believes that patients are entitled to prompt and fair compensation.

This compensation should include, first and foremost, full payment of all out of pocket "economic" losses. The AMA also believes that patients should receive reasonable

MICRA-type reforms are effective, especially at controlling non-economic damages. Several economic studies substantiate this point. One study looked at several types of reforms and concluded that capping non-economic damages reduced premiums for general surgeons by 13% in the year following enactment, and by 34% over the long term. Similar results were shown for premiums paid by general practitioners and OB/GYNs. It was also shown that caps on non-economic damages decrease claims severity (i.e., amount of the claim) (Zuckerman et al. 1990).

Another study published in the *Journal of Health Politics, Policy and Law* concluded that caps on non-economic damages reduced insurer payouts by 31%. Caps on total damages reduced payouts by 38% (Sloan, et al. 1989). Another study concluded that states adopting direct reforms experienced reductions in hospital expenditures of 5% to 9% within three to five years. If these figures are extrapolated to all medical spending, a \$50 billion reduction in national health spending could be achieved through such reforms (Kessler and McClellan, *Quarterly Journal of Economics*, 1997).

Further, as discussed above, a 2002 Congressional Budget Office study on H.R. 4600 (107th Congress) asserts caps on non-economic damages have been extremely effective in reducing the severity of claims and medical liability premiums. Conversely, a 1996 American Academy of Actuaries study shows that medical liability costs rose sharply in Ohio after the Ohio Supreme Court overturned a liability reform law in the 1990s that set limits on non-economic damages. (Ohio recently enacted a new liability reform law.)

Furthermore, a Gallup poll released on February 5, 2003, show that 72% of those polled favor a limit on the amount patients can be awarded for pain and suffering. This Gallup poll is consistent with a 2002 survey conducted by Wirthlin Worldwide showing that three-quarters of Americans understand the detrimental effect that excess litigation has on our health care system. The Wirthlin survey shows that the vast majority of Americans agree we need common sense medical liability reform. In addition to the 78 percent discussed above who said that they are concerned about access to care, the survey found that:

- 71 percent of Americans agree that a main reason health care costs are rising is because of medical liability lawsuits.
- 73 percent support reasonable limits on awards for "pain and suffering" in medical liability lawsuits.
- More than 76 percent favor a law limiting the percentage of contingent fees paid by the patient.

CONCLUSION

Physicians and patients across the country realize more and more every day that the current medical liability situation is unacceptable. Unless the hemorrhaging costs of the current medical liability system are addressed at a national level, patients will continue to face an

APPENDIX B

Medical Liability Crisis Affects Access to Care

Crisis States

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

Florida

- Women are facing waiting lists of four months before being able to get an appointment for a mammogram because at least six mammography centers in South Florida alone have stopped offering the procedure as a result of increasing medical liability insurance premiums. "This trend is troubling. There are a growing number of older people and less and less people to provide mammograms," said Jolean McPherson, a Florida spokeswoman for the American Cancer Society. *South Florida Sun Sentinel*, Nov. 4, 2002.
- Aventura Hospital in South Florida closed its maternity ward and cited \$1,000 in insurance premiums for each delivery as the prime factor. Aventura is one of six maternity wards to close in recent months. Now, patients will be forced to drive to other counties and other facilities. "There may be waits getting into a labor-room floor," said OB/GYN Aaron Elkin, MD. *Miami Herald*, Oct. 19, 2002.
- "Without a doubt, access to health coverage is being affected. Some of our emergency rooms are losing their effectiveness," said Dr. Greg Zorman, neurosurgery chief at Memorial Regional Hospital in Hollywood. His unit gets several patients a week from smaller ERs that have lost neurosurgery coverage. *South Florida Sun Sentinel*, February 5, 2003.
- Port Charlotte cardiologist Leonardo Victores, MD, left for Kansas in the face of medical liability premiums that were going to increase 100 percent. "He's moving to Kansas because that state has caps on malpractice awards," said colleague Mark Asperilla, MD. *Sun Herald*, Jun. 1, 2003.
- Despite having no malpractice claims or disciplinary actions on his record, Lakeland OB/GYN John Kaelber, MD, was forced to close his practice and leave the state in the wake of insurance premiums that doubled. *Lakeland Ledger*, Nov. 21, 2002.
- More than 50 Bradenton patients had to postpone elective surgeries and more than 100 office visits were canceled because two physicians were unable to obtain liability insurance. The insurer may leave the state altogether. *Bradenton Herald*, Jan. 24, 2003.
- After recently receiving notice of a premium spike coming in July 2002, Vladimir Grnja, MD, decided that he would "go bare" and drop all medical liability insurance coverage. Rates for the Hollywood, FL radiologist were to rise to \$112,000 from \$35,000 a year (a 220% increase), mainly because of litigation over mammograms. "No doctor wants to go bare," said Dennis Agliano, MD, chairman of the Florida Medical Association's special task force on the Florida medical liability crisis. But with significant premium hikes in Florida for specialties like OB/GYN, neurosurgery, thoracic surgery, radiology and even primary care, "some doctors have no choice," he says. Some neurosurgeons in

- American Physicians Assurance announced on July 17, 2002 that it is leaving the state
- Farmer's Insurance has announced its intent to leave the state. Among other insurers, MAG is still writing policies, while Medical Protective and ProNational are being very selective. FPIC, the largest medical liability carrier in the state, endorsed by FMA, is only writing very selectively. Both Clarendon and St. Paul have pulled out entirely.
- According to the FMA's General Counsel, Florida's existing caps simply do not work and are never used. The caps only apply in cases where the physician agrees to arbitration and in order for the case to go to arbitration the physician must admit liability. In addition, the original intent of this Florida provision was to have the cap apply to each incident, but it has been interpreted to apply to per claimant, which obviously also decreases its effectiveness. The lack of a straight cap is the primary reason for the current crisis in Florida. Unlike such States as Kansas, Florida, has not seen an increase in frequency of claims, but there has been an increase for severity in jury awards.
- In a presentation before FMA, the medical liability insurance carrier, EPIC, presented facts that demonstrate the medical liability crisis in Florida. During 1975, there were 380 health care lawsuits in Florida, resulting in \$10.8 million in jury awards and costing \$1.5 million to defend. In 2000 there were 880 lawsuits alleging malpractice, resulting in awards of \$219 million and costing \$36 million to defend.
- Dr. Oliver Bayouth says his medical-malpractice premiums are skyrocketing. The Orlando obstetrician is paying about \$100,000 for insurance this year, up at least 25 percent from two years ago. Frustrated, Bayouth says he is thinking about moving his practice out of Florida. *Orlando Sentinel, January 20, 2002.*
- In South Florida, where insurers say litigation is the heaviest, ob/gyns pay as much as \$202,949 a year--the highest rates in the country, according to Medical Liability Monitor, a Chicago-based newsletter. *Orlando Sentinel, January 20, 2002.*
- Dr. Alan Appley, an Orlando neurosurgeon, moved his practice to Lafayette, Louisiana, last year in part to escape Florida's soaring malpractice rates. *Orlando Sentinel, January 20, 2002.*
- Dr. Joseph Boyer, an Orlando cardiologist, says his rates rose 64.6 percent, to \$99,000, in 2002. *Orlando Sentinel, January 20, 2002.*
- Central Florida Cardiothoracic Surgery in Orlando says it will pay about \$140,000 to insure two surgeons in 2002, compared with about \$54,000 last year. *Orlando Sentinel, January 20, 2002.*
- Dr. Alexander Jungreis, an Orlando neurosurgeon, said his liability insurance premiums tripled this year. *Orlando Sentinel, January 20, 2002.*

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

Georgia

- According to a Georgia Board for Physician Workforce study released in January 2003, 2,800 physicians in Georgia are expected to stop providing high-risk procedures to limit medical liability.
- The study also indicated that 1,750 physicians reported that have stopped or plan to stop providing ER coverage and 630 physicians plan to quit practicing or leave the state. In addition, 1 in 5 family physicians and 1 in 3 OB-GYNs reported plans to stop providing high-risk procedures, including delivering babies.
- But numbers alone do not tell the whole story; there is a very human side to this crisis. For instance, although she is only in her first year of medical school at Medical College of Georgia, the liability crisis has already caused Thandeka Myeni, 26, to reconsider her preference for obstetrics, one of the specialties hardest hit by medical liability increases. "I definitely think it could be discouraging," she said. *The Augusta Chronicle, Nov. 13, 2002.*
- Evans Memorial, a rural hospital in Claxton, decided to "go bare"—have no coverage at all—instead of paying what it considered an exorbitant medical liability premium. Only one insurer offered a malpractice policy for the hospital and its nursing home, and the annual premium for \$1 million in coverage would have been \$581,000, up from \$216,000 last year. "We just thought it was outrageous," said Eston Price, Evans Memorial administrator. *The Atlanta Journal-Constitution, Oct. 7, 2002.*
- The largest hospital in the state's health system has bought a new policy—with a deductible of \$15 million—covering 953-bed Grady Memorial, a nursing home and clinics. On each paid claim below that mark, Grady is responsible for every dollar. The \$15 million deductible starts again with each claim. "Grady faces open-ended liability," said Timothy Jefferson, Grady Health System executive vice president and chief counsel. *The Atlanta Journal-Constitution, Oct. 7, 2002.*
- Knowing that malpractice premiums were rising for everyone in the industry, Ty Cobb Health System CEO, Chuck Adams earmarked enough money for a 100 percent increase. The bill arrived by fax this summer, just 24 hours before a check was due. Not only was the insurance company increasing his deductible tenfold, but the premium jumped from \$553,000 to \$3.15 million – a 469 percent increase. "We were numb," said Adams, who eventually got an extension and another cheaper policy at \$1.65 million. "There goes our expansions, like a renovation of the Hart County Emergency Room." *The Atlanta Journal-Constitution, Aug. 11, 2002.*
- "Dr. Edmund Wright, a Fitzgerald family practitioner who performed Caesarian sections, has given up that part of his practice. His premiums quadrupled to \$80,000 in

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

Mississippi

- Although Mississippi enacted some medical liability reforms late last year, it is still too early to see if this will stem the exodus of physicians from the State. The reason: the Mississippi cap on non-economic damages has broad exceptions and the trial bar is looking for ways to get around its limits. In short, Mississippi remains in crisis.
- The Mississippi State Medical Association still estimates that the state could lose as many as 10 percent of its 4,000-4,500 physicians.
- Obstetricians in Mississippi still worry about what is going to happen to their patients who face longer trips to the hospital while already in labor. Women who used to walk or make a short drive for both prenatal visits and delivery now face a 45-minute drive by car to the only physician in their area who can still treat OB patients.
- Pregnant women who are considered high-risk, such as someone with diabetes, cannot be treated at the Kosciusko Medical Clinic because it is too risky for physicians, where seven physicians formerly practiced obstetrics and gynecology. Only three were predicted to remain in January 2003. *The Clarion-Ledger, Aug. 26, 2002.*
- Only two neurosurgeons remain in practice in the Gulf Coast-area of Mississippi, and general surgeons are in short supply because of the state's medical liability crisis. "Everybody is reduced to the same low level of trauma care that we had 20 years ago," said Steve Delahousey, vice president of operations at American Medical Response ambulance service. *Jan. 29, 2003 Biloxi Sun Herald*
- Neurologist Terry Smith, MD said he had applied with 14 companies, and Medical Assurance was his last hope to find coverage before his current policy expired on Aug. 4, 2002. His premium went from \$55,000 a year to potentially \$150,000 with a \$132,000 tail to his old insurer. "I'm looking at writing a check for \$300,000," said Smith, who does brain surgery at three hospitals in Jackson and Harrison counties. *Associated Press, July 11, 2002.*
- Four rural hospitals in Ocean Springs faced closure, as their insurer, Medical Assurance Company of Alabama, was not renewing their coverage because the insurer was leaving Mississippi.
- Greenwood Hospital – the only trauma center in a 55-mile radius – was unable to keep its Level-II trauma center rating because area neurosurgeons have left, citing the high cost of liability insurance. Greenwood also has lost 2 of its 4 Ob-Gyns.
- At least 15 insurers, including St. Paul, have left Mississippi in the previous five years.

- In the northern half of the state last year there were nine practicing neurosurgeons: now there are just three on emergency call. *The Wall Street Journal, May 1, 2002*
- In 1998, 227 Mississippians filed malpractice suits. Based on the suits filed during the first quarter of 2002, the Medical Association Company of Mississippi predicts over 550 medical liability suits will be filed this year.
- Across the State, there is a veritable litigation explosion, in Jefferson County, for example, there are only about 9,740 residents - but the number of lawsuits filed in 1999 numbered 10,000. A year later, in 2000, the number of plaintiffs on the docket increased to 27,000, or nearly three times the number of residents. *The Washington Times, May 11, 2002.*

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

Nevada

- In August, Nevada Governor Guinn called a special legislative session to address medical liability issues. In just four days, Nevada legislators enacted a meaningful liability reform bill.
- Unfortunately, while Nevada passed needed reforms, the crisis there has not yet been averted due to continued lack of availability and affordability of medical liability insurance. Insurers in Nevada have not yet reduced their premiums and physicians are still leaving the state, particularly in Southern Nevada:
- Why? Because the trial bar has threatened to institute legal challenges to this new law that could thwart and delay its implementation. Without the full force and effect of reforms right now, the scenario that has crippled access to medical care in Nevada will continue.
- 60 percent of Las Vegas-area Ob-gyns have said they would stop delivering babies in 2002 because of the out-of-control legal system and skyrocketing liability premiums.
- Las Vegas' only trauma center, which treated more than 11,000 patients in 2001, closed for 10 days in July 2002 because it did not have enough surgeons to staff the center.
- When a trauma center closes, "some patients are going to die that wouldn't die . . . the quicker you're at the trauma center, the better chance you have of survival," a Las Vegas surgeon told NPR. The next closest trauma center is at least 5 hours away.
- "There is an unavailability of [medical liability] insurance," said Nevada State Insurance Commissioner Alice Molasky-Arman, at a March 4, 2002 hearing where insurance officials testified they would no longer insure any new obstetricians, surgeons and other high-risk specialists.
- A Las Vegas Ob-gyn was forced to close her practice and leave 30 pregnant patients behind because her liability insurance increased from \$37,000 to \$150,000 in one year. She now practices in Los Angeles and pays only \$17,000. Some Nevada women have had to call as many as 50 Ob-gyns just to find one who is accepting new patients.
- Nevada ranks 5th among states with the highest physician liability premiums (at \$94,820 per year), but only 47th out of 50 states in the number of physicians for its population, according to the American College of Obstetricians and Gynecologists. An ACOG survey concludes that 6 out of 10 Nevada Ob-gyns will no longer practice obstetrics.
- "Approximately 100 Las Vegas physicians have already left Nevada to practice elsewhere, announced they will be closing their practices, or retire early because they

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

New Jersey

- A multi-physician practice in Teaneck, NJ, was forced to layoff employees and reduce the number of deliveries it performed because of medical liability insurance premium increases of more than 120 percent. "All of my colleagues are experiencing the same pressures," said George Ajjan, MD. *Bergen Record, May 22, 2002.*
- One out of every four hospitals—nearly 27 percent—has been forced to increase payments to find physicians to cover Emergency Departments. Physicians are increasingly reluctant to take on such assignments because of the greater liability exposure. Hospitals report that more and more physician specialties are being hit by the crisis. While a previous New Jersey Hospital Association survey in March 2002 found that OB/GYNs and surgeons were primarily affected, the new survey finds a deepening impact for neurologists/neurosurgeons, radiologists, orthopedists, general practitioners and emergency physicians. *New Jersey Hospital Association, Jan. 28, 2003 news release.*
- "We have as much to lose as they have," said Joan Hamilton, a patient who attended a recent rally in New Jersey in support of her physician. *Bergen Record, Oct. 6, 2002.*
- Physicians, nursing homes and hospitals are all in jeopardy. Liability premiums for hospitals increased more than 150% over the past 3 years. A N.J. American Hospital Association survey found that nearly 2/3 of hospitals had one or more instances where physicians were forced out of medicine because of high premiums.
- 64.8 percent of all New Jersey hospitals said they have had physicians stop practicing medicine or plan to stop because of the state's liability crisis.
- New Jersey's largest insurer, the MIIX company, declared May 9, 2002, it is getting out of the medical liability business. Previously, MIIX insured 7,000 physicians – nearly 40% of the state. MIIX previously left the medical liability insurance markets in Ohio, Pennsylvania and Texas, citing those states' out-of-control legal climates as an unacceptable business risk.
- After years of only a few large jury awards, New Jersey had 26 greater than \$1 million in 2001, and is averaging one a week in 2002, MIIX President Patricia Costante told the *Philadelphia Inquirer* June 4. New Jersey has no limits on non-economic damages in medical liability cases.
- New Jersey physicians are also facing difficulty finding new insurance because PHICO, which insured 9%, and St. Paul, with 6% of the market, have pulled out.

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

New York

- New York physicians still pay, in most instances, the highest medical liability premiums in the country. Ob-gyns' average premium is \$144,973, according to the American College of Obstetricians and Gynecologists.
- New York continues, by far, to lead the country in total medical liability payouts, with \$633 million total in 2000. That is 80% more than the state with the second highest total, Pennsylvania (at \$352 million), and 300% more than California (at \$200 million). Average medical liability verdicts have skyrocketed recently, going from an average of \$1.7 million in 1994 to \$6 million in 1999.
- "The number of doctors leaving Erie County last year doubled from the previous year, a trend that continues in 2002," wrote Donald Copley, MD, an officer of the Erie County Medical Society in *Business First of Buffalo*. "I've watched sadly as valued colleagues have left Erie County and even the profession. A competent young specialist recently quit doing high risk diagnostic procedures to become a business consultant. Several local obstetricians have stopped delivering babies to reduce their insurance expenses. A half dozen nationally-known doctors have quietly left Western New York. The number of doctors leaving Erie County last year doubled from the previous year, a trend that continues in 2002." *Buffalo Business First, April 15, 2002*.
- The Medical Society of New York says the trend of physicians leaving New York State or retiring early is happening across the state.
- "The rising cost of malpractice coverage is becoming one of the most important factors driving inflation for physicians' services," said a managing director of the Carlyle Group, the investment group for *The New York Times*.

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

Ohio

- The Ohio Supreme Court has overturned three tort reform measures in the past 15 years. Following the state Supreme Court's 1995 overturning of the state's tort reforms, premium increases and jury verdicts began rising. Family physicians in rural areas are increasingly no longer performing obstetrical services. Recently, Ohio again enacted medical liability reforms, but it is too soon to tell if the courts there will let these reforms take root.
- Meanwhile, according to a recent Ohio State Medical Association survey, 79% of Ohio physicians reported an increase in their medical lawsuit insurance costs over the last two years, with an average increase of 41%. And 51% of Ohio physicians are contemplating early retirement, while 15% are considering or have relocated their practices, as a result of rising costs.
- Physician groups in Cincinnati are seeing increases between 20 and 100%. "I expect this to get worse," Ken Folz, CEO of Patient First, told the *Cincinnati Business Courier*.
- According to Daniel J. McLaughlin, a vascular surgeon in Cleveland, some specialists in the region have seen their malpractice premiums increase 600 percent this year, and typical premiums for surgeons with just three or four years of experience have doubled or tripled, to from \$50,000 a year to as much as \$100,000 or more. *Health Leaders Magazine, Sept. 2002*.
- In July, Westlake oncologist Dr. Romeo Diaz was faced with an insurance premium of \$80,000 – double what he paid last year. He would have gone out of business had it not been for his patients, who raised the needed \$40,000 to help Diaz stay insured. "At first I thought he was playing," said Kathy Fritsch, a patient of Diaz for 10 years. "But when he looked up at me, he was crying. He said his insurance rose from \$40,000 last year to \$80,000 this year. It used to be \$20,000." *Morning Journal, July 31, 2002*.
- Dr. William Hurd, chairman of the department of obstetrics and gynecology at the Wright State University School of Medicine, said the liability insurance issue already is driving young doctors out of the Dayton area. "In the last two years, not a single one of our (OB/GYN) residents has set up a practice in Dayton, or even Ohio," Hurd said. *Dayton Daily News, Aug. 28, 2002*.
- The average jury verdict in Ohio was \$11.7 million in 2001. In 2000, it was \$8.6 million.
- Physicians in Cleveland are being forced to lay-off staff and discontinue high-risk procedures, reported the *Cleveland Plain Dealer* February 18, 2002.

- "In the past two years, my medical liability premiums have increased more than 50%. I have no claims, graduated first in my medical school class, and was chief resident at OSU. I had been treating some of my chronic pain patients with acupuncture (medical research documents decreased pain and decreased inflammation with acupuncture). Due to the skyrocketing medical liability premiums, I will have to stop offering this treatment for these patients to try to decrease my costs of insurance." – A Columbus physical medicine and rehabilitation physician.
- "My premiums increased significantly, but my reimbursement level is down because of the Medicare cuts. In order to stay in practice, I had to float a loan from my pension fund. I am actively looking to leave this state. I know of one colleague who gave up his private practice and went to work at the local VA hospital, so they would cover his liability premium. – A Warren cardiologist.
- "This five physician practice recently had to give up obstetrics due to our rates. We have been committed to delivering full-range family practice...true womb to tomb medicine. We had to send our patients to local OBs. We and our patients are devastated by this turn of events." – A Medina family practitioner
- "After a mad scramble to obtain insurance, it came down to 5:45 p.m. on the day before my insurance expired to obtain insurance. I was literally 15 minutes from having to close a practice that cares for over 4,000 people in this town." – A Coldwater family practitioner
- "We have an obstetrician-gynecologist retiring because his insurance company pulled out of Ohio. To buy a tail and the new policy would cost this man \$140,000, which he couldn't afford to do." – A Rossford obstetrician-gynecologist.
- "I was told two months ago that I will have no insurance after the 11th of September. I have had no claims filed against me." – An Akron general surgeon
- "My carrier has refused to cover me for bariatric procedures. I have had to turn patients away who need this service." – A Massillon general surgeon

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

Oregon

- Rural families in John Day, Hermiston, and Roseburg counties, Oregon have either lost obstetric care or have seen services drastically reduced. *The Business Journal of Portland, Jan. 10, 2003.*
- Only by dropping obstetrics were two Hermiston physicians able to afford their liability insurance premiums: "It's something you don't like to tell patients," said Doug Flaiz, MD. *The Oregonian, Oct. 29, 2002.*
- "No one with \$100,000 in debt from medical school wants to start a practice in a place where they could find themselves completely broke and having to pick up and go somewhere else to start all over again," said Rosemari Davis, CEO of Willamette Valley Medical Center, who has seen three of her center's family practitioners stop delivering babies. *The News Register, Jan. 28, 2003.*
- In 1999, the Oregon Supreme Court overturned the State's law capping non-economic damages. Since then, multi-million dollar claims have become commonplace, according to the Oregon Medical Association.
- Since the 1999 decision, Oregon physicians are experiencing rapidly rising premiums and insurers becoming more reluctant to offer policies to physicians, such as Ob-gyns and surgeons, who perform high-risk procedures.
- Recent jury verdicts include: \$8 million, \$8.5 million, \$10 million and \$17 million.
- Rural patients in Oregon are being particularly hard hit. A small town clinic, Roseburg Women's Healthcare, which delivered 80% of the babies for the area, closed its doors in May 2002 because its liability insurance was canceled after one large lawsuit. "We consider this a medical crisis for the community," Mercy Medical CEO Vic Fresolone told the Associated Press.
- The Roseburg clinic physicians paid \$17,000 per physician per year in 2001 for medical liability insurance and are now receiving quotes for \$80,000 -100,000 per physician.
- Oregon's only academic health center – the Oregon Health & Science Center – reports fewer medical students are applying for its Ob-gyn residency positions. Ob-gyn residents elsewhere reportedly are increasingly concerned about setting up practice in Oregon due to the state's broken liability system.
- A major liability insurer, Northwest Physicians Mutual Insurance Company, announced in 2002 it would not write new policies to obstetricians. Remaining insurers are raising rates by 60% or more.

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

Pennsylvania

- According to the Pennsylvania Medical Society Alliance, 919 doctors have decided to leave the Keystone State or have scaled back their practices as premiums spiraled upward over the past three years. *The Baltimore Sun, Feb. 5, 2003.*
- Dr. Anthony Clay never thought he would have to leave Philadelphia. He has spent his whole life there—growing up and attending college, medical school, and residency to become a cardiologist. He treats families he has known since boyhood. He likes knowing where his patients live, work, and shop. All nine of his siblings still live there. But, Dr. Clay is leaving his practice in Philadelphia this Spring because of surging malpractice insurance rates. He is starting over in Delaware, where his insurance costs will drop from roughly \$70,000 a year to \$8,000. "It's been terrible," said Dr. Clay, 40. "In this field, you've been with the patient, and also the family, in some of their most life-defining moments - in the throes of a heart attack with no blood pressure. Wrongly or rightly, the patient credits you with being there when they weren't doing so well. You realize you've created a bond. I take that very seriously." *Baltimore Sun, February 5, 2003.*
- Brian Holmes, MD, is one of an estimated 18 percent of Pennsylvania neurosurgeons to have left the state, retired, or limited his or her practices because of the medical liability crisis. "It saddened me to move, but I had no choice. It was either move or go out of business." *Philadelphia Business Journal, Sept. 25, 2002.*
- After 25 years of practice, OB/GYN Michael Horn, MD, stopped delivering babies in 2002 because of the fear of getting sued. "It's just the potential, the not knowing if someone will seek an outlandish reward. I don't want to expose myself or my family." *Burlington County Times, Oct. 2, 2002.*
- Medical students are less likely to seek residencies in Philadelphia, and residents are less likely to stay and practice in the area because of "prohibitively high" medical liability insurance rates, according to Jefferson Medical College professor Stephen L. Schwartz, MD. *Associated Press, Oct. 4, 2002.*
- OB/GYN Lawrence Glad, MD, used to deliver about 500 babies a year—40 percent of all the babies born in Fayette County annually. After his premiums skyrocketed from \$57,000 to \$135,000, however, he closed his practice in the fall of 2002. *Pittsburgh Business Times, Nov. 18, 2002.*
- Mercy Hospital chief of surgery Charles Bannon, MD, has watched numerous physicians leave Scranton and Lackawanna County—creating a shortage of surgeons, fewer medical school applications and residencies. "It will take generations to get back the quality of medicine in Philadelphia." *Scranton Times, Nov. 20, 2002.*

- 414 medical liability lawsuits were filed in Philadelphia County in February 2002 – five times the average number filed during the month over the previous decade, reported the *Philadelphia Inquirer*.
- One-quarter of respondents to an informal poll conducted by the American College of Obstetricians and Gynecologists say they have stopped or are planning to stop practicing obstetrics.
- Statistics compiled for the Pennsylvania Medical Association by Caso Consulting indicate it costs \$96,199 to cover an orthopedic surgeon in Pennsylvania, compared with \$37,783 in Delaware, and \$36,291 in New Jersey. *Best's Insurance News, January 7, 2002*.
- Howard A. Richter, a neurosurgeon and president of the Pennsylvania Medical Society, said a 2001 survey by the medical society showed that 72% of doctors have either deferred the purchase of new medical equipment or have not hired needed staff because of "sudden and sharp increases" in insurance rates. *Best's Insurance News, January 21, 2002*.
- "To lower their risk and insurance premiums, doctors who normally would take on high-risk medical procedures are opting not to do so. For example, we've seen obstetrician/gynecologists give up delivering babies. Virtually every medical liability insurance carrier increased their rates in recent years. From the beginning of 1997 through September 2001, major liability insurance carriers writing in Pennsylvania increased their overall rates between 80.7 percent and 147.8 percent." *York Daily Record, January 20, 2002*.
- Driving premiums through the roof are excessive sums awarded in malpractice suits. Medical liability payments for physicians in 2000 totaled \$3,908,113,303. *York Daily Record, January 20, 2002*.

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

Texas

- In the "Lone Star State" medical liability insurance premiums for physicians have skyrocketed as much as 300 percent in some regions and for some specialties, according to the Texas Medical Association. As a result, there is only one neurosurgeon serving 600,000 people in the McAllen area.
- In the past two years, four South Texas patients with head injuries died before they could be flown out of the area for medical attention. As reported in a July 10, 2002, article in *The Courier*, a community family practice clinic in Conroe (just north of Houston) was recently forced to turn away half of its normal patient load because its liability insurance provider would not provide coverage while "highly lawsuit-risky obstetrics training was conducted."
- Even though the Texas legislature has passed medical liability reforms, the Texas Supreme Court has regularly overturned them.
- Medical liability premiums were expected to increase by at least 20 percent and perhaps as much as 75 percent in 2002, according to the Texas Department of Insurance. *San Antonio Express-News*, April 8, 2002.
- In 1999, 17 companies offered malpractice coverage to doctors in Texas. Today, the field has dwindled to only four, and Texas is considered the least profitable state for liability carriers. *The Dallas Morning News*, September 1, 2002.
- Moreover, premiums this year have climbed at triple-digit rates for many of Texas' 36,000 physicians. That's on top of double-digit increases in prior years. Now it's not uncommon for doctors in high-risk specialties such as trauma surgery, emergency medicine, and orthopedic surgeries and obstetrics to pay more than \$ 100,000 annually for coverage. This means that some 6,100 Texas physicians are scrambling to find liability insurance.
- The Doctor's Company, a national insurer, told the *Dallas Morning News* the company is selective about which types of physicians it will cover. "Texas is a very dangerous venue, and we don't really encourage . . . [growth] from there - not without tort reform," said senior vice president Jack Myer.
- In South Texas, one jury awarded \$43 million to a woman who claimed a diabetes drug damaged her liver, while another gave \$15 million to three women who received faulty hip implants. *The Wall Street Journal*, May 1, 2002.
- 6 of every 7 medical liability claims in Texas are closed with no fault found on the doctor's part. Nonetheless, tens of millions of dollars are spent fighting these cases.

- In Texas, about 85 percent of cases are closed without payment to plaintiff, yet they still cost money to resolve, said Texas Medical Liability Trust president W. Thomas Cotton. *The Dallas Morning News, January 20, 2002.*
- Insurance carriers in Texas paid more than \$381 million in claims in 2000, according to the Texas Department of Insurance--costs passed on to policyholders. That's an 87 percent increase since 1995. Nationally, the median malpractice award more than doubled from 1994 to 1999, to \$800,000. *The Dallas Morning News, January 20, 2002.*
- Texans filed 4,501 claims in 2000, up 51 percent from 1990, according to the Texas Medical Examiners Board. More troublesome is the rise in expenses involved in resolving a case. Each claim cost an average of \$68,681 to litigate in 2000, compared with \$46,079 in 1995. The figure does not include the amount of settlement or award. *The Dallas Morning News, January 20, 2002.*
- Meanwhile, physicians in the Rio Grande Valley are in crisis, said Texas Medical Liability Trust president W. Thomas Cotton. An OB-GYN in North Texas pays \$47,500 annually for \$500,000 in coverage, while his Rio Grande Valley counterparts pay \$82,300. Neurosurgeons pay even higher premiums. *The Dallas Morning News, January 20, 2002.*
- Seven in 10 Rio Grande Valley doctors have had medical liability claims filed against them. A February 2001 survey by the Texas Medical Association found that 1 in 3 Valley doctors say their insurance providers have stopped writing liability insurance. *The Dallas Morning News, January 20, 2002.*
- In Rio Grande Valley, half of the physicians admitted to being inclined to leave the area or to retire, according to a survey conducted in February 2001 by the Texas Medical Association. Many doctors in the Valley said they profile patients and refuse to treat some, because they fear the patients are prone to sue. They said they deny care for people who pay with cash, because the patients are most likely poor and may look at a lawsuit like a lottery opportunity. Some physicians are even hesitant to respond to a "code blue," which indicates a medical crisis, in a hospital. Dr. Carlos Cardinez, a gastroenterologist in McAllen, said he doesn't want to respond anymore because of the legal uncertainty. *The Dallas Morning News, January 20, 2002.*
- Increases in medical practice costs have outstripped revenue increases over the last 10 years, according to the Medical Group Management Association's 2000 cost survey. Operating costs for multispecialty groups went up an average of 35 percent over the past 10 years, while revenue increased 21 percent over that same period. *The Dallas Morning News, January 20, 2002.*

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

Washington

- "There is a growing crisis in medical malpractice in Washington state and nationally," state insurance commissioner Mike Kriedler said in an April 2002 news release.
- "Patients in many communities are finding that their physicians have either started limiting their services or have closed their doors completely due to rising malpractice premiums," said Dr. Maureen Callaghan, president of the Washington State Medical Association. *PR Newswire, Feb. 3, 2003.*
- "I went through my mourning and my grieving, and now I have to find a place for my [380] patients," said a South Bend internist who has not been sued but can no longer afford liability insurance coverage.
- The cost of medical malpractice insurance has soared so high that Mount Vernon obstetrician Robert Pringle, MD, has stopped delivering babies, according to the *Puget Sound Business Journal*.
- So have his two colleagues at the North Cascade Women's Clinic, and so have others. "Of the nine obstetricians in our community, six have stopped delivering babies or left the area." Pringle said.
- When he began his practice 20 years ago, Pringle paid a premium of \$1,000 for medical malpractice insurance, which covers physicians against claims of injury resulting from negligent medical care. "Now it's in the neighborhood of \$60,000," he said. "From an economic standpoint, you would have to be a lunatic to continue private practice of obstetrics." *Puget Sound Business Journal*.
- The severe premium hikes besetting many doctors "could not come at a worse time," said Dr. Sam Cullison, president of the Washington State Medical Association. Cullison said the high cost of malpractice insurance has combined with low reimbursement rates from Medicaid, Medicare and private insurers to clamp many doctors in a financial squeeze. As a result more physicians are retiring early, or leaving the State, he said. Also, it's increasingly difficult to recruit doctors from other states." *Puget Sound Business Journal*.
- "Everyone is in the same situation in terms of increasing premiums, increasing overhead and decreasing reimbursement," said Olympia neurologist Maureen Callaghan, MD. "The final end point," she added, "is that people are not to be able to get in to see a doctor." *Puget Sound Business Journal*.
- During the past five years, medical liability premiums paid by orthopedic surgeons increased 30 percent, to nearly \$40,000, and premiums paid by family physicians who

THE MEDICAL LIABILITY CRISIS – A NATIONWIDE PROBLEM

West Virginia

- The “Mountaineer State” was one of the first states to experience wide-spread medical liability insurance problems.
- According to the West Virginia State Medical Association, some 100 doctors have already retired early or moved out of the state within the previous two years.
- That has helped drive 1 out of every 20 doctors out of West Virginia or into early retirement in the past two years. *CNN, Jan. 2, 2003.*
- General surgeon Gregory Saracco, MD, only 49 years old, was forced to borrow money twice in 2002 to pay \$73,000 for his liability insurance. His premiums for 2003 are expected to rise to \$100,000. He is considering leaving West Virginia and while he has taken time away from his practice this year to decide what his options are, he said “my job is to help people—I couldn’t drive past an accident on the road and not stop. I don’t know any doctor that could.” *Associated Press, Jan. 2, 2003.*
- Although orthopedic surgeon George Zakaib, MD, was raised and went to school in Charleston, WV, he and his family left because of the state’s medical liability crisis. Dr. Zakaib’s premiums had increased to \$80,000 plus \$94,000 in “tail” coverage. *Charleston Daily Mail, July 27, 2002.*
- Fourth-year medical school student Jennifer Knight isn’t sure she’ll stay in West Virginia. The Charleston Area Medical Center says fewer medical students are applying to its residency programs, and fewer students are applying to Marshall University’s medical school. “I think the problem is, we have too many frivolous lawsuits,” said Ms. Knight. *Sunday Gazette-Mail, Nov. 24, 2002.*
- The state legislature has been trying for more than a year to come up with a solution that will prevent more physicians from curtailing services or leaving the state. A state medical association poll found that 40% of the State’s doctors are considering similar action to stop practicing or leave the State.
- “It’s a ‘code blue’ emergency” threatening the state’s trauma centers and other health care services in the state, WVSMA President Ahmed D. Faheen, MD, told *The New York Times*.
- Wheeling, West Virginia, has no remaining neurosurgeons, forcing closure of its only trauma center. Trauma patients must be flown by helicopter for care elsewhere.
- Across the State, the pattern is the same, trauma centers are closing or headed in that direction, and there is incredible difficulty in recruiting high-risk specialty residents.

APPENDIX C

Medical Liability Crisis Affects Access to Care

Selected States Showing Problem Signs

THE MEDICAL LIABILITY CRISIS—A NATIONWIDE PROBLEM

Alabama

- The severe liability crisis in the neighboring States of Mississippi, Georgia and Florida has not left Alabama untouched.
- Atmore Community Hospital has had to close its maternity ward because of soaring medical liability premiums, forcing pregnant mothers to travel 15 miles to the nearest hospital with an obstetrics department.

Arizona

- Arizona has not been immune to the medical liability crisis. Serious access problems are already developing.
- The Copper Queen Community Hospital, was forced to stop delivering babies in January after a group of family physicians said they could no longer afford medical liability insurance.
- Pregnant mothers in this part of Arizona must now travel over 35 miles to the nearest hospital – the only hospital left in that County that is still delivering babies.

Connecticut

- The crisis may be spreading to Connecticut as evidenced by the recent decisions of 28 OB/GYNs to stop delivering babies.
- Some OB/GYNs in Connecticut are now paying between \$120,000-\$160,000 per year in insurance premiums, according to state medical society executive Tim Norbeck.
- Connecticut already is on a "watch" list issued by the American College of Obstetricians and Gynecologists. *Hartford Courant, Jan. 3, 2003.*
- The average payment made by one of Connecticut's major insurers to resolve a claim rose from \$271,000 in 1995 to \$536,000 in 2001.
- OB/GYN Jose Pacheco, MD's insurer stopped offering medical liability insurance, and he had to seek another carrier. However, because of the high cost of new insurance—estimated around \$60,000—combined with "tail" coverage of \$80,000, Dr. Pacheco retired after a 27-year career. *Hartford Courant, Nov. 17, 2002.*

- A recent survey completed by the Missouri State Medical Association found that 31.4 percent of the responding physicians were considering leaving their practice, and 28.6 percent said they would consider limiting their practice because of rising liability insurance premiums.
- This same survey showed an average premium increase for medical liability insurance of 61.2 percent for 2002, on top of a 22.4 percent average increase last year.
- Neurosurgeons in Kansas City are facing an increase in premiums of \$12,000 to \$42,000 this year, with further increases expected next year.
- The 2002 premiums for Ob-gyns have increased by as much as \$50,000 from 2001. Again, further increases are expected next year.
- According to a separate survey by the Metropolitan Medical Society of Greater Kansas City, 40% of practices are looking for new coverage because their insurer has stopped writing medical liability coverage.
- Predictably, an access crisis to needed health care is developing. The St. Joseph Health Center in Kansas City recently lost another trauma doctor. It is now down to three. The situation is even worse because a local nearby trauma center has been virtually shut down, meaning St. Joseph's must treat double the number of patients, and it is having trouble finding other surgeons willing to cover trauma.
- According to the *St. Louis Business Journal*, access issues are spreading. Dr. John Anstey, an obstetrician/gynecologist, recently faced a difficult choice. He knew he had to cut expenses after learning his medical malpractice insurance premium, which cost about \$26,000 this year, would jump to \$50,000 next year. Consequently, he closed his office in St. Ann effective July 30th. Previously, Anstey and his partner, Dr. Fred Monterubio, Jr., deliver about 400 babies a year through their practice, St. Ann OB/GYN. As a stopgap measure, Drs. Anstey and Monterubio were forced to move their practice to a hospital-based setting where they await news of their 2003 premium by October.
- The current medical liability insurance market in Missouri is extremely tight, with at least three insurers having pulled out of the market over the past year.
- Intermed Insurance Company, based in Springfield, is the largest provider of medical liability insurance coverage in Missouri. The Missouri Department of Insurance said the company had a 34 percent market share in 2001. The company imposed an 18 percent hike, effective July 1, and also put a moratorium on writing new business in Missouri.
- Andy Bennett, president and chief executive of Intermed, said rates went up because the severity, or average amount paid per settlement or verdict, has continued to go up fairly dramatically in Missouri. *St. Louis Business Journal*.

- *The World* cites the example of a Tulsa pediatrician whose malpractice insurance doubled this year. *The Oklahoman*, July 17, 2002
- Oklahoma pediatricians have far less to worry about than the State's obstetricians and surgeons, whose rates in Oklahoma in 2003 are expected to rise by 25 percent to 30 percent, says the Oklahoma State Medical Association.

South Carolina

- The medical liability crisis is rapidly spreading to the Palmetto State.
- A 10-physician OB/GYN group in Columbia had to take out a \$400,000 loan this year to continue to provide OB services and pay malpractice premiums.
- In rural Oconee County, just four physicians deliver babies now, down from 11 physicians one year ago.
- A family practice group in Seneca was forced to drop OB coverage for four of their six physicians because of skyrocketing premiums. There are currently a total of four physicians in Seneca treating pregnant women.
- A solo practitioner practicing geriatrics in Charleston has had to quit treating patients in nursing homes because of high premiums.

Tennessee

- Professional liability premiums for physicians in Tennessee have been steadily rising in recent years.
- According to State Volunteer Mutual Insurance Company, which covers most practitioners in Tennessee, premiums have increased by 45% over the past three years, in order to keep up with rapidly escalating losses in medical liability lawsuits.
- Only approximately 4% of this 45% increase was related to lower investment yield, with the remainder being due to increasing medical malpractice losses. (State Volunteer Mutual Insurance Company is a policyholder owned mutual company with no outside investors).
- In recent years both juries and judges in Tennessee have made multi-million dollar awards for non-economic damages, over and above a patient's actual economic losses.

- A case in point is Manuel Belandres, MD, a general surgeon who was in the twilight of his career but still practicing until recently when he was unable to obtain tail coverage. He subsequently closed his practice rather than expose himself to open-ended future liability.
- In Virginia's western border, many physicians are no longer treating West Virginia patients who cross the State-line due to aggressive personal injury attorneys attempting to bring suit against Virginia physician in West Virginia courts. This has further aggravated the access problem for pregnant West Virginia Medicaid patients, in particular, and their access to needed care.

Medical Liability Reform - NOW!
October 1, 2003

American Medical Association
515 North State Street
Chicago, Illinois 60610

I. Identification of the Problem

A. Recurrence of an Old Problem?

1. The medical liability insurance system experienced a period of crisis in the early 1970s, when several private insurers left the market because of rising claims and inadequate rates.
2. This exodus of capacity resulted in an availability crisis and created an affordability issue for those physicians and hospitals lucky enough to find insurance.
3. Over the next fifteen years, various attempts were made to ease the explosion in claims costs: tort reform, increased diagnostic testing, improved peer review and increased communication between physicians and patients. Aggressive campaigns to reform state laws governing medical liability lawsuits began in the 1970s and were successful in a number of states including California, Louisiana, Indiana and New Mexico.
4. These efforts appear to have had a positive impact. The number of claims dropped. The severity of verdicts, in the form of the dollar amount, has continued nationwide except for the states that effected reforms
5. Relative to those states which did not enact tort reforms, the per capita supply of physicians increased in those that did.¹

B. Second PLI Crisis: 1980s

1. During the 1980s, the second crisis – one of affordability – shook the industry, as claim frequency and severity increased again and premiums rose rapidly.
2. The affordability crisis had a dramatic effect. Physicians in specialties such as obstetrics and gynecology cut back on high-risk procedures and high-risk patients to reduce their risks and hold down their premiums.
3. Some physicians closed practices in states where the risk of being sued and the costs of premiums were especially high.

C. The Current Liability Crisis: Trends in Jury Awards

1. Recent data from Jury Verdict Research reported in the 2002 edition of *Current Award Trends in Personal Injury*, illustrate the problem as it exists today.²
2. The median medical liability award in medical malpractice cases jumped 176 percent from 1994 to 2001, topping \$1 million.³

¹ Fred Hellinger and William Encinosa, AG. FOR HEALTHCARE RESEARCH AND QUALITY, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *THE IMPACT OF STATE LAWS LIMITING MALPRACTICE AWARDS ON THE GEOGRAPHIC DISTRIBUTION OF PHYSICIANS*, (July 2003).

² JURY VERDICT RESEARCH, *CURRENT AWARD TRENDS IN PERSONAL INJURY*: 2002 ed. (2003), 18.

³ *Id.*

3. The average award reached \$3.9 million in 2001.⁴
4. But plaintiffs lost the majority of their cases that went to a jury. Overall, plaintiffs won just 30.5% of medical liability cases in 2002.⁵ Of the 7% of claims that went to jury verdict, the defendant won 82.4% of the time.⁶
5. However, physicians who win at trial still have large fees to pay for their defenses.
 - a. Defense costs averaged \$77,135 per claim in cases where the defendant prevailed at trial. And in cases where the claim was dropped or dismissed, costs to defendants averaged almost \$16,307.⁷
6. The frequency of very large awards is increasing.
 - a. In the period 1995-1997, 36% of all verdicts that specified damages assessed awards of \$1 million or more. Over the next two years, the relative frequency of these awards increased to 43%. By 2000-2001, 54% of all awards were for \$1 million or more. 25% of all awards exceed \$2.7 million.⁸
 - b. According to a recent study by the Blue Cross/Blue Shield Association, plans in crisis states believe that inappropriately large jury verdicts are the primary factor contributing to increasing malpractice premiums. Non-crisis states attributed the increases mostly to increased patient litigiousness.⁹

D. The Current Liability Crisis: Access to Care

1. A February 2003 poll shows that eighty-four percent (84%) of Americans fear that skyrocketing medical liability costs could limit their access to care.¹⁰
2. More than 26% of health care institutions have reacted to the liability crisis by cutting back on services and/or eliminating some units.¹¹
3. The Blue Cross/Blue Shield survey also shows that rising medical malpractice premiums are causing access and cost problems in crisis states. Access problems are beginning to surface in the remaining states as well.¹²

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* This figure varies depending on the source. Lawrence Smart, CEO of Physician Insurers Association of America (PIAA), reports a plaintiff recovery rate at trial of 20%, while the U.S. Dept. of Justice reports a plaintiff recovery rate at trial of 23.4%.

⁷ PIAA Claim Trend Analysis, 2002 Ed.

⁸ *Id.*

⁹ BLUE CROSS BLUE SHIELD ASS'N, THE MALPRACTICE INSURANCE CRISIS: THE IMPACT ON HEALTHCARE COST AND ACCESS 3 (2003).

¹⁰ WIRTHLIN WORLDWIDE, WHAT AMERICANS THINK ABOUT THE HEALTH CARE LIABILITY CRISIS, (Feb. 2003), at <http://www.hcla.org>.

¹¹ AM. HOSP. ASS'N, TRENDWATCH 1 (2002).

¹² BLUECROSS BLUESHIELD ASS'N, *supra* note 7, at 4.

E. The Current Liability Crisis: Costs

1. Altogether, medical liability adds \$60 billion to \$108 billion to the costs of health care each year – which means higher health insurance premiums and higher medical costs for all Americans, according to estimates in a recent U.S. Department of Health and Human Services report.¹³
2. On September 25, 2002, HHS issued an update on the medical liability crisis. This update reported on the results of a survey conducted by Medical Liability Monitor (MLM), an independent reporting service that tracks medical professional liability trends and issues. According to MLM, the survey determined that the crisis identified in HHS's July report had become worse.¹⁴ The federal government reported that:

The cost of the excesses of the litigation system are reflected in the rapid increases in the cost of malpractice insurance coverage. Premiums are spiking across all specialties in 2002. When viewed alongside previous double-digit increases in 2000 and 2001, the new information further demonstrates that the litigation system is threatening health care quality for all Americans as well as raising the costs of health care for all Americans. (emphasis added)¹⁵

3. HHS also believes that excessive medical liability adds \$47 billion annually to what the federal government pays for Medicare, Medicaid, the State Children's Health Insurance Program, Veterans' Administration health care, health care for federal employees, and other government programs.¹⁶
4. Evidence that the litigation system is broken, and that the medical liability crisis is growing, is further established in a study released by Tillinghast-Towers Perrin on February 11, 2003.¹⁷ Tillinghast reported that "The cost of the U.S. tort system grew by 14.3% in 2001, the highest single-year percentage increase since 1986," which is "equivalent to a 5% tax on wages."¹⁸ This is the only study that tracks the cost of the U.S. tort system from 1950 to 2001 and compares the growth of tort costs with increases in various U.S. economic indicators. Some of the key findings of this study are stunning:
 - a. The U.S. tort system is a highly inefficient method of compensating injured parties, returning less than 50 cents on the dollar to people it is designed to help and returning only 22 cents

¹³ OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING AND EVALUATION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM* 7 (July 2002) [hereinafter *CONFRONTING THE NEW HEALTH CARE CRISIS*].

¹⁴ U.S. DEP'T OF HEALTH AND HUMAN SERVS., OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING AND EVALUATION, *UPDATE ON THE MEDICAL LITIGATION CRISIS: NOT THE RESULT OF THE "INSURANCE CYCLE,"* (Sept. 25, 2002), available at http://heal-fl.health-care-pdf.netcomsus.com/resources/update_report.doc.

¹⁵ *Id.* at 4.

¹⁶ *CONFRONTING THE NEW HEALTH CARE CRISIS*, *supra* note 11, at 7.

¹⁷ TILLINGHAST-TOWERS PERRIN, *U.S. TORT COSTS: 2002 UPDATE: TRENDS AND FINDINGS ON THE COST OF THE U.S. TORT SYSTEM* 4 (2002), at

http://www.tillinghast.com/tillinghast/publications/reports/2002_Tort_Costs_Update/Tort_Costs_2002_Update_rev.pdf (last visited Mar. 21, 2003) [hereinafter *TILLINGHAST-TOWERS PERRIN*].

¹⁸ *Id.* at 1.

to compensate for actual economic loss.¹⁹

- b. As of 2001, U.S. tort costs accounted for slightly more than 2% of GDP, signaling an increase after a 13-year decline in the ratio of tort costs to GDP.²⁰
 - c. While the cost of the U.S. tort system has increased one hundred fold over the last fifty years, GDP has grown by a factor of only 34.²¹
 - d. Medical malpractice costs have risen an average of 11.6% a year since 1975 in contrast to an average annual increase of 9.4% for overall tort costs, outpacing increases in overall U.S. tort costs.²²
5. The vast majority of medical liability claims, almost 70%, do not result in any payments to patients.²³ Fewer than 1% of cases result in trial victories for plaintiffs.²⁴
 6. Blue Cross/Blue Shield plans nation-wide report that approximately half of the plans expect ob/gyn and surgical fees to increase as a result of increased professional liability premiums. This was expected in both crisis and non-crisis states.²⁵
 7. Patients are aware of the impact of lawsuits on healthcare costs. Seventy-one percent (71%) agree that medical liability litigation is driving up healthcare costs.²⁶
 8. Health care consumers acknowledge the impact of rising insurance premiums on overall healthcare costs. An April 2002 PricewaterhouseCoopers study "The Factors Fueling Rising Healthcare Costs" concluded that litigation accounted for 7% of the increase in rising costs of health insurance premiums. "Litigation" includes the effects of defensive medicine, malpractice premiums, risk management and reinsurance, outsized awards and legal costs, and class action lawsuits.²⁷

F. The Current Liability Crisis: Defensive Medicine

1. Defensive medicine practices include unnecessary tests and treatments that are performed to help avoid lawsuits.

¹⁹ *Id.* at 3.

²⁰ *Id.* at 4.

²¹ *Id.* at 11.

²² *Id.* at 18.

²³ CONFRONTING THE NEW HEALTH CARE CRISIS, *supra* note 11, at 9.

²⁴ PIAA, *supra* note 6.

²⁵ BLUE CROSS BLUE SHIELD ASS'N, *supra* note 7, at 2.

²⁶ WIRTHLIN WORLDWIDE, *supra* note 8.

²⁷ Lee Lauer, *The Factors Fueling Rising Healthcare Costs*, PricewaterhouseCoopers, prepared for the Am. Ass'n of Health Plans (April 2002) at <http://www.aabp.org/InternalLinks/PwCFinalReport.pdf>.

- a. A majority (59%) of physicians believe that the fear of liability discourages open discussion and thinking about ways to reduce health care errors.²⁸
 - b. **Three-fourths (76%) of physicians believe that concern about medical liability litigation has negatively affected their ability to provide quality care in recent years.**²⁹
- 2. Defensive medicine wastes tens or hundreds of billions of dollars on unnecessary and harmful medical care.
 - 3. Of Blue Cross/Blue Shield plans surveyed, those in crisis states are two and a half times more likely to identify defensive medicine as "already a very serious problem" in relation to cost increases.³⁰ For the rest of the states, over half of the Blue Cross/Blue Shield plans feel it is an "inevitable" problem.³¹

G. Activity in the Crisis States

- 1. The federal government update highlights that liability insurance rates are escalating faster in states that have not established reasonable limits on unquantifiable and arbitrary non-economic damage awards. The government's report states that:
 - . . . 2001 premium increases in states without litigation reform ranged from 30%-75%. In 2002, the situation has deteriorated. **States without reasonable limits on non-economic damages have experienced the largest increases by far, with increases of between 36%-113% in 2002.** States with reasonable limits on non-economic damages have not experienced the same rate spiking. (emphasis added)
- 2. The Current Liability Crisis: The Crisis States³²
 - a. The AMA has identified the following nineteen states currently experiencing a medical liability crisis: Arkansas, Connecticut, Florida, Georgia, Illinois, Kentucky, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Washington, Nevada, West Virginia, and Wyoming.
 - b. Twenty-five states have the potential to be deemed "in crisis."
 - c. Only 6 states are considered stable; California, Colorado, New Mexico, Louisiana, Wisconsin, and Indiana. Even in some of

²⁸ Humphrey Taylor, David Krane, Amy Cottreau & Diana Gravitch, *Common Good Fear of Litigation Study The Impact on Medicine* 30 (Apr. 2002) Harris Interactive, at http://ourcommongood.com/library/download/litprn.pdf?item_id=10032.

²⁹ *Id.* at 57.

³⁰ BLUECROSS BLUESHIELD ASS'N, *supra* note 7, at 3.

³¹ *Id.* at 8.

³² AM. MED. ASS'N, *AMA ANALYSIS* (July 2003) at <http://www.ama-assn.org/ama/pub/category/7861.html>.

these states, there are indications that problems are beginning to develop.³³

3. The Blue Cross/Blue Shield Association concludes that the "medical malpractice insurance crisis is threatening healthcare affordability and access to care." (Eighty-eight percent of plans agree.)³⁴
 - a. Blue Cross/Blue Shield recognizes the AMA designation of "crisis" states and acknowledges the impending problems of 30 other states.³⁵
 - b. The Blue Cross/Blue Shield study validates the conclusion that reduced access to care is a result of the current medical liability crisis.
 - i. Fifty-six percent (56%) of Blue Cross/Blue Shield plans in crisis states respond that physicians are refusing some high risk procedures. (In non-crisis states 32% of plans report this finding.)³⁶
 - ii. Fifty-six percent (56%) of Blue Cross/Blue Shield plans in crisis states report that physicians are leaving practice or retiring. (The response in non-crisis states is 42%.)³⁷
 - iii. Almost 1/3 of the Blue Cross/Blue Shield plans in crisis states state that physicians are moving practices out of state. (In non-crisis states, 1/5 of plans report that physicians are moving out of state.)³⁸

4. Nevada

- a. The only trauma center in Las Vegas – one of the busiest in the nation – closed for 10 days this past summer when orthopedic surgeons couldn't afford professional liability insurance. The CEO of the hospital warned the public to "Drive home carefully."³⁹
- b. In Nevada, recent legislation providing a cap on non-economic damages provides hope that the situation will improve. Unfortunately, the cap on non-economic damages is applied per physician, per claimant and not per incident. Thus, multiple caps can be allowed in a single event.⁴⁰
- c. According to a survey of physician members conducted by the Nevada State Medical Association, 76 specialists have closed their practices because of the cost of malpractice insurance. An

³³ *Id.*

³⁴ BLUECROSS BLUESHIELD ASS'N, *supra* note 7, at 2.

³⁵ *Id.*

³⁶ *Id.* at 9.

³⁷ *Id.*

³⁸ *Id.*

³⁹ J. ECON. COMM., *supra* note 1, citing to Tony Batt, *UMC Official Says Crisis Is Far From Over*, L.V. REV.-J., Oct. 12, 2002.

⁴⁰ NEV. REV. STAT. § 41.A.0312 (2002).

additional 126 physicians are "seriously considering" or in the process of closing their doors.⁴¹

5. Pennsylvania

- a. The crisis in Pennsylvania began in 1996. At that time, there was a 100% emergency surcharge by the state's Medical CAT Fund. Then, from 1997 until 2001, premiums of major private insurance carriers in Pennsylvania rose between 80.7% and 147.8%. In 2002, the increase in filed premiums ranged from 40% to 50.3%. For 2003, similar increases were filed.
- b. Mercy Hospital in West Philadelphia and Methodist Hospital in South Philadelphia closed their maternity wards in the summer of 2002.
- c. In the Philadelphia suburbs, Brandywine Hospital closed its trauma center and Paoli Hospital closed its paramedic unit. In January, Abington Memorial Hospital "temporarily suspended" its trauma center because there weren't enough on-call surgeons who could afford liability coverage.
- d. Radiologists specializing in mammography are among those hardest hit: the loss of radiologists in the state has resulted in waiting periods for routine mammographies of up to eight months.⁴²
- e. In the past five years, eight companies have stopped offering medical liability insurance here, with only two remaining.

6. Florida

- a. Aventura hospital, a medical center located near Miami, stopped providing maternity care. Each birth at the medical center cost the hospital \$1,000 in insurance premiums. The obstetrics program had lost \$3.5 million over six years.
- b. Palm Beach Gardens Medical Center is a leading provider of brain and spinal surgery. Yet, this hospital has several weeks, every month, when there is no neurosurgeon on-call to treat emergency patients. The hospital, like so many others, has found it increasingly difficult to locate neurosurgeons to cover the emergency department. The physicians are not able to afford the cost of medical liability coverage.
- c. Finally, there's Orlando Regional Hospital which reports that the average wait time for women seeking mammography rose from 20 days in 2000 to 150 days in 2002. Many radiologists could not find or afford the necessary liability insurance. In a recent survey of Palm Beach, Miami Dade and Broward Counties, 7 of the 29 radiologists said they had stopped reading mammograms, and 8 others are considering this possibility.

⁴¹ Ryan Pearson, *76 Medical Practices have Closed*, ASSOCIATED PRESS, Jan. 30, 2003.

⁴² J. ECON. COMM., *supra* note 1, citing to Marian Uhlman, *Shortage of Radiologists, Technologists Creating Long Waits*, PHIL. INQ., Feb. 11, 2003.