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## Policy Perspective

# Resuscitating Health Care

March 7, 2003

Every day, medical doctors give their patients the greatest gifts: hope and life. They mend our fractured bodies and our wounded spirits. They heal those who are suffering. Today, medical doctors are helping to heal another cause of suffering by leading the reform of our professional liability system.

Physicians, nurses, health care professionals, and their patients are leading this reform effort by telling politicians, the media, and the American people about the devastating impact of exploding liability costs on the quality, availability, and affordability of health care.

The medical liability system is a critically injured patient. But after being prepped for surgery in the House Energy and Commerce and Judiciary committees, the House will soon pass legislation, H.R. 5, to treat it. And with Dr. Bill Frist as Senate Majority Leader, the chances of the Senate agreeing to send this legislation to President Bush, who is anxious to sign it, are stronger than ever.

### The Disease

While medical doctors care for the sick and the injured with skill and dedication, the multi-million dollar lawsuit industry represents something altogether less creative, less valuable to society, and of absolutely no help in sustaining life or relieving patient suffering. The cost of lawsuits has triggered massive increases in the cost of professional liability insurance in many specialties. America faces a nationwide crisis that isn't just driving good doctors out of the profession, but also the best and brightest of our young people out of careers in medicine. It is devastating the quality and availability of care for millions of patients.

For doctors in all fields, professional liability insurance premiums are increasing at the highest rate in decades. The driving forces are enormous jury awards and outrageous settlement demands. According to a March 2002 study by Jury Verdict Research, the national median malpractice award is increasing 43% per year. This is unsustainable. The number of malpractice suits per doctor increased 25% in the 1990s. Today, the average physician faces a new lawsuit **every single year**.

A visitor from another country who learns of these data and knows nothing about the U.S. medical system might conclude that Americans must be very unhealthy. With so many lawsuits and a rising tide of damage awards there must be a terrible downward trend in the quality of care and patients must be suffering as never before. Certainly Americans must be dying at horrific rates as all of these incompetent doctors botch so many procedures.

The evidence shows just the opposite. Americans are healthier than ever before, enjoying the longest life expectancy in history. In the 20<sup>th</sup> century, life expectancy increased 30 years for the average American, and it continues to lengthen. The National Center for Health Statistics predicts that the **average** American born in 2010 will live to nearly 80—another all-time record high.

And let's be clear—this powerful trend of improvement in health and longevity is not just benefiting the elderly. In the past 50 years, according to a recent report from the Department of Health and Human Services, death rates among young people up to age 24 have fallen by half. Thanks in large part to American medicine, the rate of infant mortality, which has plunged more than 75 percent since 1950, continues its historic decline. Select almost any measure of health you wish—infant mortality rates, rates of mothers dying during childbirth, death rates from heart disease, stroke—and what you find is a powerful long-term trend of healthier Americans.

And yet this progress is now seriously threatened. Rising litigation costs, a growing incidence of lawsuits, greater damage awards, and more exorbitant settlement demands are placing an unsustainable legal tax on American healthcare.

For this reason, the House Energy and Commerce and Judiciary committees conducted hearings to explore the depths of this problem nationwide. The Congress has found a grave threat to patients' ability to get the care that they need:

- On June 30, 2002, Methodist Hospital in South Philadelphia, which had been delivering babies since 1892, closed its maternity ward and stopped delivering babies due to the rising costs of medical liability insurance.
- Last July in Nevada, physicians gave new meaning to the movie title "Leaving Las Vegas." Liability costs forced Southern Nevada's only trauma center to close its doors, temporarily leaving Las Vegas as the only city of its size in the entire country without such a life-saving facility.
- More recently, surgeons in Wheeling, West Virginia walked off the job to protest the crushing burden of liability insurance. One of the surgeons, Dr. Gregory Saracco, told CNN that he had to borrow money twice last year to afford his insurance bills. His coverage will cost \$100,000 this year in West Virginia, where average physician wages are among the lowest in the nation.

## The Cure

Congress will act to an end this crisis so that patients are not denied the care they need. Doctors who want to serve their fellow citizens will no longer find it financially impossible to do so because of out-of-control liability insurance rates.

In fact, the House legislation is based on the solution enacted in California by a Democratic legislature and a Democratic Governor, Jerry Brown: the Medical Injury Compensation Reform Act of 1975, or MICRA. This legislation was first introduced by Chairman Cox in the 103<sup>rd</sup> Congress in 1993, and has been passed three times by the House—only to be stalled by Democrats in the Senate. In the current Congress, it is sponsored by Rep. Jim Greenwood (R-PA), and is titled the Help Efficient, Accessible, Low Cost, Timely Health Care (HEALTH) Act. The HEALTH Act includes the most successful provisions of MICRA and additional remedial provisions based on the past quarter century of experience.

MICRA has successfully limited increases in physician liability costs. Measured in constant dollars, the average California liability insurance premiums actually fell by more than 40% from 1976 to 2001. Just like MICRA, the HEALTH Act:

- Allows unlimited recovery of economic losses; that is, any medical cost, rehabilitation expenses, future lost wages, or anything else that can be measured in dollars. And it allows up to an additional quarter million dollars in non-economic damages—for “pain and suffering” or “injured feelings.”
- Puts reasonable limits on the amount of dollars that lawyers can take out of an injured patient’s recovery.
- Permits payment of future damages based on actual harm, rather than requiring a lump sum payment relying on uncertain forecasts of future harm.

Congress has built upon its experience in the quarter century since passage of MICRA to include additional provisions in the HEALTH Act to rein in reckless punitive damages and improve the availability of high quality health care throughout the country:

- **Sensible standards for punitive damages.** California’s law contains a laundry list of vague and ill-defined offenses for which punitive damages can be awarded—and the standards for punitive damages are conflicting. There is even greater conflict among all 50 states. The HEALTH Act clarifies that the standard for punitive damages is either malicious intent or deliberate failure to avoid unnecessary injury. In other words, a doctor who makes a completely innocent mistake may be spared punitive damages in addition to all the other damages if a jury finds the mistake was unintentional.
- **Punitive damages must bear some relationship to actual harm caused.** Under the HEALTH Act, punitive damages can be up to two times the amount of economic damages, which are unlimited. The HEALTH Act doesn’t cap punitive damages; it does give them at least some mooring to earth.

- **No punitive damages if there are no actual damages.** Finally, the HEALTH Act stops the practice of lawyers using the court to “send a message” or to strike out against “the system” when there is no actual harm to any of the parties in the lawsuit. In those cases, no punitive damages can be awarded.

Rationalizing the use of punitive damages—which more than any other aspect of the civil justice system are responsible for our lawsuit lottery—brings us closer to a system where patient health is the number one concern.

### **Delivering Treatment**

The Association of Trial Lawyers of America and its 56,000 members stand athwart the cure for excessive litigation costs that would be delivered by the HEALTH Act. ATLA has convinced itself that the best place to make split-second medical judgments is in the courtroom—after months and years of depositions and interrogatories. They believe the phenomenon of billionaire lawyers is a reflection of social justice.

Notwithstanding ATLA rhetoric, America is poised to win the war against abusive lawsuits and skyrocketing medical costs that are a result of lawsuit abuse. In the ten years since the HEALTH Act was first introduced by Chairman Cox, its support has grown from a handful of cosponsors to the enthusiastic backing of the House and Senate Leadership and the White House. The efforts of its current lead sponsor, Rep. James Greenwood of the House Energy and Commerce Committee, and the Speaker of the House, Dennis Hastert, have earned the HEALTH Act designation as a “Speaker’s bill,” H.R. 5. The low bill number signals the importance that the House Leadership attaches to this critical reform.

The HEALTH Act is about ensuring that the U.S. health care system remains the best in the world. It is about controlling vexatious and wasteful lawsuits that have little to do with compensating victims, and everything to do with enriching an elite group of trial lawyers. It is high time for medical justice. Thankfully, that time has come.