

# Alliance of Specialty Medicine

A Coalition of 13 Medical Societies Representing Over 160,000 Physicians in  
United States



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Statement  
of the  
Alliance of Specialty Medicine  
Before the  
House Energy and Commerce Health Subcommittee  
On the Subject Of  
“Assessing the Need to Enact Medical Liability Reform”  
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American Academy of Dermatology Association, American Association of Neurological Surgeons/  
Congress of Neurological Surgeons, American Association of Orthopaedic Surgeons,  
American College of Cardiology, American College of Emergency Physicians,  
American College of Osteopathic Surgeons, American College of Radiology,  
American Gastroenterological Association, American Society for Clinical Pathology,  
American Society of Cataract and Refractive Surgery, American Urological Association,  
National Association of Spine Specialists, and Society of Thoracic Surgeons.

## **Assessing the Need to Enact Medical Liability Reform**

Chairman Bilirakis, and Members of the Subcommittee, the Alliance of Specialty Medicine, a coalition of 13 medical organizations representing over 160,000 specialty care physicians in the United States, appreciates the opportunity to comment on the impact that our current medical litigation system is having on patient access to medical care and the need to enact medical liability reform legislation. The Alliance would also like to take this opportunity to thank you for the leadership that you and your committee have shown on this issue. We believe that the reforms contained in HR 5, the Help, Efficient, Accessible, Low Cost, Timely Health Care Act, which were approved by your subcommittee last year, will go a long way to solve the current medical liability crisis.

And it is a crisis. The media now report on a daily basis that the situation has become so critical that many physicians are forced to limit services, move to other states where the medical liability system is more stable, or retire altogether. Much of the “face” of this crisis has centered around the great difficulties that pregnant women are having in finding obstetricians to deliver their babies, but the simple truth is that this is a problem that potentially affects all of our citizens: the mother whose little boy has fallen off of the jungle gym and needs an orthopaedic surgeon to fix his broken arm; the teenager who has been in a serious car accident and needs a neurosurgeon to treat his severe head injury; the woman who needs a pathologist to evaluate her Pap smear to screen for cervical cancer; the elderly man who has a poor heart and needs a cardiologist or cardio-thoracic surgeon to unblock a clogged artery or replace a failing valve; the woman who has a family history of breast cancer and needs a radiologist to perform a mammography to make sure she is cancer free; the business man who needs a gastroenterologist to treat his ulcer; the man who needs a urologist to screen for prostate cancer; and the list goes on and on.

### **Cause of the Crisis: The Current Medical Litigation System is Out of Control**

The root cause of this problem is quite simple: the unrestrained escalation of jury awards and settlements, in even a small number of medical liability cases, is driving up doctors’ liability insurance premiums and is forcing some insurance companies out of business altogether. This problem is making it difficult, and sometimes impossible, for doctors to obtain affordable liability insurance so they can remain in practice. Adding to this is the fact that doctors distrust and fear the medical litigation system, causing them to alter the way they deliver medical care to their patients, and in some cases this fear is causing doctors to cease practicing altogether. There is a wide body of evidence to substantiate these conclusions:

#### **➤ Medical Liability Awards are On the Rise**

Medical liability awards have been growing steadily, and according to Jury Verdict Research data, from 1994 to 2000 the median jury award rose by 176 percent. The number of mega-verdicts is also on the rise, with the proportion of million dollar plus awards increasing dramatically over this same time period. In 1996, 34 percent of all jury awards exceeded \$1 million. Four years later, the number of million dollar awards increased to 52 percent, and the average jury award in 2000 was nearly \$3.5 million.

### ➤ **Medical Liability Insurance Premiums are Skyrocketing**

It is clear that the increasing number of multi-million dollar jury awards is driving up the costs of medical liability insurance and insurance companies are now paying out approximately \$1.40 for every premium dollar collected. Obviously, this is not sustainable, and this trend is therefore forcing insurance companies, which must set their rates based on anticipated future losses, to steeply increase doctors' medical liability premiums to ensure adequate reserves to pay future judgments. As a result, over the past several years, physicians across the country have faced double, and sometimes triple, digit rate increases. Alliance members, including high-risk specialists like neurosurgeons, orthopaedic surgeons and emergency physicians, have been disproportionately affected by these premium increases. For example:

- According to a national survey of neurosurgeons, between 2000 and 2002 the national average premium increase was 63%, from \$44,493 to \$72,682. In some states, neurosurgeons are now paying medical liability insurance premiums in excess of \$300,000 per year.
- Utah orthopaedic surgeons have seen medical liability rate increases of 60% since last year and in Texas they are rising by more than 50 percent. In Pennsylvania, a survey conducted in June 2002 revealed rate increases as high as 59 percent. In other areas of the country, orthopaedic surgeons are finding that their premiums have risen by over 100 percent, even if they have never had a claim filed against them.
- Over the past several years, over 95 percent of emergency medicine physicians have experienced medical liability premium increases, with approximately 69 percent facing increases between 60 to 500 percent. This is attributed to the fact that emergency medicine physicians are almost always named in any litigation that arises from a patient encounter that begins in the emergency department. Since most hospital admissions now come through the emergency department, these doctors are experiencing steep premium rises even though the lawsuits against them may have no merit and result in either dismissal or a defendant's verdict.
- Even those specialists who are not in high-risk categories are affected by this upward trend in premium costs. For example, 80 percent of recently surveyed dermatologists reported that their premiums increased last year and those dermatologists who were insured by a state plan were paying nearly double what their colleagues were paying in the private market.

### ➤ **Medical Liability Insurance is Unavailable**

Not only are medical liability insurance premiums rising at astronomical rates, but many doctors are also finding it increasingly difficult to obtain medical liability insurance at any price. Citing the increases in liability losses, several companies, including, St. Paul, MIXX, PHICO, Frontier Insurance Group and Doctors Insurance Reciprocal, have recently stopped selling medical liability insurance or have gone out of business, leaving thousands of doctors scrambling to find replacement coverage. Of the companies that have remained in the market, many are no longer renewing insurance coverage for existing policyholders and/or they are not issuing new insurance policies to new customers. This is particularly true in states that have no

effective medical liability reform laws in place, where, for instance, in Mississippi fifteen insurers have left the market in the past five years. Alliance members have witnessed the impact of this problem first hand. For example:

- In 2002, nearly 40 percent of orthopaedic surgeons in Pennsylvania were not able to renew their medical liability coverage with the same carrier and 31 percent did not find new coverage. Close to 50 percent of Pennsylvania orthopaedic surgeons have reported that their liability policies will not be renewed for 2003.
- In 2002, 15 percent of dermatologists experienced difficulties securing their liability insurance. In some cases, dermatologists in solo practice who have never even been sued were forced to turn to the state for coverage because the remaining insurers in their area made a blanket decision to no longer insure solo practice physicians, regardless of specialty.
- Today in Mississippi, the only way a neurosurgeon can even be considered for coverage is if he or she joins an existing group that already is covered by the state medical society's insurance company. The other two companies providing insurance coverage in Mississippi will not issue new policies for neurosurgeons at all. In addition, neurosurgeons in Florida have been unable to obtain medical liability insurance at any cost, forcing them to "go bare" or self-insure.
- Recently one internationally-recognized pathologist, who has never had a claim filed against him, was turned down by three insurers and a fourth offered him a policy that was simply too expensive.
- Three of four insurance carriers with the largest market share in Missouri have stopped writing policies in that state. This means that physicians can often obtain a quote from only one company. For example, one group of 12 cardiologists could get only one quote with an 80 percent increase for 2003.

### ➤ **Medical Litigation System Breeds Fear in Doctors**

Given the litigious nature of our society, every physician faces the reality that he or she may at some time be named in a medical liability lawsuit, whether meritorious or not, and the current medical litigation system breeds fear in all doctors. This fear of litigation, particularly among high-risk specialists, is a contributing factor in doctors' decisions to change the way in which they are practicing medicine. Data from a 2002 Harris Interactive study conducted for the Common Good, a bipartisan legal reform organization, validates this point. According to the data, nearly all physicians feel that unnecessary care is provided because of fear about litigation. To protect themselves in the event that they might be sued:

- 91 percent of doctors are ordering more tests than are medically needed;
- 85 percent of doctors refer patients to specialists more often than is necessary; and
- 73 percent of doctors suggest that patients have invasive procedures to confirm medical diagnoses

The report aptly concludes: “From the increased ordering of tests, medications, referrals, and procedures to increased paperwork and reluctance to offer off-duty medical assistance, the impact of the fear of litigation is far-reaching and profound.”

### **Result of the Crisis: Patient Access to Medical Care is in Jeopardy**

There are many casualties of the current medical liability crisis – but those affected the most are patients. Because the medical litigation system is broken, across the nation patients are finding it harder and harder to get access to the care they need, when they need it. As medical liability insurance becomes unaffordable or unavailable, more and more doctors, especially specialists, are no longer performing high-risk procedures, or they are being forced to move their practices to states with stable medical liability systems, or they are simply retiring from medical practice -- all of which seriously impede patient access to care. Once gone, these doctors are hard to replace, and those states currently facing a medical liability crisis are having a difficult time recruiting new physicians to their communities adding to the shortage of doctors in many parts of the country. The combination of these factors is also now severely straining our nation’s already stressed emergency medical system, as patients who have no access to doctors inevitably end up on the emergency department’s doorsteps, further exacerbating the hospital emergency department overcrowding problem. A growing list of examples demonstrates just how serious this crisis is becoming:

#### **➤ Doctors are No Longer Performing Complex and High-Risk Medical Procedures**

- According to a nationwide survey conducted last year, 43 percent of neurosurgeons reported that they are no longer performing high-risk surgery such as treating brain aneurysms, removing brain and spinal tumors, or complex spinal surgery. In addition, many neurosurgeons are no longer serving on-call to hospital emergency departments or operating on children.
- A recent survey found that 55 percent of orthopaedic surgeons nationwide have reduced the type of operational procedures they perform, with 39 percent avoiding performing spine surgery and 48 percent altering their practice in other ways, including eliminating emergency room call or trauma call.
- The elderly are particularly affected, as decreases in reimbursements for complex medical procedures have declined to the point where Medicare no longer even covers the cost of medical liability insurance. Specialists with a high volume of Medicare patients, such as cardiologists and cardio-thoracic surgeons, and their patients who need high-tech, lifesaving heart therapy, will feel the effects the most.

#### **➤ Doctors, Trauma Centers and Other Medical Providers are Closing their Doors**

- In the case of neurosurgery, in 2001 alone, 327 board certified neurosurgeons retired, representing an alarming 10 percent of the neurosurgical workforce in the United States. Recently, the only neurosurgeon practicing at Cottonwood Hospital in Salt Lake City, Utah quit practicing following a steep insurance premium increase.
- Recent press accounts are replete with stories about the closure of trauma centers in Pennsylvania, West Virginia, Nevada, Mississippi, Missouri and Florida because of a

shortage of orthopaedic surgeons, neurosurgeons and other specialists available to provide emergency medical care. Chicago's trauma centers are also now vulnerable to closing or downgrading their status.

- In the last 18 months, nearly 700 mammography facilities have closed nationwide. The continued and steady closing of mammography facilities throughout the country has led to increased waiting times for women seeking both screening mammograms and diagnostic mammograms. The longer waiting times are now on the brink of affecting clinical outcomes for those women who must wait for a possible diagnosis of breast cancer.

#### ➤ **Doctors are Moving to States with a More Favorable Medical Liability Climate**

Every state that is experiencing a medical liability crisis reports that doctors are leaving in droves in search of another location in which to practice where the medical litigation climate is more favorable. The list of states experiencing the exodus of doctors continues to grow, and as with other elements of this crisis, specialists are most likely to "hit the road" in search of a safe haven state. For instance:

- Pennsylvania has been especially hard hit, and some counties no longer have any practicing orthopaedic surgeons. For example, Bedford County's only orthopaedic surgeon left the state in October 2001, and Pike and Monroe Counties are down from nine to five orthopaedic surgeons. Huntingdon County has just one orthopaedic surgeon remaining to take trauma call at two hospitals. The situation is the same in West Virginia, and a number of orthopaedic surgeons either have left the state or are scaling back their practices. At the end of 2002, five orthopaedic surgeons in Parkersburg moved their practice to Ohio.
- Neurosurgery's survey data show that nearly 19 percent of practicing neurosurgeons either plan to, or are considering, moving their practice to another state where the medical liability costs are relatively stable. Mississippi, for instance, has lost 35 percent of its neurosurgeons in the past two years, and the flight of neurosurgeons from Pennsylvania and West Virginia mirrors the Mississippi experience.

#### ➤ **The State of America's Health Now and in the Future is at Risk**

The combination of all the above factors is clearly placing the health of our nation's citizens at considerable risk. Because of the medical liability crisis, more and more people are finding it difficult to get the specialized medical attention they need, when they need it. This is causing a national health care emergency. Thus:

- When patients can't find a specialist close to home, they must sometimes travel great distances, often going out of state, to get their medical care.
- When fewer specialists are available, hospital emergency departments and trauma centers must shut their doors, and patients with emergency medical conditions lose critical life-saving time searching for an available emergency room.

- When specialists stop performing high-risk medical services, patients are often referred to academic medical centers, and these medical facilities are already overburdened and are ill equipped to handle the increase in patient volume.
- When specialists retire at an early age, the looming shortage of doctors is accelerated, which, if left unchecked will place additional burdens on the health care system as the population ages and requires more medical care from an increasingly shrinking pool of practicing doctors.
- When the practice of medicine becomes so uninviting, fewer and fewer of our nation's best and brightest will want to become doctors, thus jeopardizing our country's status as one of the finest health care systems in the world.

### **Scope of the Crisis: A National Problem that Requires a Federal Solution**

Those who oppose federal legislation to address this crisis cite various reasons to support their contention that this is not a national problem that merits a federal solution. In particular, they note that the regulation of insurance and health care are generally state issues, and therefore principles of Federalism preclude federal legislation to address this problem. They are, however, wrong. The undisputed truth is that this problem now touches nearly every American and a federal solution is therefore a national imperative. As the following demonstrate:

#### **➤ Nearly All States are Facing a Medical Liability Crisis**

The AMA has identified 12 states that are in a medical liability crisis for all physicians. These include: Florida, Georgia, Mississippi, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Texas, Washington and West Virginia. However, for many high-risk specialties, like neurosurgery and orthopaedic surgery, the situation is even more widespread than the AMA reports. A 2002 national survey of neurosurgeons identified 25 states that are in a severe medical liability crisis, with an additional 12 states in potential crisis. In addition to those identified by the AMA, the crisis states for neurosurgery include: Alabama, Arkansas, District of Columbia, Illinois, Kentucky, Missouri, New Hampshire, North Carolina, South Carolina, Rhode Island, Tennessee, Utah and Virginia.

#### **➤ Every American Pays for the Costs of the Current Medical Litigation System**

According to the U.S. Department of Health and Human Services (HHS), in its report entitled, "Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing our Medical Liability System," the current medical litigation system imposes enormous direct and indirect costs on the health care system. These costs are passed on to all Americans in the form of increased health insurance premiums, higher out-of-pocket medical expenses and higher taxes. The report estimates that enacting federal medical liability legislation could save between \$60-108 billion in health care costs each year. These savings would in turn lower the cost of health insurance and make health care more affordable and available to many more Americans.

➤ **Federal Medical Liability Reform Will Save the Federal Government Money**

Each year, the Federal Government pays for the increased costs associated with the current medical litigation system through various health care programs, including Medicare, Medicaid, Community Health Centers and other health care programs for veterans and members of the armed forces. The Department of Health and Human Services estimates that the direct cost of medical liability insurance coverage and the indirect cost of defensive medicine, increases the Federal Government's costs of these health programs by \$28.6 to \$47.5 billion each year. In the above referenced report, HHS estimates that if reasonable limits were placed on non-economic damages, it would reduce Federal Government spending by \$25.3 to \$44.3 billion per year. The Congressional Budget Office (CBO), in its cost estimate of HR 4600, the HEALTH Act of 2002, confirms that passage of federal medical liability reform legislation that includes a cap on non-economic damages will increase federal tax revenues, and at the same time reduce the costs of federal health care programs.

➤ **States Face Significant Barriers to Implementing Medical Liability Reforms**

Many states face barriers – some legal and some political -- to enacting effective medical liability reform laws. Some states, including Texas, Florida, Ohio and Pennsylvania, have enacted medical liability reform laws, only to have their state Supreme Courts strike them down as unconstitutional. New laws passed by Mississippi and Nevada face certain court challenge, and it will be years before it is determined whether these laws pass state constitutional muster. Finally, in some other states, the issue has become a political one, effectively killing any chances for passage. As a consequence, despite the increasing medical liability crisis in many of these states, they are effectively powerless to act to effectively solve the problem.

**Solution to the Crisis: Medical Liability Reform Legislation Patterned After California's MICRA**

Fortunately, Congress does not need to start from scratch and identify and implement a solution that is untested. Faced with a similar crisis in the early 1970's, the state of California, with bipartisan support, enacted the Medical Injury Compensation Reform Act or MICRA. The key elements of MICRA include:

- Providing full compensation for all economic damages, including medical bills, lost wages, future earnings, custodial care and rehabilitation;
- Placing a fair and reasonable limit of \$250,000 on non-economic damages, such as pain and suffering;
- Establishing a reasonable statute of limitations for filing a lawsuit;
- Allowing for periodic payments of damages rather than lump sum awards; and
- Ensuring that the bulk of any award goes to the plaintiffs, not attorneys

The clear and simple truth is that MICRA works. For nearly three decades, this law has ensured that legitimately injured patients get unfettered access to the courts and receive full compensation for their injuries, while at the same time providing stability to the medical liability insurance market to ensure that doctors can remain available to care for their patients. In a similar manner, the HEALTH Act will ensure that patients and doctors nationwide will reap the benefits of this rational approach to solving the professional liability crisis.

Consider the following points about the effectiveness of MICRA:

➤ **MICRA Fully Compensates Injured Patients**

First and foremost, under MICRA, patients receive full compensation for legitimate injuries resulting from medical negligence. Detractors of federal reform legislation are attempting to obfuscate the facts by scaring the public and policymakers into believing that injured patients will only receive a maximum of \$250,000 to compensate them for their injuries. This is simply not the case. Patients receive full compensation for all of their quantifiable needs, with up to an additional \$250,000 for non-economic damages, such as pain and suffering. To demonstrate this fact, the Californians Allied for Patient Protection recently compiled a sample of total awards (including both economic and non-economic damages) provided to injured patients. For example:

December 2002  
**\$84,250,000 total award**  
Alameda County  
5 year-old boy with cerebral palsy and quadriplegia because of delayed treatment of jaundice after birth.

October 2002  
**\$59,317,500 total award**  
Contra Costa County  
3 year-old girl with cerebral palsy as a result of birth injury.

July 2002  
**\$12,558,852 total award**  
Los Angeles County  
30 year-old homemaker with brain damage because of lack of oxygen during recovery from surgery.

November 2000  
**\$27,573,922 total award**  
San Bernardino County  
25 year-old woman with quadriplegia because of failure to diagnose a spinal injury.

➤ **MICRA Significantly Minimizes Premium Increases**

Opponents of reform cite statistics that over the past several years, premiums for doctors in California have also been rising; thus proving that MICRA does not have any impact in holding down the costs of medical liability insurance. While it is true that premiums are on the rise in nearly all states, including California, the rate of increase of premiums for California doctors is significantly lower than in other states, and over time, MICRA has, in fact, stabilized medical liability insurance premiums as compared to the rate of increase in the rest of the country. As the following chart demonstrates, from 1976 to 2000, premiums for physicians in California have risen only 167 percent as compared to an increase of 505 percent for the entire United States.

## Premium Growth: California vs. U. S. Premiums 1976-2000

U.S. + 505% Increase

CA + 167% Increase

Source: NAIC Profitability Study, 2000

Data collected from high-risk medical specialties from 2000 to 2002 also validate these trends. For example, according to a nationwide survey of neurosurgeons, the national average premium increase for California neurosurgeons was 39 percent as compared to 63 percent for neurosurgeons in the entire country. In addition, the same survey clearly demonstrated that the rate of increase for an individual neurosurgeon in Los Angeles, California, as compared to other neurosurgeons who practice medicine in crisis states where there are no reforms in place, is significantly lower. The average rate of increase for the neurosurgeons in these non-reform states was 143 percent as compared to just 8 percent in Los Angeles, CA.

State/City	2000	2002	Percentage Increase
<b>Los Angeles, CA</b>	<b>\$ 48,000</b>	<b>\$ 52,000</b>	<b>8%</b>
West Palm, FL	58,000	210,000	262%
Cleveland, OH	75,675	167,941	122%
Oaklawn, IL	110,000	282,720	157%
Philadelphia, PA	90,000	190,000	111%
New York, NY	154,890	251,126	62%

Source: American Association of Neurological Surgeons /Congress of Neurological Surgeons  
Nationwide Survey April 2002

The Alliance does acknowledge that despite the successful reforms contained in MICRA, the average medical liability claim in California has outpaced the rate of inflation. This is in large part due to the fact that economic damages are not limited under MICRA and have grown as a component of medical liability claims. Notwithstanding this, however, the undisputed fact remains that MICRA prevents runaway juries from awarding outrageous awards for subjective, arbitrary and often unquantifiable non-economic damages, which allows insurance companies to adequately predict future lawsuit awards, bring stability to the health care delivery system.

## ➤ **Federal Government Validates that MICRA Works**

U.S. Government experts agree that MICRA does in fact hold down the costs of medical liability insurance, and over the years there have been a number of studies that have identified MICRA's \$250,000 cap on non-economic damages as a critical element in stabilizing premium costs. For example, dating back to September 1993, the former U.S. Office of Technology Assessment (OTA), in a report entitled, "Impact of Legal Reforms on Medical Malpractice Costs," concluded that caps on damages were consistently found to be an effective mechanism for lowering medical liability insurance premiums. Most recently, the previously referenced HHS report, "Confronting the New Health Care Crisis" and the CBO cost estimate report of the HEALTH Act, came to the same conclusion.

## **Justification for Federal Reform Legislation: Americans Overwhelmingly Support a MICRA-Style Solution**

Americans are becoming acutely aware of the impact that this crisis is having on our nation's health care system, and overwhelmingly favor having Congress pass legislation to reform the current medical liability system and create one that balances the rights of patients to seek and obtain appropriate compensation for injuries caused by medical negligence against the right of all our citizens to have continued access to medical care. Two recent polls clearly demonstrate this support. In January 2003, Gallup conducted a poll on this issue and found the following:

- Americans believe that the medical liability insurance issue is either a major problem (56%) or a health care crisis (18%);
- 72 percent favor passing a law that would limit the amount that patients can be awarded for their emotional pain and suffering; and
- 57 percent responded that they think patients bring too many lawsuits against doctors

This Gallup poll confirms the findings of last year's Wirthlin Worldwide study conducted for the Health Care Liability Alliance (HCLA), which found that:

- 78 percent of Americans are concerned that skyrocketing medical liability costs could limit their access to care;
- 73 percent favor a federal law that guarantees injured patients full payment for lost wages and medical costs and reasonable limits on awards for "pain and suffering" in medical liability cases; and
- 48 percent believe the number of medical liability lawsuits against doctors is higher than justified

## **Conclusion**

We have reached a very important juncture in the evolution of the U.S. health care system. At a time when lifesaving scientific advances are being made in nearly every area of health care, patients across the country are facing a situation in which access to health care is in serious jeopardy. Thus, as the Congress deliberates the many facets of this issue, the Alliance urges you to continue to keep in mind that this issue is not about doctors, lawyers and insurance companies. Rather, it is about patients and their ability to continue to receive timely and consistent access to quality medical care. By reforming the medical litigation system, the crisis will ultimately be

abated. Patients are calling for reform. Doctors are calling for reform. President Bush is calling for reform. And the Alliance urges the Congress to heed these calls and, at a minimum, pass the HEALTH Act so all Americans are able to find a doctor when they most need one. Ultimately, when the question “Will your doctor be there?” is asked, the answer must be an unqualified yes.

Thank you for considering our comments and recommendations. The Alliance of Specialty Medicine, whose mission is to improve access to quality medical care for all Americans through the unified voice of specialty physicians promoting sound federal policy, stands ready to assist you on this and other important health care policy issues facing our nation.