

MEDICAL SOCIETY of the STATE OF NEW YORK

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Division of Governmental Affairs
MEMORANDUM IN OPPOSITION

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S.744 (FUSCHILLO)

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A.1056 (WEINSTEIN)

AN ACT to amend the civil practice law and rules, in relation to the limitations of time within which an action for medical, dental, or podiatric malpractice accrues

This bill would revise Section 214-a of the civil practice law and rules, the statute of limitations for medical, dental and podiatric malpractice actions, to make it a “discovery” statute. **As this measure would potentially lead to enormous increases in the cost of liability insurance at a time when no increases can be tolerated, the Medical Society of the State of New York strongly opposes this measure and urges its defeat.**

The effect of this drastic proposal would be to materially alter the statute of limitations in every single medical malpractice case. The statute of limitations would not begin to run until the plaintiff discovered the alleged negligent act —no matter how long into the future that may be. We are advised by the state’s leading medical liability insurance company that a Milliman actuarial study indicated that if this legislation were to be enacted, **medical liability premiums would need to be increased by 15.6%, perhaps even greater**. Any increase of this nature would prompt a very serious access-to-care problem throughout New York State.

It must be understood that New York physicians pay premium rates that are already among the very highest in the country, if not the highest. **Yet while many other states have passed legislation to reduce these costs, New York State has failed to enact legislation to address this problem.** In fact, legislation to significantly reduce the cost of medical liability insurance was a major component of Budget discussions just two years ago.

Liability premiums for New York physicians went up 55-80% from 2003 to 2008, went up an average additional 5% in 2010-11 policy year (for some physicians it was even significantly higher), and went up an additional 3% for the 2012-13 policy year. Many New York physicians pay liability premiums that far exceed \$100,000 and some even exceed \$200,000. For example, for just a single year of coverage, the cost of medical liability coverage for the 2011-12 policy year was:

- \$306,393 for a neurosurgeon in Nassau and Suffolk counties;
- \$171,275 for an Ob-GYN in Bronx and Richmond counties;
- \$116,989 for a general surgeon in Kings and Queens counties; and
- \$109,019 for an vascular surgeon or cardiac surgeon in Bronx and Richmond counties

Moreover, malpractice payouts in New York State continue to be far out of proportion to the rest of country. For example, in 2011, according to the Kaiser Family Foundation, New York State had by far and away the highest number of paid medical liability claims in the country (1,379), more than 50% greater than the next highest state, California (889), and nearly 80% greater than the state with the third highest number, Pennsylvania (767). <http://www.statehealthfacts.org/comparemactable.jsp?ind=436&cat=8>.

Kaiser statistics also showed that New York State had the highest cumulative medical liability payouts in 2011 (\$627,067,500), more than two times greater than the states with the next highest amounts, Pennsylvania (\$299,671,500), and more than three times greater than Florida (\$188,324,250), California (\$186,235,900) and Illinois (\$183,968,050).

<http://www.statehealthfacts.org/comparemactable.jsp?ind=437&cat=8>

These enormous costs are driven by an unpredictable medical liability adjudication system that numerous studies have concluded results in cases where awards are made despite the absence of any negligence whatsoever. Moreover, under the current system studies have shown that often those truly injured by negligence do not sue.

As a result of the randomness and unpredictability of the current medical liability adjudication system, physicians who treat the most high-risk patients are sued with astounding regularity in New York State. Every 5 years, 65% of our neurosurgeons are sued, as well as nearly 50% of our surgical specialists and OB-GYNs.

While approximately 2/3 of all medical liability cases brought result in no payment, even the costs of defending these cases are extensive and significantly add to the astronomical cost of medical liability insurance. For example, MLMIC spent over \$800,000,000 in the previous decade to defend physicians and hospitals on whose behalf no payment was ever made to the plaintiff.

There is no question that this legislation, if enacted, would have disastrous consequences on New York's health care system, potentially causing another malpractice crisis in this state even more serious than those in 1975-76 and 1985-86. It would also take a significant step backward from important actions taken by the State Legislature in those years to address the problem of availability and affordability of liability insurance for physicians which, of course, will have a direct impact on accessible health care for New Yorkers.

In 1975, New York State was facing a crisis so severe that no insurer was willing to write liability policies for physicians. They had determined that the risk had been so expanded in New York that it was no longer insurable. The Legislature at that time enacted several reforms to ensure at least the availability of medical liability insurance. One of the most important of these was a bill to restore, at least partially, a statute of limitations which had been completely eviscerated. In 1985 and 1986, the Legislature had to again act to prevent another medical malpractice crisis in the state. The reforms adopted by the Legislature included the certificate of merit rule, modest limitations on attorney's contingency fees and establishment of the Excess Medical Liability Insurance Program which provides a second layer of medical liability insurance for physicians. Without question, of the reforms enacted in 1975-76 and 1985-86, none was more significant than the statute of limitations changes which this bill would now decimate.

At the same time physicians face these exorbitant costs, health plans continue to reduce payments to physicians by inappropriately denying, delaying and reducing payment for needed care. Moreover, Medicare payments have essentially remained flat for the last decade, and physicians face potentially another 25% cut to their Medicare payments at the end of 2013 unless Congress acts to prevent the cut. When factoring all these problems together, it is no surprise that regions all across New York State are beginning to see shortages in several specialties, according to reports issued by the Center for Health Workforce Studies.

Yet despite these enormous difficulties facing New York's physicians, this bill does nothing to address these problems and instead would make this problem drastically worse. Given the already enormous cost of medical liability insurance, increases of this magnitude cannot be sustained by physicians.

Proponents of this measure argue that many other states have incorporated such "date of discovery" exceptions into their statutes of limitation for medical liability actions. **However, it must be noted that well over half of these states with "date of discovery" rules also have enacted caps on non-economic damages in medical liability actions, thereby significantly offsetting the enormous costs of this provision.** Moreover, those states that have "date of discovery" rules, but no caps on damages, include Alabama, Delaware, Iowa, Kentucky, Rhode Island, Vermont and Wyoming, where physicians pay far less in medical liability insurance premiums than those paid by physicians in New York City, Long Island and the Hudson Valley. The vast majority of these states, furthermore, have an outside limit on the lengths of the discovery toll.

The reforms of 1975-76 and 1985-86 were absolutely essential to assure that there would not be a health care access tragedy in New York State. We reiterate that reversing those reforms would have drastic consequences on New York's health care system, particularly at a time when demand for health care will go up significantly due to the hundreds of thousands of New Yorkers who will be newly insured starting in 2014. We also remain committed to working with you and all other interested parties to engage in a constructive dialogue regarding how best to achieve meaningful reform of the liability system in a way that is fair to all. However, we need liability cost decreases, not increases!

Based on the foregoing, MSSNY urges that this legislation be defeated.

Respectfully Submitted,

ELIZABETH DEARS KENT, ESQ.

2/25/13
MMA - oppose