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11246 SENATE LABOR & COMMERCE

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*, 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.*

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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

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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 Kosciuszko 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. *Jun. 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.*

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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

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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.

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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

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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.

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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*.

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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.*

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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 Send 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



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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

**Statement
of the
American Medical Association**

**to the
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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

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.)

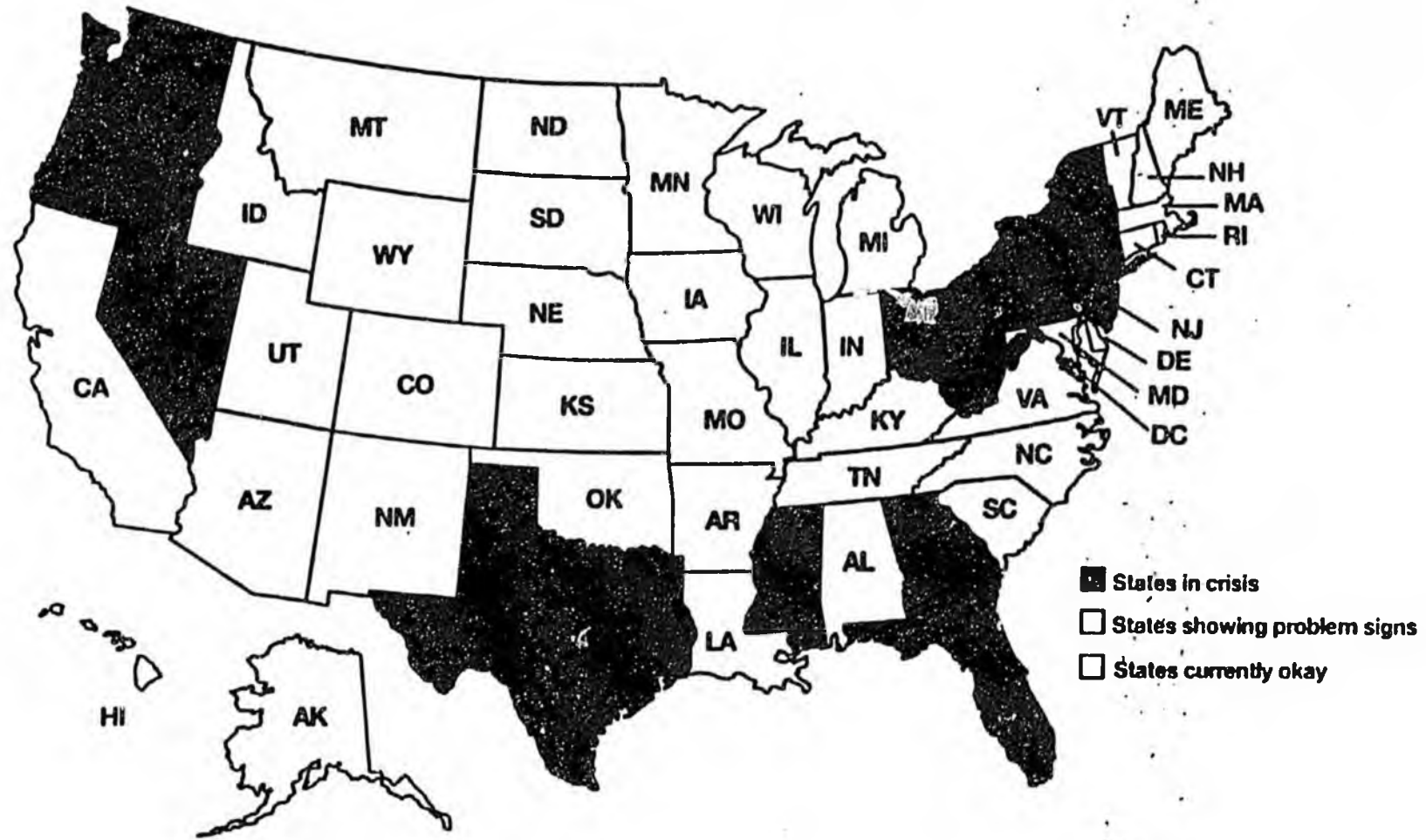
Furthermore, a Gallup poll released on February 5, 2003, show that 72% of those polled favor a limit on the amount patients can be awarded for pain and suffering. This Gallup poll is consistent with a 2002 survey conducted by Wirthlin Worldwide showing that three-quarters of Americans understand the 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

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 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*, 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*.

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 Rosemary 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.*

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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 is 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.

SB

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(FILE 3 OF 5)

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. (2002) 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 Smarr, 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 5.

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

²⁶ WIRTHLIN WORLDWIDE, *supra* note 8.

²⁷ Lee Launer, *The Factors Fueling Rising Healthcare Costs*, PricewaterhouseCoopers, prepared for the Am. Ass'n of Health Plans (April 2002) at <http://www.aahp.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 Cotteau & Diana Gravitch, *Common Good Fear of Litigation Study The Impact on Medicine* 30 (Apr. 2002) Harris Interactive, at http://ourcommongood.com/library/download/litprpt.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.

- d. The Orlando Regional Medical Center is currently at risk of closing its trauma center because of a lack of neurosurgeons willing to provide services in the emergency room.⁴³
- e. The situation in Florida has become so dire that Governor Bush created a special Task Force to examine the availability and affordability of liability insurance. This Task Force held nine hearings over a five month period and received extensive testimony and information from numerous, diverse sources. It concluded in one of its recommendations to the Governor that "the Legislature should, in medical malpractice cases, cap non-economic damages at \$250,000 per incident...Without the inclusion of a cap on potential awards of non-economic damages in a legislative package, no legislative reform plan can be successful in achieving the goal of controlling increases in healthcare costs, and thereby promoting improved access to healthcare. Although the Task Force was offered other solutions, *there is no other alternative remedy that will immediately alleviate Florida's crisis of availability and affordability of healthcare.*"⁴⁴ (Emphasis added).
- f. After four special sessions, Florida's legislature enacted S.B. 2-D, which was signed into law by Governor Bush on August, 14, 2003. In its final form; the bill does not provide the level of reforms advocated by Governor Bush's task force or by the Florida Medical Association (FMA). In particular, the language on non-economic damages and exceptions to the cap added during late stages of negotiations are troublesome. In fact, this clause prohibited FMA from supporting the legislation in its final form.⁴⁵
- g. S.B.2-D provides a separate cap on non-economic damages for practitioner and non-practitioners. For practitioners the cap is \$500,000 per claimant regardless of the number of defendants. For non-practitioners the cap is \$750,000 per claimant regardless of the number of defendants. The cap can increase to \$1 million for practitioners and \$1.5 million for non-practitioners if the negligence resulted in death or a permanent vegetative state, or if the court finds a manifest injustice would occur if the cap was not increased because the non-economic harm sustained by the patient was particularly severe and the defendant's negligence caused a catastrophic injury to the patient.

7. Texas

- a. In the past two years, 62 percent of Texas physicians have begun denying or referring high-risk cases, and 52 percent have stopped providing certain services to their patients. Nearly two-

⁴³ J. ECON. COMM., *supra* note 1, citing to Margaret Ann Mille, *Manatee Doctors, Nurses Rally for Cap on Malpractice Suits*, SARASOTA HERALD-TRIB., Mar. 1, 2003.

⁴⁴ Fla. Dep't of Health, *Governor's Select Task Force on Healthcare Professional Liability Insurance Report, Executive Summary*, at xi (May 4, 2003), available at <http://www.doh.state.fl.us/>.

⁴⁵ S.B. 2-D, 2003 Special Session D, Florida Laws (2003) (enacted).

thirds of physicians say the climate for practicing medicine and the fear of malpractice lawsuits have forced them to deny or refer high-risk cases to other doctors (Texas Medical Association, April 2003)

- b. Home to about 20 malpractice carriers in 1999, Texas now had only four in 2002 willing to write new policies, according to Insurance Commissioner Jose Montemayor. (Houston Chronicle, Aug. 3, 2002.)
- c. Medical liability insurance premiums have jumped anywhere from 50 to 200 percent. This is especially devastating to rural physicians, obstetricians, and emergency and trauma care physicians. (Texas Medical Association)
- d. On June 11, 2003 Governor Perry signed HB 4 into law. HB 4 contains sweeping tort reforms, many of which exclusively address malpractice litigation against physicians. Of these reforms, perhaps the most important is the hard cap of \$250,000 on non-economic damages per claimant in any judgment against a physician or health care provider, regardless of any applicable theories of vicarious liability, the number of defendants involved, or the number of causes of action asserted as part of the claimant's case against the physician. HB 4 also places a hard cap of \$250,000 on non-economic damages per claimant in any judgment against a health care institution in a medical liability cause of action. A judgment against two health care institutions shall not exceed \$500,000 in non-economic damages with each institution not liable for more than \$250,000 in non-economic damages.⁴⁶ All persons claiming to have sustained damages as a result of the bodily injury or death of a single person are considered a single claimant.

The new law states the cap on non-economic damages applies per "claimant." This terminology may create some confusion about the scope of the cap. Fortunately, however, the new law defines "claimant" as "a person, including a decedent's estate, seeking or who has sought recovery of damages in a health care liability claim. All persons claiming to have sustained damages as a result of the bodily injury or death of a single person are considered a single claimant." **Therefore, all persons claiming to have sustained damages as a result of injury or death sustained by a single person are considered a single claimant.** The new law also states **the cap applies regardless of the number of defendants or causes of action asserted.** Therefore, the maximum amount a claimant (including all persons that claim damages as a result of injury or death of a single person) can recover in non-economic damages, even if multiple physician defendants are involved and the claimant asserts multiple causes of action, is \$250,000. There is also a separate cap for health care institutions whereby a claimant can recover up to an additional \$250,000 for one institution and up to \$500,000 if more than one institution is

⁴⁶ H.B.4., 78th Texas Legislature (2003) (enacted).

involved. Again this cap applies regardless of the number of causes of action asserted, or persons who claim to have damages from the injury or death of a single person.

The caps provision states as follows:

"(a) In an action on a health care liability claim where final judgment is rendered against a physician or health care provider other than a health care institution, the limit of civil liability for noneconomic damages of the physician or health care provider other than a health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed \$250,000 for each claimant, regardless of the number of defendant physicians or health care providers other than a health care institution against whom the claim is asserted or the number of separate causes of action on which the claim is based. (b) In an action on a health care liability claim where final judgment is rendered against a single health care institution, the limit of civil liability for noneconomic damages inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed \$250,000 for each claimant. (c) In an action on a health care liability claim where final judgment is rendered against more than one health care institution, the limit of civil liability for noneconomic damages for each health care institution is, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed \$250,000 for each claimant and the limit of civil liability for noneconomic damages for all health care institutions, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed \$500,000 for each claimant."

- e. On September 13, 2003, the people of Texas approved Proposition 12, a ballot initiative to amend the state constitution to specifically allow the legislature to enact laws that place limits on non-economic damages in medical and health liability cases. This vote validates the legislature's work in enacting HB 4. The final vote was 51.12% in favor of Proposition 12 and 48.88% against. Thus a decrease in liability insurance premiums can occur immediately rather than a possible 10 year wait for the state supreme court to decide whether caps are allowed under the state constitution. The constitutional change clearly states that the legislature can set a cap on non-economic damages in medical and health care liability cases.

8. West Virginia

- a. In West Virginia, the Charleston Area Medical Center had to pay \$2,000 daily in malpractice premium subsidies in order to retain the doctors necessary to keep its trauma center open. After the last emergency room neurosurgeon left Wheeling, the local

hospital had to transport trauma patients by helicopter to other emergency rooms.⁴⁷

- b. On March 12, 2003, Governor Bob Wise signed H.B. 2122 into law. The key provision of HB 2122 is a \$250,000 cap on non-economic damages per claimant regardless of the number of defendants. The cap increases to \$500,000 for cases involving (1) wrongful death, (2) permanent and substantial physical deformity, loss of use of limb or loss of a bodily organ system, or (3) permanent physical or mental functional injury that permanently prevents a person from being able to independently care for himself or herself and perform life sustaining activities. The cap will be adjusted annually for inflation, but the \$250,000 cap will not exceed \$375,000 and the \$500,000 cap will not exceed \$750,000. HB.2122 also places a cap on total damages for care provided in a trauma center and creates a physicians mutual insurance company.⁴⁸

9. Anecdotes from other crisis states

- a. In Mississippi, patients are not able to find a neurosurgeon in the northern half of the state. In April, Leanne Dyess from Vicksburg testified before the House Judiciary Committee speaking in support of reforms. She told the story of her husband Tony, who was in an auto accident and is now permanently brain damaged because there was no neurosurgeon near the scene of the accident.
- b. In Arizona, a woman gave birth by the side of the road before she reached the only remaining maternity ward in a 6,000 square mile area.
- c. In Washington State, clinics serving 60,000 patients were forced to close under the insurance burden. Increased losses forced Washington Casualty Co., the state's largest provider of malpractice coverage to rural hospitals, into receivership.⁴⁹
- d. A recent study of Georgia physicians projected that 2,800 doctors in the state (approximately 1 in 5) would stop providing higher-risk procedures in order to reduce their liability exposure.⁵⁰
- e. The Medical Society of New Jersey estimates that 3,000 physicians in the state are at risk of losing coverage due to reduced coverage by insurers. Over a period of less than a year, three insurers – the MILX Group, Phico, and the St. Paul

⁴⁷ J. ECON. COMM., *supra* note 1, citing to Frances X. Clines, *Insurance-Squeezed Doctors Folding Tents in West Virginia*, N.Y. TIMES, June 13, 2002.

⁴⁸ H.B.2122, 76th West Virginia Legislature (2003) (enacted).

⁴⁹ J. ECON. COMM., *supra* note 1, citing to Carol M. Ostrom, *Malpractice Insurer Ordered into Receivership by State*, SEATTLE TIMES, Mar. 8, 2003.

⁵⁰ Daniel Yee, *Study: Insurance Rates Affect Georgia Care*, WASH. POST, Jan. 26, 2003.

Companies, who cover 55 percent of the state's doctors – stopped writing coverage for malpractice.⁵¹

- f. In New York State, 16 percent of obstetricians have stopped practicing obstetrics because of the state's medical liability crisis – 40 percent of the state's counties have fewer than five practicing obstetricians – and seven counties in New York State, with as many as 300 births per year, currently have no obstetrician.
- g. In Ohio, rising liability insurance costs had an oncologist eyeing retirement, but his patients raised more than \$40,000 to pay the premium and keep him in practice.

II. Solutions

A. State Legislative Reforms Demonstrate Lower Costs

- 1. In a study on the effect of reforms, Stanford University researchers Kessler and McClellan concluded that direct reforms, including caps on non-economic damages, reduced the likelihood that a physician will be sued by 2.1%. Within three years, premiums in direct reform states declined by 8.4%.⁵²
- 2. Another study by Stephen Zuckerman *et al.* looked at several types of reforms and concluded that capping physician liability reduced premiums for general surgeons by 13% in the year following enactment of that reform and by 34% over the long term. Premiums for general practitioners and OB/GYNs were impacted similarly.⁵³
- 3. In fact, not only do reforms lower physicians' premiums, but costs for consumption of health care as well.
 - a. In a different study by Kessler and McClellan, those researchers found "that malpractice reforms that directly reduce provider liability pressure lead to reductions of 5 to 9 percent in medical expenditures without substantial effects on mortality or medical complications."⁵⁴
- 4. These states upheld legislation for caps on non-economic damages: Alaska, California, Colorado, Idaho, Kansas, Maryland, Michigan, Minnesota, Missouri, Nebraska, , Virginia, West Virginia and Wisconsin. (Of them, Missouri, North Carolina, and West Virginia are considered crisis

⁵¹ J. ECON. COMM., *supra* note 1, citing to Lynna Goch, *Medical-Malpractice Tort Reform Trouble Spots*, BEST'S REV., Dec. 2002, and Joseph B. Treaster, *New Jersey Insurer is Leaving Many Doctors Scrambling*, N.Y. TIMES, May 10, 2002.

⁵² Daniel P. Kessler & Mark B. McClellan, *The Effects of Malpractice Pressure and Liability Reforms on Physicians' Perceptions of Medical Care*, LAW & CONTEMP. PROBS. 60, 81-106 (1997).

⁵³ Stephen Zuckerman, Randall R. Bovbjerg & Frank Sloan, *Effects of Tort Reforms and Other Factors on Medical Malpractice Insurance Premiums*, INQUIRY 27, 167-182 (1990).

⁵⁴ Daniel P. Kessler & Mark B. McClellan, *Do Doctors Practice Defensive Medicine*, NAT'L BUR. OF ECON. ANALYSIS Working Paper 5466 (Feb. 1996), 2.

states.)⁵⁵

- a. It is important when looking at the effectiveness of caps on non-economic damages to make the comparison on equal terms, *i.e.*, apples to apples. For example, a fixed cap, like the \$250,000 cap found in California's MICRA, is not comparable to the cap provided in the Missouri law.⁵⁶ The Missouri cap increases with inflation. Originally set at \$350,000 in 1986, the cap on non-economic damages in Missouri is \$557,000 as of February 1, 2003. In addition, the Missouri law applies the cap individually to each defendant and each plaintiff. Thus, the cap on non-economic damages in Missouri law has not been as effective as the cap under MICRA.
 - b. Tillinghast-Towers Perrin confirms this conclusion. In a current study, Tillinghast-Towers Perrin finds savings could be expected with a \$250,000 cap on non-economic damages. The study further states that a cap of \$500,000 is likely to be of very little benefit to physicians.⁵⁷
5. Among the many findings in the report released on January 29, 2003, the **Governor's Task Force in Florida found that the level of liability claims paid was the main cause of the increases in 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."⁵⁸
 6. Indiana, Louisiana and New Mexico upheld caps that encompass both economic and non-economic damages.⁵⁹ Louisiana's cap, akin to New Mexico, does not include medical expenses, which are paid as incurred.⁶⁰
 7. The following states struck down caps on non-economic damages: Alabama, Georgia, Illinois, Kansas, New Hampshire, North Dakota,

⁵⁵ See *Evans v. State*, 56 P.3d 1046 (Alaska 2002); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985); *Scholz v. Metro. Pathologists P.C.*, 851 P.2d 901 (Colo. 1993); *Kirkland v. Blaine County Med. Ctr.*, 4 P.3d 1115 (Idaho 2002); *Samsel v. Wheeler Transport Services, Inc.* 246 Kan. 336 (Kan. 1990); *Murphy v. Edmunds*, 601 A.2d 102 (Md. 1992); *Zdrojewski v. Murphy*, 202 Mich. App. Lexis 1566 (2002); *Adams v. Children's Mercy Hosp.*, 848 S.W.2d 535 (Mo. Ct. App. 1993); *Linder v. Smith*, 629 P.2d 1187 (Mont. 1981); *Prendergast v. Nelson*, 256 N.W.2d 657 (Neb. 1977); *Gourley ex. rel. Gourley v. Nebraska Methodist Health System*, 633 N.W.2d 43 (Neb. 2003); *Etheridge, et. al. v. Medical Ctr. Hosp.*, 367 S.E.2d 525 (Va. 1989); *Robinson v. Charleston Area Med. Ctr.*, 186 W.Va. 720 (W. Va. 1991); *Verba v. Ghaphery*, 552 S.E.2d (W. Va. 2001); *Guzman v. St. Francis Hosp.*, 623 N.W.2d 776 (Wis. Ct. App. 2000).

⁵⁶ MO. REV. STAT. § 538.210 (2002).

⁵⁷ Letter from James D. Hurley and Gai E. Tverberg, to Ray Cantor, Dir. of Gov't Affairs, Med. Soc'y of N.J., (Jan. 7, 2003) (on file with the Am. Med. Ass'n).

⁵⁸ Fla. Dep't of Health, *Governor's Select Task Force on Healthcare Professional Liability Insurance Report, Executive Summary*, at xi (May 4, 2003), available at <http://www.doh.state.fl.us/>.

⁵⁹ *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585 (Ind. 1980); *Butler v. Flint Goodrich Hosp.*, 607 So.2d 517 (La. 1992), *Fed. Express Corp. v. United States*, 228 F. Supp. 2d 1267 (N.M. 2002).

⁶⁰ LA. REV. STAT. § 40:1299.42(B)(1) (2003).

Oregon, Washington (Of them, Georgia, Illinois, Oregon, and Washington are considered crisis states.)⁶¹

8. In Florida and Texas, caps were upheld, but with some restrictions (Florida and Texas are crisis states.)⁶²

B. Favorable State Case Law Establishes Rationale for Supporting Legislative Reforms - Failed Legal Challenges Brought Against Caps on Non-economic Damages⁶³

1. Equal Protection Clause

- a. Under the "deferential rational relationship" test, a number of courts have upheld damages caps as a permissive and rational means of achieving the legitimate state goal of reducing insurance premiums paid by physicians.
- b. Other societal goals supporting the implementation of caps that have been upheld by the court include; (i) ensuring the availability of physicians in the state, (ii) the continued existence of state compensation funds, (iii) the continued existence of insurance for physicians in the state, and (iv) assurance of medical related payments to all claimants.
- c. Courts have held it constitutional for damage caps to differentiate between medical malpractice tort claimants who have suffered injuries valued at a level below the damages cap, and those who have suffered damages valued above the damages cap amount based upon the legitimate purpose of the legislature.

2. Due Process Clause - Court analysis of due process challenges has also proceeded under the rational relationship test, where damages caps have been found to be neither arbitrary nor irrational legislative goals.

3. Right to Trial by Jury

- a. After a plaintiff is awarded damages up to the amount of the statutory cap, the determination of damages is removed from consideration by the jury and given to the court. This is not a denial of the right to trial by jury, since the jury has already completed its fact-finding mission, determining that the plaintiff is owed compensation. Deciding how much a patient will recover is a question of law for the court. The court implements the policy decision of the legislature.
- b. Reviewing courts have also held that it is within the legislature's power to modify common law and statutory rights and remedies,

⁶¹ See *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156 (Ala. 1991); *Denton v. Con-Way S. Express, Inc.*, 402 S.E. 2d 269 (Ga. 1991); *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997); *Kan. Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988) new law enacted in 1988; *Carson v. Mauer*, 424 A.2d 825 (N.H. 1980); *Arneson v. Olson*, 270 N.W.2d (N.D. 1978); *Lakin v. Senco Products, Inc.*, 987 P.2d 463 (Or. 1999); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989).

⁶² See *Univ. of Miami v. Echarte*, 618 So.2d 189 (Fla. 1993); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988); *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990).

⁶³ See cases cited *supra*, note 50.

as was done with the caps.

4. Open Court Challenge - The courts have struck down the argument that a damage cap impermissibly allows the legislature to intrude on the judicial process. Instead of being an impermissible barrier to the courts, the cap is merely a limit on recoveries.
5. Intrusion on the Rulemaking Power of the Judicial Branch - The courts did not find that caps allow the legislature to overstep its constitutional powers. Instead, the courts found that the legislature has full purview over questions of policy, as opposed to procedural questions. Damage caps are questions of policy, properly within the legislature's scope of power.

C. California's Solution: MICRA

1. California enacted the Medical Injury Compensation Reform Act of 1975 (MICRA) which largely eliminates the lottery aspect of medical liability litigation in that state.⁶⁴
2. The United States Supreme Court dismissed a challenge to the non-economic damages cap in MICRA for want of substantial federal question.⁶⁵ However, a federal law is required to ensure that reforms will be effected in all states. The Supremacy Clause, principles of preemption and the language of H.R. 5, would protect states with existing caps, yet provide a federal standard for a non-economic cap, even if such caps are barred by a state constitution.
3. HR 5, also known as the HEALTH Act, is based on MICRA and does the following:
 - a. Ensures that patients receive 100 percent compensation for their economic losses, including medical expenses, rehabilitation costs and lost wages, if harmed by a physician's negligence;
 - b. Establishes periodic payments of future damages;
 - c. Maximizes the amount of money juries award for patients – not trial lawyers; and
 - d. Places a \$250,000 cap on non-economic damages, and also allows states the flexibility to establish different caps.
4. Now, in California, claims are settled in one-third less time than in states without caps on non-economic damages.⁶⁶ This not only decreases the cost of litigation, it also means injured patients are indemnified much faster in California.
5. California's experience with MICRA shows that tort reform works. MICRA has been held up as "the gold standard" of tort reform, and a model for repeated attempts at Federal reform legislation. See attached chart that

⁶⁴ CAL. CIV. CODE § 3333.2 (2003).

⁶⁵ *Fein v. Permanente Medical Grp.*, 474 U.S. 892 (1985).

⁶⁶ *Harming Patient Access to Care: The Impact of Excessive Litigation: Hearing Before the Subcomm. on Health of the Comm. on Energy and Commerce*, 107th Cong. 88 (2002) [hereinafter Anderson statement] (statement of Richard E. Anderson, Chairman of the Doctors' Co. for the Physician Ins. Ass'n of Am.).

clearly demonstrates cost savings realized, by specialty, on premiums comparing California to other states without reforms.

6. According to Phil Hinderberger of Norcal Mutual, before MICRA was passed, "California physicians paid 25% of all medical liability premiums paid in the U.S., while they represented only about 10% of all practicing physicians in the U.S. Today, California physicians pay about 10% of all medical liability premiums paid in the U.S., which represents a fair share."⁶⁷
7. According to the National Association of Insurance Commissioners, while total premiums in the rest of the U.S. have risen 569%, California premiums have risen only 182% since 1976.⁶⁸
8. Since 1975, The Doctors Company, one of the 45 carriers that comprise the Physician Insurers Association of America (PIAA), has lowered its medical liability premium rates in California by 40% in constant dollars.⁶⁹
9. One argument put forth by opponents to MICRA is that Proposition 103, not MICRA, kept medical liability premium rates affordable in California. Proposition 103, also known as the Insurance Rate Reduction and Reform Act, applies to all lines of 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 the provision that would have only allowed rates and premiums that were reduced between November 8, 1988 and November 8, 1989 pursuant to subdivision (a) to be increased if the commissioner found, after a hearing, that an insurer was substantially threatened with insolvency.⁷⁰ The rest of the law was upheld. 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."⁷¹ However, Proposition 103 provides that "every insurer which desires to change any rate shall file a complete rate application with the commissioner."⁷² 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.⁷³
10. According to Californians Allied for Patient Protection, the not-for-profit group devoted to protecting MICRA, "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."⁷⁴ This illustrates that Proposition 103 is not responsible for keeping medical liability premiums

⁶⁷ Posting of Phil Hinderberger, phil-hinderberger@norcalmutual.org, Sr. Vice President and General Counsel, Norcal Mutual Insurance Company, to asmac-1@unity.ama-assn.org (Jan. 20, 2003) (copy on file with author).

⁶⁸ National Association of Insurance Commissioners Reports of Profitability by Line by State, 1976-2001.

⁶⁹ Anderson statement.

⁷⁰ *Calfarm Inc. Co. v. Deukmejian*, 48 Cal. 3d 805, 771 P.2d 1247 (1989).

⁷¹ CAL. INS. CODE § 1861.05(a) (2003).

⁷² *Id.* at § 1861.05(b) (2003).

⁷³ *Id.* at § 1861.05(c) (2003).

⁷⁴ "Why MICRA, and not Prop. 103, keeps medical liability insurance rates reasonable in California," Californians Allied for Patient Protection, attachment to posting of Catherine Hanson, chanson@cmanet.org, California Medical Ass'n, to asmac-1@unity.ama-assn.org (Jan. 16, 2003) (copy on file with author).

down; rather it is MICRA that has been the force behind California's success.

11. According to HHS, the number of large jury awards has been declining in California, although the total number of claims has not.⁷⁵ "The percentage of claims resolved through settlement and arbitration has increased in California, saving money for injured patients."⁷⁶ "Premiums for specialists in Los Angeles are substantially less than for specialists in metropolitan areas in states without reforms such as Florida, Illinois, and Nevada."⁷⁷

D. Joint Economic Committee supports caps on non-economic damages

1. In a study released in May 2003, the Joint Economic Committee of the U.S. Congress stated: "Some of the key reforms proposed at the federal level, including the cap on pain and suffering damages, have proven successful at producing savings when implemented."⁷⁸
2. The study points to California, which under MICRA has a \$250,000 cap on non-economic damages, binding arbitration on disputes, collateral sources offsets, limits on contingency fees, advance notice of malpractice claims, statute of limitations, and periodic payment of damages. The Joint Economic Committee praises California as "perhaps the most successful example of reform at the state level," noting its slower rate of growth in malpractice premiums (167 percent versus 505 percent in the rest of the country from the period 1976 to 2000).⁷⁹
3. After observing the failure of our current system to achieve either of its central goals, *i.e.*, to compensate those who are truly negligently injured and to deter negligent behavior, the study concludes: "This indictment of the tort system serves as the basis for medical liability reform... If adopted, the federal reform discussed here could yield budgetary savings of more than \$19 billion per year, reduce the number of Americans without health coverage by up to 3.9 million, and lead to an environment that is significantly more receptive to efforts to improve patient safety and reduce medical errors."⁸⁰

E. Agency for Healthcare Research and Quality demonstrates a cap on non-economic damages helps protect patients' access to care

1. The July 3, 2003 study from the Agency for Healthcare Research and Quality⁸¹ looked at the distribution of physicians across states with and without caps on non-economic damages since 1970. After adjusting for multiple factors, AHRQ found that by 2000, states with damage caps averaged 12 percent more physicians per capita than states without damage caps.
2. Additional key findings include: caps are effective in improving the supply of physicians and patients' access to care.; the lower the cap, the greater its effectiveness in ensuring patients' access to care.

F. National Legislation

⁷⁵ U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 12.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ J. ECON. COMM., U.S. CONG., LIABILITY FOR MEDICAL MALPRACTICE: ISSUES AND EVIDENCE 19 (May 2003).

⁷⁹ *Id.* Note: the updated figures according to the NAIC, through 2001, are 182% and 569%, respectively.

⁸⁰ *Id.* at 24.

⁸¹ Hellinger and William Encinosa, *supra* note 1.

1. The HEALTH Act (Help Efficient, Accessible, Low-cost, Timely Healthcare Act of 2003), is modeled after the successful MICRA statute.⁸² On March 13, 2003, the House of Representatives passed the HEALTH Act by a vote of 229-196.
2. The vote was largely along party lines with 213 Republicans and 16 Democrats supporting the bill. Nine Republicans, 186 Democrats and 1 Independent opposed the bill. One Republican voted "present." Eight members did not vote on H.R. 5.
3. H.R. 5 would safeguard patients' access to care by enacting common sense reforms that provide a \$250,000 cap on non-economic damages, thus reasonably limiting damages without preempting existing state law.

A 2003 Congressional Budget Office study on H.R. 5 (108th Congress) indicates that certain tort limitations, primarily caps on awards and rules governing offsets from collateral-source benefits, effectively reduce average premiums for medical liability insurance. Consequently, CBO estimates that, in states that currently do not have controls on malpractice torts, H.R. 5 would significantly lower premiums for medical liability insurance from what they would otherwise be under current law.⁸³

4. The HEALTH Act would have real results because it gets to the root of the problem and also addresses ancillary issues.
 - a. The source of the problem lies not in incompetent physicians, as some would argue, but rather in large jury verdicts that award exorbitant amounts of non-economic damages in medical malpractice cases.
 - b. As a result of these large jury verdicts, insurance companies are forced to raise their premiums—otherwise face insolvency.
 - c. Escalating insurance premiums, such as the \$249,000 premium for obstetricians in Florida, mean it is no longer economical for many physicians to purchase insurance. Therefore, physicians choose to narrow the range of services they offer, withdraw from practice altogether, or relocate to a state where insurance premiums are less. All of these actions lead to lower quality care to patients who can not get access to care, regardless of their health insurance coverage or plan.
 - d. The HHS Agency for Healthcare Research and Quality (AHRQ) has illustrated this phenomenon in a formal study. AHRQ revealed that states that have enacted limits on non-economic damages in medical lawsuits have about 12 percent more physicians per capita than states without such a cap. According to the study's authors, Fred Hellinger, Ph.D. and William Encinosa, Ph.D., "these findings demonstrate that state laws limiting non-economic damages in medical malpractice cases

⁸² Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2003, H.R. 5, 108th Cong. (2003), introduced on Feb. 5, 2003, by Rep. Jim Greenwood (R-PA).

⁸³ CONG. BUDGET OFFICE, *H.R. 5 Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2003* (March 10, 2003), at <http://www.cbo.gov/showdoc.cfm?index=4091&sequence=0>.

increase the number of physicians who practice in the states."⁸⁴

- e. H.R. 5 would allow patients injured due to negligence to be awarded unlimited economic damages, which include medical expenses, lost wages and benefits, lost earning capacity, long term care, assisted living devices, childcare, household services, lost time, and special medical damages. It would also help stabilize medical liability insurance premiums by limiting non-economic damages to \$250,000 (e.g., pain and suffering, mental anguish, physical impairment, etc.), with states being given the flexibility to establish or maintain their own laws on damage awards, whether higher or lower than those provided for in this bill.
 - f. The HEALTH Act also ensures that more of the award goes to the person actually injured, the patient. The bill would minimize the incentive of plaintiffs' lawyers to bring a suit of questionable merit because their contingent fee would be reduced; rather than receiving one-third (or greater) of the total recovery plus costs, an attorney would receive 40% of the first \$50,000, one third of the next \$50,000, one fourth of the next \$500,000, and 15% of any amount over \$600,000. So for example, if a jury awarded damages of \$1 million, instead of getting \$333,333 plus costs, a plaintiff's lawyer would receive \$221,667 plus costs.
- 5. President Bush continues to be a strong advocate for medical liability reform.
 - 6. In the Senate, Senator John Ensign (R-NV) introduced S. 11, the "Patients First Act of 2003" on June 26. S. 11 is similar to H.R. 5, except that it includes a provision to reform expert witness requirements.

In early July 2003, Senators opposed to S. 11 blocked the bill from being debated and voted on by the full Senate. Republicans lacked the sixty votes needed to overcome a Democratic filibuster that prevented them from bringing the measure up for a formal vote. Forty-nine voted in favor of breaking the filibuster, while forty-eight voted against. Despite support from President Bush, the House of Representatives, 72% of the American public,⁸⁵ and the Senate leader, the measure failed.

Sen. Feinstein (D-CA) remains interested in developing a bill based on the proven reforms in MICRA. Discussions on a Senate bill continue and the Senate leadership plans to bring a bill to the floor later this year.

- 7. Tillinghast-Towers Perrin, in reviewing proposed legislation in New Jersey on medical malpractice liability reform, concluded that a \$250,000 cap on non-economic damages would be expected to result in 5%-7% savings for physicians. If the number of large malpractice claims is trending upward rapidly, a \$250,000 non-economic cap may also help to flatten out the rate of increase in the number of claims.⁸⁶

⁸⁴ Agency for Healthcare Research and Quality, *Study Links Higher Physician Supply to Limits on Non-Economic Damages*, HHS Press Release (July 7, 2003) at <http://www.ahrq.gov/news/press/pr2003/tortcapspr.htm>.

⁸⁵ See *infra*, note 82.

⁸⁶ Letter from James D. Hurley and Gail E. Tverberg, to Ray Cantor, Dir. of Gov't Affairs, Med. Soc'y of N.J., (Jan. 7, 2003) (on file with the Am. Med. Ass'n).

8. Seventy-three percent (73%) of those surveyed in a Wirthlin Worldwide poll favor a law that would guarantee an injured patient full payment for lost wages and medical costs and place reasonable limits on awards for "pain and suffering" in medical liability cases.⁸⁷ A recent Gallup poll confirms this public opinion. The poll results, released February 4, show that 72% of Americans support limiting the amount patients can be awarded for "pain and suffering." In addition, 74% believe medical liability insurance in health care to be a crisis or major problem.⁸⁸

III. Responding to Other Arguments

A. Public Citizen and Other Anti-tort Reform Groups' Concerns

1. Physicians are victims of insurance companies that made bad business decisions and are now trying to make up their losses.⁸⁹

Rebuttal: Professional liability carriers had actually been subsidizing their premiums. Figures reported by A.M. Best representing 76% of the industry show that 80% of investments by PIAA companies between 1995 and 2001 were in high-grade bonds, with the remainder divided among stocks, mortgages, real estate and working cash. However, with plunging interest rates, investment yields on these bonds have declined, and there are no longer profits with which insurers can subsidize premium rates the way they once did.⁹⁰ Increased losses on claims are the primary contributor to higher medical liability premium rates. Insurers are not charging and profiting from excessively high premium rates. None of the insurance companies studied experienced a net loss on investments.⁹¹

2. Insurance companies raise rates when they are seeking ways to make up for declining interest rates and market-based investment losses.⁹²

Rebuttal: Annual Statement data summarized in Best's Aggregates & Averages, Property-Casualty, 2002 edition, showed that the Investment Yields of medical malpractice insurers have been stable and positive since 1997. Those returns have ranged from 5.0-5.5%, and include income from interest, dividends, and real estate income. Medical malpractice insurers have approximately 80% of their investments in the bond market. Therefore, their total returns on invested assets are strongly influenced by bond market performance, and less so by stock market performance. Best's Aggregates and Averages indicates that insurers' total returns on invested assets has fallen by only 3.2 percentage points over that period. The facts simply don't justify anyone trying to place blame on the insurance

⁸⁷ WIRTHLIN WORLDWIDE, *supra* note 8.

⁸⁸ Gallup Poll News Serv., *Tort Reform* (Feb. 4, 2003), at <http://www.gallup.com/poll>.

⁸⁹ See Pub. Citizen, *Medical Misdiagnosis: Challenging the Malpractice Claims of the Doctors' Lobby* (Jan. 2003), at <http://www.citizen.org/congress/civjus/medmal/index.cfm>.

⁹⁰ *Health Care Litigation Reform: Does Limitless Litigation Restrict Access to Health Care?: Hearing Before the Subcomm. on Commercial and Admin. Law of the Comm. on the Judiciary, 107th Cong. 64* (2002) (statement of Lawrence E. Smart, Pres. of Physician Ins. Ass'n of Am.).

⁹¹ U.S. GENERAL ACCOUNTING OFFICE, *Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates*, GAO-03-702 (June 2003) at 15, 32, 25.

⁹² Ams. for Ins. Reform, *Medical Malpractice Insurance: Stable Losses/Unstable Rates*, (Oct. 2002), at <http://www.insurance-reform.org/StableLosses.pdf>.

industry for an out-of-control legal system.⁹³

According to the Ohio Department of Insurance, the vast majority of invested assets are fixed-income instruments such as treasury, municipal, and corporate bonds whose losses have been minimal.⁹⁴

The Ohio Department of Insurance also refutes this misconception by stating that there is no provision in its regulations that allows insurance companies to increase their rates in order to recoup past costs resulting from pricing mistakes, larger than expected claims, adverse court decisions, or other unexpected costs.⁹⁵

Brown Brothers Harriman & Co. (BBH) released a report ("Did Investments Affect Medical Malpractice Premiums?") that analyzed the impact of insurers' asset allocation and investment income on the premiums they charge. **BBH concluded that there is no correlation between the premiums charged by the medical liability insurance industry, on the one hand, and the industry's investment yield, the performance of the U.S. economy, or interest rates, on the other hand.**⁹⁶

In addition, BBH released an addendum to this study that analyzed National Association of Insurance Commissioners (NAIC) data to determine whether investment gains by medical liability insurance companies declined in the recent bear market. BBH asked the question: "Did medical malpractice companies raise premiums because they had come to expect a certain percentage gain that was not achieved due to market conditions?" BBH determined that the decline in equities (which are a small percentage of insurance company investments) was more than offset by the capital gains by bonds (which make up a substantial part of insurance company investments) due to a decline in interest rates. **BBH concluded that "investments did not precipitate the current crisis."**⁹⁷

3. The crisis was created by the "insurance cycle." Reform should focus on preventing such insurers investment practices, not restricting claimants' rights.⁹⁸

Rebuttal: It is not the underwriting cycle that drives the problem but the growing size of jury awards. The U.S. Department of Health and Human Services argues that if the insurance cycle were the cause of the current crisis, "then all states would be equally experiencing a crisis."⁹⁹ Insurers are not leaving other markets. They are leaving the medical liability market because of the risk of unbounded payouts in that sector, particularly in non-reform states.¹⁰⁰ As a case in point, "St. Paul Companies, which was the

⁹³ BEST'S AGGREGATES AND AVERAGES - PROPERTY/CASUALTY, QUANTITATIVE ANALYSIS REPORT, MEDICAL MALPRACTICE PREDOMINATING 166 (2002).

⁹⁴ "Medical Malpractice Insurance," Presentation by Holly Saelens, Asst. Dir., OH Dep't of Ins. 19 (n.d.).

⁹⁵ *Id.* at 18.

⁹⁶ Raghu Ramachandran, *Did Investments Affect Medical Malpractice Premiums?*, BROWN BROTHERS HARRIMAN & CO. (Jan. 21, 2003), at <http://salsa.bbh.com/news/Articles/MedMal.html>.

⁹⁷ Raghu Ramachandran, *A Note on Investment Income of Medical Malpractice Companies*, BROWN BROTHERS HARRIMAN & CO. (Feb. 4, 2003), at <http://salsa.bbh.com/news/Articles/medmal2.html>.

⁹⁸ See e.g., Meg Green, *Consumer Groups Blame Premium Hikes on Regulatory Inaction*, BESTWIRE, Aug. 1, 2002, available at <http://www.consumerwatchdog.org>.

⁹⁹ U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 12.

¹⁰⁰ *Id.* at 2.

largest malpractice carrier in the U.S. (covering 9% of physicians), announced in December of 2001 that it would no longer offer coverage to any doctor in the country."¹⁰¹

4. The insurance cycle is evidence of the breakdown in the state regulatory system. Regulators need to keep rates from being both excessive and inadequate.¹⁰²

Rebuttal: Even the American Association of Health Plans finds that "all state insurance departments and other state governmental agencies heavily regulate and monitor the solvency of medical malpractice carriers and require extensive reporting."¹⁰³ These regulators place strict limits on the types and riskiness of investments insurers can purchase. Also, the insurers are required to report annually on the status of their investments. The AAHP also reasoned that if the stock market were to blame, the crisis would resonate across the country to all medical malpractice insurers. This is not the case, as evidenced by the fact that it is mostly physicians that practice in states without meaningful medical malpractice reform who are significantly affected.¹⁰⁴

B. Trial Bar Explanations

1. Tort reforms unfairly penalize patients and are ineffective in holding down premiums for physicians and hospitals.¹⁰⁵

Rebuttal: But do patients with a claim get the right amount of compensation? Awards of non-economic damages that are given are out of scale with equity or need are not fair to anyone, given that economic compensatory damages are unlimited. Thus, legislators must consider the needs of the greater public welfare to ensure access to care for all.

Tort reforms hold down premiums. Compare California's premiums with those of the other large states. For example, 2001 annual premiums for surgeons in California ranged from \$14,000 to \$42,000, while premiums for surgeons in Florida ranged from \$63,000 to \$159,000.¹⁰⁶

2. Rather than tort reform, more efforts should be directed at removing incompetent physicians and improving quality of care.

Rebuttal: Removing "incompetent" physicians based on how many times they have been sued or have been found liable for negligence would be an extreme and ineffective method of trying to resolve the crisis because of the randomness of the litigation system. The few cases that do result in

¹⁰¹ *Id.* at 3.

¹⁰² See Ams. for Ins. Reform, *Americans for Insurance Reform Launched to Fight Insurance Industry Mismanagement and Price Gouging* (July 2002), at <http://www.insurance-reform.org/pr/AIRRelease.pdf>.

¹⁰³ Am. Ass'n of Health Plans, "Lawsuit Lottery" Causes Medical Malpractice Crisis – Suggestions that Poor Investments Led to Crisis Don't Pass Smell Test, at <http://www.americanbenefitscouncil.org/documents/refutingstockmarketargument.pdf> (n.d.).

¹⁰⁴ *Id.*

¹⁰⁵ See Ass'n of Trial Lawyers of Am., *Medical Malpractice Fibs and Facts*, at http://www.atla.org/ConsumerMediaResources/Tier3/press_room/FACTS/medmal/medmalfibsfacts.aspx (n.d.).

¹⁰⁶ CONFRONTING THE NEW HEALTH CARE CRISIS, *supra* note 11, at 13.

huge jury awards encourage a "lottery" mentality among plaintiffs and lawyers.¹⁰⁷

Also, according to HHS, researchers have found that most errors are system failures, rather than failures of individual physicians. That is to say, even if physicians perform their job correctly, most errors would still occur. A better approach to fixing the problem of system errors would be to dispel the fear by physicians, hospitals and nurses that open discussion on adverse events would be discoverable in lawsuits. This could be accomplished through state peer review statutes that protect confidentiality of such discussions.¹⁰⁸ A federal statute that allows confidential peer review, with expedited systems for correction including dissemination of de-identified information, is a model that works for the Aviation Safety Reporting System and should be replicated for health care.

The AMA supports bipartisan efforts in the House and Senate to advance legislation that would establish the statutory framework to create a "culture of safety" whereby information on health care errors could be reported in a confidential and legally protected manner. In the 108th Congress, the House has passed a patient safety bill and a key Senate committee has cleared legislation for a full Senate vote. The two bills are similar in many respects, and after the Senate votes on its patient safety bill a conference committee will meet to reconcile the differences.

In the Senate, Senators Jeffords (I-VT), Breaux (D-LA), Frist, MD (R-TN), and Gregg (R-NH) introduced S. 720, the "Patient Safety and Quality Improvement Act of 2003." On July 23, 2003, the Senate Committee on Health, Education, Labor, and Pensions reported (approved) S. 720 (as amended by the chairman's mark) by a unanimous vote of 20 yeas to 0 nays. This clears the way for the bill to be debated and voted on by the full Senate. The AMA strongly supports S. 720 as amended by the HELP Committee.

The bill reported by the HELP Committee would create a confidential, voluntary reporting system in which physicians and other health care providers could report information on errors to entities to be known as Patient Safety Organizations (PSOs). The PSOs would collect and analyze unique "patient safety data" and provide feedback on patient safety improvement strategies. This legislation would:

- create a confidential, voluntary reporting system in which physicians, hospitals, and other health care providers could report information on errors to organizations known as Patient Safety Organizations (PSOs).
- Allow PSOs to collect and analyze unique "patient safety data" and then provide feedback on patient safety improvement strategies.
- Provide that "patient safety data" would be confidential and legally protected.

¹⁰⁷ *Id.* at 8.
¹⁰⁸ *Id.* at 22.

- Not limit or affect the availability of any information or evidence that is currently available from sources other than the PSO and can be collected under existing law.
- Provide for appropriate penalties for unlawful disclosures.
- Recognizes and preserves the protection of confidential patient information under the Health Insurance Portability and Accountability Act of 1996.
- Not preempt other state and federal peer review laws.

This legislation strikes the proper balance between maintaining confidentiality and legal protections for unique patient safety data, and the need to ensure accountability throughout the health care delivery system. Such a balance was envisioned in the 1999 IOM report, *To Err is Human*.

On March 12, 2003, the House of Representatives passed H.R. 663, the "Patient Safety and Quality Improvement Act," by a near unanimous vote (418-6). This bill would establish a system for reporting health care errors in a confidential and legally protected manner that is similar to the Senate bill.

3. Tort reform will only benefit insurance companies and physicians.

Rebuttal: Tort reform, such as capping non-economic damages, would lower insurance premiums. If physicians have the reassurance that their premiums are lower, they are less likely to practice defensive medicine or limit the procedures they perform. This is well illustrated by the fact that because of skyrocketing insurance premiums, physicians have opted out of performing high risk procedures such as those involved in obstetrics and other surgery.¹⁰⁹

C. Additional Reflections of the Insurance Industry

1. The only way insurers can assure financial viability is to increase revenue, or, in other words, raise rates.

The medical malpractice combined ratio, a measure of profitability, reached 153.3 in 2001, compared with 115.7 for all lines combined. That means, for every \$1 insurers received in premiums, they paid out \$1.53.¹¹⁰ This deterioration occurred in spite of a rise in premiums of 8.7 percent that year. Estimates show that in 2002 the combined ratio continued to worsen, reaching 165.¹¹¹

2. Insurers blame jumps in big jury awards and large settlements.

Even though plaintiffs lost the majority of their cases that went to a jury

¹⁰⁹ BLUE CROSS BLUE SHIELD ASS'N, *supra* note 7, at 2.

¹¹⁰ Insurance Information Institute, *Medical Malpractice* (June 2003) at <http://www.iii.org/media/hottopics/insurance/medicalmal/>.

¹¹¹ *Id.*

trial,¹¹² the average cost of defending any claim is about \$27,009.¹¹³ And, this number does not account for the time lost to the physician in defending the case, the cost of defensive medicine and other inefficiencies in the healthcare system when resources are diverted from patient care.

In addition, "sixty-one percent of all claims filed against individual practitioners were dropped or dismissed by the court."¹¹⁴ Taken together with the percentage of claims where the doctor prevailed at trial, in two-thirds of all claims the individual physician was found to be not at fault. Considering the cost to the system of bringing a claim and the number of claims without merit, it is apparent the total cost could be staggering.

PIAA, which represents about 60% of the professional market, expressed support for tort reform, stressing that the shrinking availability and rising costs of medical professional liability insurance eventually will harm patients.¹¹⁵

D. GAO Reports

1. While verifying that the liability crisis has affected access to health care services, the GAO made several determinations in its August 2003¹¹⁶ report relating to the extent of the liability crisis that the AMA believes do not accurately reflect the severity of the current crisis in real time. Numerous changes to the GAO methodology would strengthen the basic findings of this report. Among the data sources, measures, or analytical methods that could be improved are the following:
 - a. *Examination of all crisis states.* The GAO only examined five of the 19 crisis states. The current medical liability crisis is far more widespread, extending to the additional 14 states as well.
 - b. *Appropriate measurement of physician mobility.* Physician counts were based on state licensure data, which do not accurately reflect the number of physicians practicing in a given location. Actual physician practice location information must be used instead.
 - c. *More accurate counts of physicians by specialties and local markets.* Physician/population ratios that aggregate physicians across local markets and specialties obscure the significant market-specific or specialty-specific changes in the supply of physicians and availability of critically important medical services.
 - d. *Use of multi-payor data to accurately measure access to health care services that Medicare data alone do not capture.* Utilization statistics based exclusively on data from a single payor (Medicare) exclude data for obstetric and emergency care, and fail to capture the impairment of

¹¹² *Patient Access Crisis: The Role of Medical Litigation, Hearing Before the S. Comm. on the Judiciary, 108th Cong. (2003)* (testimony of Lawrence E. Smarr of Physician Ins. Ass'n of Am.).

¹¹³ PIAA Claim Trend Analysis, 2002 Ed., Exhibit 1.

¹¹⁴ *Patient Access Crisis: The Role of Medical Litigation, Hearing Before the S. Comm. on the Judiciary, 108th Cong. (2003)* (testimony of Lawrence E. Smarr of Physician Ins. Ass'n of Am.) at 16.

¹¹⁵ White House Writers Groups, *National Quorum Survey Results* (Apr. 2002), at

http://www.thepiaa.org/pdf_files/hcla_2002_poil.pdf.

¹¹⁶ U.S. GEN. ACCOUNTING OFFICE, *Medical Malpractice: Implications of Rising Premiums on Access to Health Care* (August, 2003) GAO-03-336.

access among other vulnerable populations, such as Medicaid patients.

- e. *Use of current source of data to capture the magnitude of the access problem in real time.* The GAO accorded no weight to current sources of data which reflect the magnitude of impairment of patient access today.

E. The Current Liability Crisis and Patient Safety

1. Quality of care improves when there is greater access to physicians.
2. A culture of safety requires a legal environment that encourages professionals and organizations to work together to identify problems in providing care, evaluate the causes, and use that information to improve care for all patients.
3. The current litigation system does little, if anything, to help improve our health care system. But it does plenty to threaten it, including:
 - a. Encouraging defensive medicine.
 - b. Creating an almost lottery mentality throughout the nation's court system.
 - c. Enriching certain trial lawyers at the expense of patients and physicians.
4. The Harvard Medical Practice Study found that "one malpractice claim was filed by a New York patient for every 7.5 patients who suffered a negligent injury."¹¹⁷ A critique of the study concluded that "a substantial majority of malpractice claims filed are not based on actual provider carelessness or even iatrogenic injury." This means that negligence had occurred in only one-sixth of the matched tort claims.¹¹⁸ The results of the study are also questionable because although the two reviewing physicians were trained for the project, they did not necessarily specialize in the care areas that they reviewed. There was also a high rate of disagreement between the two physicians as to whether an adverse event was, in fact, a negligent adverse event.

One of the authors of the Harvard Study, Troyen A. Brennan and two colleagues, later conducted another study released in 1996. The follow-up study was conducted because the authors acknowledged the original study "lacked information on the eventual outcomes of the cases."¹¹⁹ In the 1996 study, researchers concluded that the only significant predictor of payment to medical malpractice plaintiffs in the form of a jury verdict or a settlement was disability, and *not* the presence of an adverse event due to negligence.¹²⁰ In other words, the severity of a patient's disability,

¹¹⁷ A.R. Localio, A.G. Lawthers, T.A. Brennan, N.M. Laird, L.E. Hebert, L.M. Peterson, J.P. Newhouse, P.C. Weiler & H.H. Hiatt, *Relation between malpractice claims and adverse events due to negligence: Results of the Harvard Medical Practice Study III*, 325 N. ENG. J. MED. 245, 245-51 (1991).

¹¹⁸ HARVARD MED. PRACTICE STUDY, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK (1990).

¹¹⁹ Troyen A. Brennan, Colin M. Sox & Helen R. Burstin, *Relation between Negligent Adverse Events and the Outcomes of Medical-Malpractice Litigation*, 335 N. ENG. J. MED. 1963, 1963 (1996).

¹²⁰ *Id.* at 1965.

regardless of any adverse event due to negligence, was predictive of payment.

The study's authors found that "serious injuries can lead to settlements even when there is no negligence, as happened in one case involving a neurologic injury that followed a vascular procedure. In that case, the patient's injuries were so serious that the insurer thought the jury would compensate the patient, even though the medical care met the expected standard."¹²¹ Brennan *et al.* discuss other cases that involved settlement payments to plaintiffs simply because the physicians in question would have made poor witnesses. In addition, the authors point out that in cases where there was no evidence of negligence, 43 percent of claims resulted in payment for the claimant. Finally, he questions "whether tort law is the most effective system of compensating injured patients and creating rational mechanisms of preventing injuries."¹²²

5. In a more recent article published in the *New England Journal of Medicine*, Brennan questions the conclusions of the Institute of Medicine report "To Err is Human" (the "IOM Report") that discusses the high rate of deaths in hospitals each year due to medical errors. Brennan highlights the lack of determination of preventable error as the primary reason for questioning the IOM's statements regarding the incidence of injuries.¹²³

Keep in mind that the IOM Report did not undermine or attack physicians themselves; indeed, it is entitled "To Err Is Human." Instead it points the finger at the systems that can cause problems in patient care. The report recommends that rather than focusing on a "bad apple" problem, the focus should shift to examining elements of the health system. This could take the form of something as simple as automated medication order entry systems, enabling physicians to rely less on memory.¹²⁴

Brennan further emphasizes the improvements that are being realized in patient safety. In fact, Brennan finds that systems improvements and other quality activities have led to increased safety and better patient outcomes.¹²⁵

6. Other research confirms these conclusions. McDonald *et al.* find that the underlying studies of the IOM report were "observational," not intended "to describe causal relationships." The authors state "The Harvard study includes no information about the baseline risk of death in these patients or information about deaths in any comparison group. Therefore, it cannot be determined whether adverse events are correlated with, let alone whether they cause, death." The authors comment that "reliance on studies without controls to make headline claims about huge numbers of preventable deaths was one error it did not catch."¹²⁶

¹²¹ *Id.* at 1966.

¹²² *Id.* at 1967.

¹²³ Troyen A. Brennan, M.D., J.D., M.P.H., *The Institute of Medicine Report on Medical Errors – Could It Do Harm?*, 342 N. ENG. J. MED. 15, 1123-1125 (2000).

¹²⁴ COMM. ON QUALITY HEALTHCARE IN AM., INST. OF MED., *To Err is Human*, Executive Summary (Linda T. Kohn et al. eds., National Academy Press 2000).

¹²⁵ Brennan, *The Institute of Medicine Report on Medical Errors – Could It Do Harm?*, *supra* note 115.

¹²⁶ Clement J. McDonald, Michael Weiner & Siu L. Hui, *Deaths Due to Medical Errors Are Exaggerated in Institute of Medicine Report* (July 5, 2000), 284 J. OF THE AM. MED. ASS'N, 93.

Consider also the comments of another researcher. Dentzer finds "First, in the vast majority of the coverage, there was an undue focus on the numbers of likely deaths from medical errors, and this tended to give the projections a misleadingly totemic significance. Second, much of the news media simply equated medical errors with malpractice--perpetuating the notion that most of the bad stuff going on in medicine can be attributed to the negligence of incompetent professionals. Third, many journalists never moved beyond this blame game to a broader understanding that many errors result from systems failures, which are amenable to systemic solutions. Collectively, these media mistakes and misjudgments may have led the public to draw false or simplistic conclusions about a serious problem that is already proving difficult to fix."¹²⁷

7. AMA policy is to be part of the solution, not the problem. The AMA believes that one preventable error is one error too many. In fact, the AMA helped launch the National Patient Safety Foundation in 1996, well before publication of the IOM report. The Foundation's approach is to create a culture of cooperative learning and mutual improvement, as opposed to a culture of shame and blame.
8. Opponents of liability reform claim that 5% of physicians are responsible for 54% of malpractice in the U.S. Public Citizen's analysis of the National Practitioner Data Bank, which covers malpractice judgments and settlements since September 1990, found that 5.1% of physicians have paid two or more malpractice awards to patients. According to Public Citizen's analysis, these physicians are responsible for 54% of all payouts reported to the Data Bank. Public Citizen finds that of these, only 7.6% have ever been disciplined by state medical boards. Public Citizen further asserts that even physicians who have made 5 payouts have been disciplined at only a 13.3% rate.¹²⁸

Rebuttal: First of all, the NPDB collects both settlements and verdicts. It goes without saying that a settlement is not an admission of negligence. In fact, many meritless cases are settled because of the risk a jury may make a huge award on the basis of a desire to compensate a patient without regard to whether negligence occurred. In other words, the jury provides for adverse outcomes that had nothing to do with malpractice. Yet these settlements generate reports to the NPDB and go into the count of incidents of malpractice.

In addition, the validity and reliability of the NPDB is questionable according to a study conducted by the General Accounting Office.¹²⁹ Therefore, any analysis performed using the NPDB database should be scrutinized. Further, these data and related reports do not account for specialties commonly known for high risk procedures. Thus, specialties such as orthopedics, ob/gyn and neurosurgery are not identified and analyzed appropriately.

Finally, it is common knowledge that the count of reported cases in the

¹²⁷ Susan Dentzer, *Media Mistakes in Coverage of the Institute of Medicine's Error Report*, EFFECTIVE CLINICAL PRACTICE, (Nov./Dec. 2000), available at <http://www.acponline.org/journals/ecp/novdec00/dentzer.htm>.

¹²⁸ Pub. Citizen, *Bush's Medical Malpractice Disinformation Campaign: A Rebuttal to the HHS Report on Liability* 21 (Jan. 2003), at http://www.citizen.org/documents/Bush's_Disinformation_Campaign_Report.pdf.

¹²⁹ U.S. GEN. ACCOUNTING OFFICE, *National Practitioner Data Bank: Major Improvements Are Needed to Enhance Data Bank's Reliability* (Nov. 2000) GAO-01-130.