



**Statement of**

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**on the subject of**

**“The Cost of the Medical Liability System Proposals for Reform,  
including H.R. 5, the Help Efficient, Accessible, Low-cost, Timely  
Healthcare (HEALTH) Act of 2011”**

**before the**

**Subcommittee on Health**

**Energy and Commerce Committee**

**U.S. House of Representatives**

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## EXECUTIVE SUMMARY

The Health Coalition on Liability and Access (HCLA) supports H.R. 5, the HEALTH Act, to help reduce health care costs for all Americans and to ensure patient access to quality medical care by enacting medical liability reform at the federal level.

The medical liability system today is broken and all Americans pay the price when the profits of personal injury lawyers take precedence over patient care. The current system:

- Increases health care costs through unsustainably high medical liability insurance premiums and by encouraging the practice of defensive medicine
- Decreases access to care as physicians avoid high-risk specialties and procedures that are the frequent target of lawsuit abuse
- Erodes the doctor-patient relationship
- Hurts the economy and costs America jobs at a time when we can least afford it

Two CBO reports released last month show clearly that enactment of legislation, which reflects the key elements of H.R. 5, will lower health care costs by:

- Lowering medical health insurance liability premiums
- Reducing the practice of defensive medicine
- Lowering private health insurance premiums
- Increasing federal revenues (\$13 billion 2012-2021)
- Reducing direct federal spending on health care (\$50 billion 2012-2021)
- Reducing the federal deficit (\$62 billion 2012-2021)

A number of states have made significant gains in reducing medical lawsuit abuse but as personal injury lawyers work state-by-state to overturn liability reforms and expand areas open to litigation, it is clear that medical liability is a national problem that requires a comprehensive federal solution.

HCLA believes there can be no real health care reform without meaningful medical liability reform. Congress must finish the job by passing H.R. 5.

## **INTRODUCTION**

Thank you, Chairman Pitts and Ranking Member Pallone for holding this important hearing to consider the essential business of fixing our country's broken medical liability system. I am grateful for the opportunity to appear before this distinguished committee to enthusiastically support passage of H.R. 5, the HEALTH Act of 2011, as it was originally introduced on January 24<sup>th</sup> of this year.

If I could, I'd like to take just a moment to present my credentials. I am currently the Medical Director for the Neurosurgical Group located in Pensacola, Florida and have been a practicing neurosurgeon for more than thirty years. I am the Immediate Past President of the American Association of Neurological Surgeons and past president of the Neurosurgical Society of America. I am also past president of both the Florida Medical Association and the Florida Neurosurgical Society.

Thank you again for the opportunity to appear here today. As health care costs continue to rise, patient access to care continues to be at risk, and the nation's physicians continue to be the targets of lawsuit abuse, I am here to voice the support of the Health Coalition on Liability and Access (HCLA) for H.R. 5. We are a national advocacy coalition working to help reduce health care costs for all Americans and to ensure patient access to quality medical care by enacting medical liability reform at the federal level.

HCLA represents a broad national coalition from physicians to hospitals, employers to health care liability insurers. While our areas of expertise and responsibility differ, we share one basic belief: our medical liability system is broken and it is time to protect patients now by passing H.R. 5 and passing it quickly.

Twenty-five years ago, President Ronald Reagan created a task force to study the need for tort reform. Its final report concluded:

“In sum, tort law appears to be a major cause of the insurance availability/affordability crisis which the federal government can and should address in a variety of ways.”

The task force recommended among other things limiting non-economic damages to a fair and reasonable amount, eliminating joint and several liability, and limiting attorneys' contingency fees.<sup>1</sup>

Today, nearly three decades later, America's patients and health care providers are still waiting for reform. Medical lawsuit abuse is still negatively impacting not just physicians and health care providers, but patients too. In fact, all Americans pay the price when the profits of personal injury lawyers take precedence over patient care. The adverse effects of frivolous lawsuits against doctors and hospitals are felt every time a woman can't deliver her child in a health care facility close to home because her local hospital no longer supports obstetrics. The reason? The risk of lawsuits is too high and so are the liability insurance rates.

The impact is felt when states that have failed to enact medical liability reform, face doctor shortages in high-risk specialties. Young doctors, saddled with hundreds of thousands of dollars of debt, are choosing lower risk specialties or opting to practice in states that have enacted effective reforms. Adding to the problem, experienced doctors are limiting their practices to low risk patients and procedures or are retiring altogether.

The impact is felt when the fear of junk lawsuits erodes the doctor-patient relationship, which is crucial to delivering exceptional health care. Medical lawsuit abuse is also driving up health care costs at a time when the country continues to suffer from a weak economy and a lack of jobs. Higher health care costs aren't the right prescription for lower unemployment.

Defensive medicine has become common practice as physicians understandably attempt to protect themselves from abusive lawsuits. They have little choice; but as health care costs rise for workers and business, especially small business, America's competitiveness suffers. With medical liability reform and lower insurance rates, doctors would be able to direct resources toward better patient care through increased hiring and improved technology. Increased resources mean more money to invest in medical technology and equipment, which can also help spur economic growth in important industries, especially manufacturing.

The clock is ticking on our health care system. So, today, HCLA asks you to take action. We ask you to create a climate for patient centered care by reforming the medical liability system that continues to put everyone's health care at risk.

## **WHY A FEDERAL SOLUTION TO MEDICAL LAWSUIT ABUSE**

We believe H.R. 5 is the solution that will help create the environment for patient centered care, and the HCLA supports the adoption of its key provisions:

- No limit on awards for economic damages.
- A three-year statute of limitations for medical malpractice claims, with certain exceptions, from the date of manifestation of an injury.
- A reasonable limit of \$250,000 on awards for non-economic damages.
- A cap on awards for punitive damages that would be the larger of \$250,000 or twice the economic damages, and restrictions on when punitive damages may be awarded.
- Replacement of joint and several liability with a fair-share rule, under which a defendant in a lawsuit would be liable only for the percentage of the final award that was equal to his or her share of responsibility for the injury.
- Sliding-scale limits on the contingency fees that personal injury lawyers can charge.
- Implementation of collateral source rule reform to “eliminate ‘double recovery’” by plaintiffs who have their medical expenses paid by health insurance or worker’s compensation...and still obtain jury awards.

While opponents of medical liability reform, some of the most vocal generously funded by personal injury lawyers, continue to lobby for the status quo, the need for this kind of

federal liability reform is clear and its benefits are undeniable. Last month, the Congressional Budget Office (CBO) issued a cost estimate for H.R. 5 that definitively refutes arguments of critics who have stalled liability reform for decades. The case for passage of medical liability reform is now indisputable.

According to the report, H.R. 5 would, on balance, “lower costs for health care.... directly by lowering premiums for medical liability insurance and indirectly by reducing the use of health care services prescribed by providers when faced with less pressure from potential malpractice suits. Those reductions in costs would, in turn, lower spending in federal health programs and lower private health insurance premiums.”<sup>2</sup>

A second CBO report, also issued in March 2011, looked at options to reduce the federal deficit, including the impact of medical liability reform on health care costs as well as federal spending and revenues. According to the report, reforms that limit medical liability (including reforms similar to those contained in H.R. 5) would:

- Increase federal revenues by \$13 billion from 2012-2021 as employers, paying lower health care premiums, redirect compensation to taxable wages and other fringe benefits.
- Reduce federal direct spending for Medicare, Medicaid and the Federal Employees Health Benefits program saving \$50 billion during the 2012-2021 period.
- Reduce federal deficits over the same period by \$62 billion.<sup>3</sup>

Despite some successful state initiatives to rein in medical liability costs, medical lawsuit abuse remains a national problem that needs a comprehensive solution. Congressional leaders and the President acknowledged as much by placing demonstration projects in the Patient Protection and Affordable Care Act. While we welcome those projects as an acknowledgement that our medical liability system is broken, they are not sufficient to remedy the problems that patients and physicians are facing today.

### **A FEDERAL FRAMEWORK IS COMMON SENSE AND CONSTITUTIONAL**

Because a number of states have made significant gains in reducing medical lawsuit abuse, some favor leaving it solely to the states to enact medical liability reform. We respectfully disagree. HCLA strongly believes that the comprehensive medical liability reforms embodied in H.R. 5 should be applied nationwide for several reasons.

While the state-by-state approach to reform has paid dividends to some patients, it is clear that state liability reforms, including reasonable limits on non-economic damages, are always under the threat of legal action by personal injury lawyers looking to maintain a system that only serves to enrich them.

In many of those states where reforms are bringing the practice of medicine back into balance, personal injury lawyers have used the courts to attempt to overturn not only legislative liability reform but also to subvert the will of the people who have voted for medical liability reform through ballot initiatives or through the passage of state

constitutional amendments. Texas is a good example of a jurisdiction in which such efforts, thankfully, have failed so far.

Illinois wasn't so lucky when its State Supreme Court struck down reforms passed in 2005. Despite clear progress in terms of lessening the medical liability crisis while the reforms were in place, today Illinois' doctors find themselves back in the quicksand of lawsuit abuse. The same can be said for Georgia's doctors who lost their liability protections when the Georgia Supreme Court overturned the state's liability limits last year. Further, in states like Pennsylvania, passing medical liability reform is proving to be particularly challenging – to say the least. Meanwhile, patient access to care in that state continues to be threatened.

Activist courts in Alabama, Illinois, Kansas, Louisiana, New Hampshire, North Dakota, Oklahoma, Oregon, South Dakota, Washington and Wisconsin have also intervened in the legislative process to strike down reasonable limits on non-economic damages. Often, these anti-reform judges employ state constitutional rationales to justify these rulings.

Enacting a federal statute, we believe, is the most effective avenue available to rein in judicial activism, address the medical liability crisis and ensure patient access to health care. H.R. 5 would level the playing field for doctors, hospitals, patients and attorneys, provide needed consistency to the system and eliminate the patchwork of protections in favor of a federal framework based on fairness and common sense.

There is plenty of legal justification for moving in this direction – some that goes as far back as James Madison and his persuasive arguments in support of the Commerce Clause. This important provision gives Congress the ability to regulate interstate commerce (a definition which the health care industry clearly meets) when done in the public interest. In a 2003 report, the Congressional Research Service (CRS) confirmed this view, concluding that Congress has the authority to enact tort reform legislation generally, under its power to regulate interstate commerce.<sup>4</sup> This legal logic has already been applied to an earlier medical dilemma when Congress passed the National Vaccine Injury Compensation Program, a federal program that preempts state court tort awards to protect vaccine manufacturers from bankruptcy in the face of extreme state tort jury awards. A precedent has been set, and we believe now is the time for Congress to act by passing federal medical liability legislation that protects doctors, patients and the states.

Some argue that a federal approach is an overreaction. But the attempt by personal injury lawyers to overturn democratically enacted medical liability reforms state-by-state is only the tip of the iceberg. One of the most disturbing new initiatives is their effort to dramatically expand the arena in which to sue doctors. The best example is a ruling by the Massachusetts State Supreme Court that reinstated a suit against a doctor for prescribing a blood pressure medicine to a 75-year-old cancer patient who later struck and killed a pedestrian with his car. The man had finished his course of chemotherapy and died later that same year. The pedestrian's family filed suit against the doctor. The

Worcester Massachusetts *Telegram* wrote of the ruling, “Indeed, making doctors legally liable not only for their treatment of their patients, but also for an extended chain of events over which they have no control, will certainly change the way physicians treat their patients, and certainly not for the better.”

In fact, legitimate concerns have also been raised that the Patient Protection and Affordable Care Act (PPACA) may create new causes of action for medical liability lawsuits, thus potentially greatly increasing the number of liability claims that are filed. The potential harm done by a flood of new lawsuits arising under the Act only further demonstrates the need to fix our medical liability system through federal action – and to do it in a timely manner.

#### **CONSENSUS ON MEDICAL LIABILITY REFORM IS GROWING**

Whether it’s health care policy experts, legislators, opinion leaders or just plain folks, there is a growing consensus that medical liability reform must be a priority for this Congress. President Obama’s former Director of OMB acknowledged as much in a *New York Times* editorial (10/20/10) on the health care reform bill, “...it does almost nothing to reform medical malpractice laws. Lawmakers missed an opportunity to shield from malpractice liability any doctors who followed evidence-based guidelines in treating their patients.”<sup>5</sup> Mr. Orzag is right.

He is not alone in the Administration. HHS Secretary Kathleen Sebelius admitted in a news conference in September 2009, “...we’ve got a situation where there are frivolous

lawsuits being filed against practicing physicians, discouraging some from practicing in certain areas.”<sup>6</sup>

Both the Bipartisan Policy Center’s Debt Reduction Task Force and the National Commission on Fiscal Responsibility and Reform also recognized the role medical liability reform could play in helping reduce our nation’s growing deficit.

The President himself has indicated support for the idea of reform on multiple occasions, including in an article he wrote in the *New England Journal of Medicine* in Oct. of 2008, stating that he “would be open to additional measures to curb malpractice suits and reduce the cost of malpractice insurance. We must make the practice of medicine rewarding again.”<sup>7</sup> Most recently, he reiterated the need to enact medical liability reforms in his January 2011 State of the Union address.

In HCLA’s poll done in October 2009, we found that 69 percent of Americans favored including medical liability reform in any new health care reform legislation. An even higher 72 percent believed lawsuit abuse put their access to quality medical care at risk by pushing good doctors out of medicine. A Rasmussen poll done at the same time found that 57 percent of people favored limiting jury awards.<sup>8</sup>

In an AP poll, conducted by Stanford University in November 2009, 54 percent of people favored making it harder to sue doctors and hospitals for medical errors while only one-

third were opposed. This view crossed party lines with 58 percent of Independents, 61 percent of Republicans and 47 percent of Democrats in support.<sup>9</sup>

HCLA believes there can be no real health care reform without meaningful medical liability reform. Congress must finish the job.

We understand that enacting liability reform is a difficult task. HCLA isn't asking you to eliminate medical liability. Like you and most Americans, our coalition believes that patients who have suffered injury due to negligence should be compensated fairly. That must not change. But one could hardly describe the current state of medical liability in America as "fair."

#### **MEDICAL LIABILITY IN AMERICA: NO DOCTOR IS IMMUNE**

Once, the medical liability system was designed to protect patient rights and improve the quality of health care. Today, it has become something akin to a "courtroom ATM" that rewards personal injury lawyers with big payoffs usually self-characterized as consumer protection. In reality, medical lawsuit abuse is weakening our health care system, putting the doctor-patient relationship at risk.

Even a cursory review of the personal injury lawyers' win/loss record shows that the majority of the cases brought against health care providers have little legitimacy.

According to the Physician Insurers' Association of America, which compiles statistics on

medical liability outcomes, in 2009, 64 percent of all medical liability cases were withdrawn, dropped or dismissed as being without merit. A mere 0.8 percent resulted in a plaintiff verdict, but a lack of merit seems to be no impediment to personal injury lawyers.<sup>10</sup>

Instead, their “litigate first – worry about the merits later” approach has taken an even more aggressive turn. In 2009, the Institute for Legal Reform released a report showing that television ads for medical liability lawsuits increased by 1,400 percent in four years as spending reached an all-time high of \$62 million – up from just \$3.8 million in 2004.<sup>11</sup>

Professor Richard A. Epstein, director of the law and economics program at the University of Chicago Law School made the case in an *American Medical News* story comparing U.S. litigation costs with those of other countries. He said, “Nobody is as hospitable to potential liability as we are in this country. The unmistakable drift is we do much more liability than anybody else, and the evidence on improved care is vanishingly thin.”<sup>12</sup>

The U.S. is in a league of its own when it comes to medical liability costs. Not only are they at least twice those in other developed countries,<sup>13</sup> they make up 10 percent of all tort cases.

But the case against our current system becomes even stronger when we put the macro numbers into perspective. The National Association of Insurance Commissioners found

that total indemnity losses in 2009 reached a staggering \$3.9 billion and the costs of defending these lawsuits was pegged at an additional \$2.5 billion.<sup>14</sup> When physicians, hospitals or other health care providers find themselves on the receiving end of a frivolous lawsuit, they can expect to pay an average of \$26,000 to defend a case that is dropped before trial and as much as \$140,000 if the case actually goes to court, regardless of the merits.<sup>15</sup> It's a no win situation for most health care providers. Even when the case is without merit, they can count on lost time, lost money and a loss of their reputation as personal injury lawyers play roulette with providers and patients alike.

While no doctor is immune from lawsuit abuse, a doctor's choice of specialty or locale can make him particularly vulnerable to these abuses. The following list illustrates the frequency doctors can expect to be sued by specialty:

- Orthopedists, trauma surgeons, ER doctors and plastic surgeons: likely to be sued in any given year.<sup>16</sup>
- Neurosurgeons: sued every two years on average.<sup>17</sup>
- OB-GYNs: nearly three out of five sued at least twice in their careers. The American College of Obstetricians and Gynecologists (ACOG) 2009 Medical Liability Survey found nearly 91 percent of OB-GYNs surveyed had experienced at least one liability claim filed against them, most without merit.<sup>18</sup>

Indeed, according to a recent AMA study,<sup>19</sup> my own specialty holds the distinction of being sued the most. A whopping 79 percent of all neurosurgeons have been sued at least once in their career and 62 percent have been two or more times. Clearly the vast

majority of neurosurgeons in this country cannot all be bad doctors; rather, the medical liability system is broken.

But the cost of the lawsuits isn't the only burden doctors in high-risk specialties must shoulder. Over the last ten years, their insurance premiums have increased substantially. In my own state of Florida, OB-GYNs and surgeons in Miami Dade, for example, paid up to a whopping \$202,000 a year for liability insurance in 2010.<sup>20</sup> That was more than the median price of a single family home in that portion of my state.<sup>21</sup> But similar stories can be found across the country in states where liability reforms have either not materialized or failed to alleviate the toxic litigation environment that drives high rates.

In Nassau and Suffolk Counties, New York, for example, OB-GYNs were hit with insurances premiums as high as \$187,000 from one insurer in 2010, a 5 percent increase over the year before. New Jersey OB-GYNs' hit was slightly less – only \$160,000 a year. But it's not just OB-GYNs who face these astronomical rates. In Cook County, Illinois, some general surgeons paid almost a \$128,000 annually for their insurance in 2010.<sup>22</sup> Neurosurgeons fare even worse.

A new survey<sup>23</sup> on defensive medicine conducted recently by the American Association of Neurological Surgeons (AANS) and the Congress of Neurological Surgeons (CNS) found, for example, that neurosurgeons in Illinois now pay in excess of \$300,000 a year in insurance premiums. Eighty percent in that state pay at least \$200,000. Study data

from New Jersey showed every respondent paid more than \$150,000 a year and in New York, 83 percent of respondents reported paying more than \$200,000 a year. Just under half of those who answered our survey in Pennsylvania paid more than \$200,000 and 71 percent, over \$150,000. These rates are simply not sustainable.

It should be noted that these rates are not the result of insurers gouging their insureds. In each of these states, as in many states, the largest insurers are owned or operated by physicians themselves. In order to believe these companies are overcharging for medical liability coverage, one must then believe that the physicians who run these companies are making a conscious decision to overcharge themselves for the benefit of the insurer. The very concept is absurd on its face.

While we have seen some relief in the past two or three years as premiums have leveled off or decreased slightly in some areas, they still remain a significant problem for many doctors. Many of us fear that as the new health care plan is implemented, we may see a resumption of the rising liability insurance rates that drove doctors out of medicine earlier in the decade and put patient care in jeopardy.

While the excessive number of claims also has flattened out in the last couple of years, the cost and size of the claims have not. In 2009, our most recent data, the average jury award escalated to almost \$600,000 from about \$280,000 in 1996.<sup>24</sup>

Those kinds of payouts are even attracting the attention of investors, banks and hedge funds that are investing in medical liability lawsuits in hopes of a big payoff. Yes, medical lawsuit abuse has become one of the financial industry's latest hot tickets.<sup>25</sup> Today, companies are loaning plaintiffs \$100 million a year to help fund personal injury lawsuits. They also charge borrowers exorbitant interest rates while lobbying for exemptions from consumer protection laws regulating lending. According to a *New York Times* story, "The loans are repaid from winnings, with costs that can exceed 100 percent a year."

Unless Congress acts, the system will continue to benefit lawyers at the expense of patients, doctors and the country's financial future. As Michelle Mello, a Harvard professor of law and public health, put it, "It would be hard to design a more inefficient compensation system or one which skewed incentives more away from candor and good practices."<sup>26</sup>

### **DEFENSIVE MEDICINE: A MATTER OF SELF-PRESERVATION**

With doctors practicing under a constant threat of what amounts to legal harassment, it's not surprising that many have turned to defensive medicine as a matter of self-preservation which, in turn, leads to higher health care costs. Philip K. Howard, Chairman of Common Good, a legal reform coalition, wrote in an April 2009 *New York Times* opinion piece on defensive medicine:

“The legal system terrorizes doctors. Fear of possible claims leads medical professionals to squander billions in unnecessary tests and procedures... Defensive medicine is so prevalent that it has become part of the standard protocol...”

Mr. Howard’s words should serve as a red flag for those tasked with reducing health care costs, putting the nation’s fiscal house in order and creating jobs. It’s important to understand that defensive medicine is comprised of both assurance behavior and avoidance behavior, and each has implications for patient care and the long-term public good.

*Assurance behavior* is best described as ordering additional tests, particularly imaging tests, diagnostic procedures or referrals to give the treating physician a stronger defense against an abusive lawsuit, and today it has become common practice. According to a study in the *Archives of Internal Medicine*, nine in ten physicians said doctors ordered more tests and procedures than patients need in order to protect themselves against lawsuits.<sup>27</sup> While there are varying estimates of the cost of lawsuit abuse, a 2006 PricewaterhouseCoopers study, put the numbers at upwards of \$210 billion a year.<sup>28</sup> They reported, “While the bulk of the premium dollar pays for medical services, those medical services include the cost of medical liability and defensive medicine...Defensive tests and treatment can pose unnecessary medical risks and add unnecessary costs to healthcare.”

Doctors agree. In a recent Gallup survey of American physicians, the research found the fear of lawsuits drove nearly 21 percent of all the tests and treatments ordered by physicians. That equates to 26 percent of all health care spending and comes to a astounding \$650 billion.<sup>29</sup> According to a study of medical liability costs and the practice of medicine in *Health Affairs*, overuse of imaging services alone, driven by fear of lawsuits, costs as much as \$170 billion a year nationally.<sup>30</sup>

State data shows similar results. A Massachusetts Medical Society study showed that 83 percent of the physicians surveyed admitted practicing defensive medicine and that an average of 18 to 28 percent of tests, procedures, referrals and consultations and 13 percent of hospitalizations were ordered for defensive reasons. Estimates are that assurance behavior costs Massachusetts a staggering \$1.4 billion annually.<sup>31</sup> A Pennsylvania study found 93 percent of physicians acknowledged practicing defensive medicine as well.<sup>32</sup>

While the costs of defensive medicine are sobering in and of themselves, an equal concern is the very real possibility that if we don't act to rein in the medical liability system soon, defensive medicine will become the standard of care pushing health care costs still higher but without an equal increase in benefit to patients – the worst of both worlds. The second factor in defensive medicine is *avoidance behavior*, and access to care is its usual victim, as physicians, particularly those in specialties targeted by junk lawsuits, restrict their practices. They do so by limiting higher risk procedures like trauma surgery,

vaginal deliveries and brain surgery to cite some examples. Some doctors simply avoid patients with complicated health issues. All these responses diminish access to care.

Over the years, a range of studies has shown both the financial and human costs of avoidance behavior. The AANS/CNS survey<sup>33</sup>, mentioned earlier, found that when asked how often they ordered tests for defensive purposes, 12 percent of responding neurosurgeons said “always,” 38 percent said “very often” and 43 percent said “sometimes.” That’s a staggering 93 percent who find it necessary to practice defensive medicine at some point. We’ve also found that more than one third said they changed the types of cases they treated because of rising medical liability insurance premiums or increased risk of a lawsuit.

Roughly 73 percent now limit or don’t take pediatric cases. Fifty-seven percent no longer treat intracranial aneurysms and 19 percent of these responding neurosurgeons told us they limit or don’t treat brain tumors at all anymore. It’s not surprising. Fifty-seven percent of the respondents told us they had been sued between one and three times. These results are similar to our findings in an earlier survey done in 2004, demonstrating that the current system is broken and fails patients and doctors alike.

Neurosurgery is certainly one of the more high-risk specialties but the defensive medicine behaviors we see reflected in the AANS/CNS research can be found in a number of specialties. Orthopedic surgeons, for example, are much the same with 55 percent admitting they avoid certain procedures for similar liability concerns. One in five has

stopped emergency room calls, six percent don't perform surgery at all and one in twenty has retired early.<sup>34</sup>

In the years ahead, we can expect this kind of avoidance behavior will inevitably lead to increasing shortages of doctors, particularly in high-risk specialties. It's understandable that young doctors will hesitate to choose crucial specialties that put them in the cross hairs of personal injury lawyers. The American Hospital Association has found that 55 percent of hospitals have difficulty recruiting doctors because of medical liability concerns.<sup>35</sup> Three out of four emergency rooms say they have had to divert ambulances because of a shortage of specialists and more than 25 percent lost specialist coverage due to medical liability issues.<sup>36</sup>

One emergency room physician was quoted as saying, "The lack of on-call specialists affects the numbers of patients referred to tertiary care facilities even for basic specialty related diseases (like orthopedics). This adds to emergency department crowding in some facilities, and it means that patients have to travel across town or greater distances for a relatively simple problem that could have been resolved if the specialist had been on call at the initial facility."<sup>37</sup> Just a few short months ago in Arizona, we all saw the value of a world-class trauma center and the availability of neurosurgical care. When dealing with traumatic injuries, minutes, even seconds, can be the difference between life and death.

One group deserves special mention when it comes to the impact of defensive medicine: women. Albert L. Strunk, M.D., deputy executive vice president of ACOG put it this way, "...the medical liability situation for ob-gyns remains a chronic crisis and continues to deprive women of all ages – especially pregnant women – of experienced ob-gyns,"<sup>38</sup>

A 2009 ACOG survey found that 63 percent of OB-GYNs had made changes to their practice because of the risk or fear of liability claims. Even more alarming, between seven and eight percent said they had stopped practicing obstetrics altogether. Before lawsuit abuse became a crisis, most obstetricians would have considered the age of 48 as mid-point in their career. Today, according to ACOG, that's the average retirement age.<sup>39</sup>

State by state studies paint an increasingly bleak picture for women and their babies. Take Hawaii. In 2007, 42 percent of the state's OB-GYNs had stopped providing prenatal care.<sup>40</sup> Dr. Francine Sinofsky, an OB-GYN in East Brunswick, N.J., pinned the blame for two of her practice's seven members giving up obstetrics squarely on the cost of medical liability. A \$14,000 annual insurance premium for gynecologists; more than \$100,000 for adding obstetrics to the practice.<sup>41</sup>

In 2008, 1500 counties in America, eight counties in New York alone, didn't have a single obstetrician as liability issues chased good doctors out of obstetrics.<sup>42</sup>

But the serious impact of lawsuit abuse on women's health isn't limited to obstetrics. Today, growing numbers of radiologists are declining to read mammograms and fewer and fewer medical residents are choosing radiology as a specialty. Why? Because a missed diagnosis is the most likely allegation in most liability lawsuits.<sup>43</sup> That makes radiologists the number one group of physicians affected.<sup>44</sup>

## **FEWER DOCTORS**

We are already seeing the effects of lawsuit abuse on access to care as doctor shortages take an increasing toll and the situation is likely to get worse, perhaps much worse. The Patient Protection and Affordable Care Act (PPACA) may well add more than 30 million people to the health care rolls in the next few years. The Association of American Medical Colleges (AAMC) has predicted that once the new health care reform provisions take effect in 2015, "the shortage of physicians across all specialties will more than quadruple to almost 63,000."<sup>45</sup> Another group, the American Academy of Family Physicians, has projected the shortfall of family physicians will reach 149,000 by 2020.<sup>46</sup>

AAMC also found the country will need 46,000 more surgeons and other specialists to meet demand in the next decade and that those living in rural or inner city locations will suffer the most severe impact. "This will be the first time since the 1930s that the ratio of physicians to the population will start to decline," according to Dr. Atul Grover, of the AAMC.<sup>47</sup>

Pennsylvania is a perfect case study of this growing problem. A *Bucks County Courier Times* article in February 2009 indicated that 17 maternity wards had closed their doors since 1997 and the Philadelphia suburb of Chester County, home to half a million people, had no trauma center to treat them. Pennsylvania's problem wasn't producing outstanding doctors. The state has a world-class medical education system turning out exceptional young physicians. The problem was keeping them.

The state's medical graduates were opting to practice in states with friendlier liability environments. In 1992, 60 percent of its medical residents stayed in the state after medical training. By 2009, that number had dipped to only 20 percent as Pennsylvania failed to enact needed liability reforms.<sup>48</sup> An aging specialist population compounded the state's doctor shortage with more than 40 percent of its practicing physicians over 50.<sup>49</sup> Over the next decade, Pennsylvania's doctor shortage is expected to balloon to 20 percent, forcing patients to drive further and wait longer for health care services.<sup>50</sup>

There are many factors driving the nation's doctor shortages, but why continue a broken medical liability system that evidence shows is adding to the problem?

If action isn't taken to reduce medical liability insurance premiums and litigation rates, we simply won't have the doctors our growing health care system will need in the years ahead.

## **LEARNING FROM STATES' SUCCESS**

The good news is we know what works because many states have led the way forward with a proven track record of success across the country. Comprehensive medical liability reform that includes full compensation for economic damages (lost wages, medical expenses) and reasonable limits on non-economic damages (“pain and suffering”) are reducing health care costs, attracting doctors to their states, strengthening the doctor-patient relationship and most important – preserving access to quality care.

A brief state-by-state look at some of the most successful medical liability reform efforts proves the point.

California:

For more than 30 years, California’s Medical Injury Compensation Reform Act (MICRA) has led medical liability reform efforts while holding down health care costs and improving access to care. And it has done this while protecting consumers’ rights. HCLA believes MICRA can serve as a good model for federal reform efforts.

Missouri:

Doctors’ insurance premiums are 17 percent below those states without limits on non-economic damages and as of 2009, new medical liability lawsuit filings reached a 10-year low.<sup>51</sup>

Alaska:

This state has the sixth lowest medical costs in the country along with strong expert witness laws that are keeping doctors in the exam room, not the courtroom.<sup>52</sup>

Mississippi:

This was once one of the country's hotbeds of lawsuit abuse. In 2004, Mississippi enacted a hard \$500,000 limit on non-economic damages and put other reforms in place to bring equity back to the liability system.<sup>53</sup> The number of medical liability lawsuits fell by nearly 90 percent and liability insurance premiums decreased 30 to 45 percent.<sup>54</sup>

The Texas Miracle:

Once Texas had the dubious distinction of being named one of the country's "judicial hellholes" by the American Tort Reform Association. Doctors were fleeing the state in droves. Texas was 48<sup>th</sup> out of the 50 states in the number of physicians per capita with 152 MD's for every 100,000 people.<sup>55</sup> Over a four-year period, Texas physicians were hit with insurance premium rate hikes of between 22.5 and 128 percent; hospital rates more than doubled.<sup>56</sup> The litigation atmosphere had become so toxic that there were 300 lawsuits for every 100 doctors in some areas of the state.<sup>57</sup>

In 2003, the legislature put limits on non-economic damages and the people of Texas passed Proposition 12, a constitutional amendment, which blocked trial lawyers' effort to overturn reforms.

The charts in the appendices following this testimony illustrate the positive outcomes that medical liability reform has brought to Texas. The number of liability filings dropped significantly and specialists who had been leaving the state saw dramatic increases in the years following reform. After reform, Texas' problems centered on trying to deal with a big backlog in the state's licensing system as doctors streamed back into the state.

The state's largest insurers reduced rates as much as 31 percent and competition has grown as new insurance companies have entered the market.<sup>58</sup> Since reform in 2003, 82 counties have seen net gains in the number of emergency physicians. What has been especially encouraging has been the increases in 43 medically underserved counties.<sup>59</sup> It's not surprising that Congressman Burgess' "Medical Justice Act" reflects the successful Texas reforms, which have brought desperately needed litigation relief to this once battered state.

## **CONCLUSION**

Unfortunately, the health care reform bill passed last year did not move comprehensive federal liability reform forward. Former Governor and Democratic National Committee Chairman Howard Dean told us why, "The reason that tort reform is not in the bill," he said, "is because the people who wrote it did not want to take on the trial lawyers...and that is the plain and simple truth."<sup>60</sup>

Now, this Congress has the opportunity to rectify this situation.

The time is right because the American people are on the side of reform. A poll done by the HCLA in October 2009 found a solid margin, 70 percent, of Americans support full payment for lost wages and medical expenses and reasonable limits on awards for non-economic “pain and suffering.” Sixty-eight percent of those polled also favor a law to limit the fees personal injury attorneys can take from an award or settlement.

The time is right because state reform efforts, though plagued by the trial attorneys’ relentless attempts to overturn the will of the people, have shown us that medical liability reform can work – for patients and providers. Who it doesn’t work for are personal injury lawyers who cling to a status quo that serves only them.

The time is right because so many Members of the 112<sup>th</sup> Congress are committed to reforming the medical liability system. We look forward to working with this Committee and others in the Congress to develop the kind of federal remedy that will bring consistency and common sense back to the system.

It has been twenty-five years since the Reagan task force on tort reform recommended the reforms embodied in H.R. 5. The trial bar has successfully blocked those reforms for more than two decades.

I am here today on behalf of the thousands of health care providers who provide the best medical care in the world every day to 300 million Americans to ask you to finish the job.

Pass H.R. 5 and pass it soon. Reform the medical liability system before health care costs go higher and patient access to quality care worsens. Before defensive medicine and doctor shortages change the health care system that serves this country and its people so well. Before the doctor-patient relationship is irretrievably damaged. Before it's too late.

Thank you very much.

## ENDNOTES

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- <sup>1</sup> Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability, February 1986.
- <sup>2</sup> "Cost Estimate, H.R. 5, Help Efficient, Accessible, Low-cost Timely Healthcare," Congressional Budget Office, March 10, 2011.
- <sup>3</sup> "Reducing the Deficit: Spending and Revenue Options," Congressional Budget Office, March 2011.
- <sup>4</sup> "Federal Tort Reform Legislation: Constitutionality and Summaries of Selected Statutes," Congressional Research Service, February 26, 2003.
- <sup>5</sup> "Malpractice Methodology," Peter Orszag, *New York Times*, October 20, 2010.
- <sup>6</sup> HHS news conference, September 2, 2009.
- <sup>7</sup> Making Patient Safety the Centerpiece of Medical Liability Reform," Sen. Barack Obama and Sen. Hillary Clinton, *New England Journal of Medicine*, May 25, 2006.
- <sup>8</sup> Rasmussen Research, December 2, 2009.
- <sup>9</sup> The Associated Press Poll by Stanford University with the Robert Wood Johnson Foundation, conducted by GfK Roper Public Affairs and Media, October 29-November 8, 2009.
- <sup>10</sup> Physician Insurers Association of America, *Claims Trend Analysis*, 2009.
- <sup>11</sup> TNSMI/Campaign Media Analysis/cmag January 1, 2004-September 1, 2009.
- <sup>12</sup> "Medical Liability: A World of Difference," Amy Lynn Sorrel, *American Medical News*, May 3, 2010.
- <sup>13</sup> Manhattan Institute's Center for Legal Policy study, 2008.
- <sup>14</sup> National Association of Insurance Commissioners, Profitability by Line by State, 2009.
- <sup>15</sup> "Reviving Tort Reform," *Investor's Business Daily*, November 15, 2010.
- <sup>16</sup> "Defending the Practice of Medicine," Richard E. Anderson, M.D., *Archives of Internal Medicine*, June 2004.
- <sup>17</sup> "Effective Legal Reform and the Malpractice Insurance Crisis," Richard E. Anderson, M.D., *Yale Journal of Health Policy, Law and Ethics*, December 2004.
- <sup>18</sup> American College of Obstetrics and Gynecologists Medical Liability Survey, September 2009.
- <sup>19</sup> "Medical Liability Claim Frequency: A 2007-2008 Snapshot of Physicians," American Medical Association, 2010.
- <sup>20</sup> Medical Liability Monitor, Annual Rate Survey, October 2010.
- <sup>21</sup> <http://media.living.net/statistics/2010/Yr%20End%202010%20home%20chart.pdf>
- <sup>22</sup> Medical Liability Monitor, Annual Rate Survey, October 2010.
- <sup>23</sup> Defensive Medicine in Neurosurgery," American Association of Neurological Surgeons/Congress of Neurological Surgeons, 2011.
- <sup>24</sup> Physician Insurers Association of America, *Claims Trend Analysis*, 2009.
- <sup>25</sup> "Lawsuit Loans Add New Risk for the Injured," Binyamin Appelbaum, *New York Times*, January 16, 2011.
- <sup>26</sup> "Why Medical Practice is Off Limits," *Wall Street Journal*, October 15, 2009.
- <sup>27</sup> "Physicians' Views on Defensive Medicine," Bishop, Federman, Keyhani, *Archives of Internal Medicine*, June 28, 2010
- <sup>28</sup> "The Price of Excess: Identifying Waste in Healthcare Spending," PricewaterhouseCoopers, 2008.
- <sup>29</sup> "Price: Cutting Medical Costs without Obamacare," *Washington Times*, March 18, 2010.

- 
- <sup>30</sup> "Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Care," Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, 2003.
- <sup>31</sup> "Investigation of Defensive Medicine," Massachusetts Medical Society, November 17, 2008.
- <sup>32</sup> "Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment," *Journal of the American Medical Association*, Volume 293, Issue 21, June 1, 2005.
- <sup>33</sup> "Defensive Medicine in Neurosurgery," American Association of Neurological Surgeons/Congress of Neurological Surgeons, 2011.
- <sup>34</sup> "Federal Medical Liability Reform Survey," 2004, American Association of Orthopaedic Surgeons, Alliance of Specialty Medicine, July 2005.
- <sup>35</sup> "Professional Liability Insurance: A Growing Crisis," American Hospital Association, March 2003.
- <sup>36</sup> "Hospital Emergency Department Administration Survey," "Federal Medical Liability Reform," 2004, the Schumacher Group, Alliance of Specialty Medicine, July 2005.
- <sup>37</sup> "National Report Card on the State of Emergency Medicine," American College of Emergency Physicians, 2009.
- <sup>38</sup> American College of Obstetricians and Gynecologists (ACOG) news release, November 3, 2006.
- <sup>39</sup> "Survey on Professional Liability, ACOG, September 2009.
- <sup>40</sup> "Doctors Urging Lawmakers to Support Tort Reform," *KGMB9.com*
- <sup>41</sup> "The Doctor Drain," Lauren Otis, *The New Jersey Monthly*, February 5, 2008.
- <sup>42</sup> "Center for Health Workforce Studies, cited in "no Place to be Born," *New York Sun*, August 25, 2008.
- <sup>43</sup> *AMA News*, March 20, 2006.
- <sup>44</sup> "Failure to Diagnose: Putting the Pieces Together, A Risk Management Review of Closed Claims in Selected Specialties 2002-2004," Linda Greenwald, Doctors' Insurance Services of New England, 2005.
- <sup>45</sup> Association of American Medical Colleges Center for Workforce Studies estimates, September 30, 2010.
- <sup>46</sup> "Doctor Shortage Looms as Primary Care Loses its Pull," Janice Lloyd, *USA Today*, August 18, 2009.
- <sup>47</sup> "Agencies warn of coming doctor shortage," Tammy Worth, *Los Angeles Times*, June 7, 2010.
- <sup>48</sup> "Pennsylvania is Driving its Doctors Away," *Wall Street Journal*, October 25, 2008.
- <sup>49</sup> *Ibid.*
- <sup>50</sup> "Area facing a shortage in primary care physicians," *The (Pennsylvania) Daily Review*, December 27, 2010.
- <sup>51</sup> "Malpractice lawsuits hit 10-year low in Missouri," *American Medical News*, November 12, 2009.
- <sup>52</sup> "Reviving Tort Reform," *Investors Business Daily*, November 15, 2010.
- <sup>53</sup> Mississippi Code Ann. § 11-1-60 (2007).
- <sup>54</sup> "Mississippi's Tort Reform Triumph," *Wall Street Journal*, May 10, 2008
- <sup>55</sup> "A Miracle in the Making: How Texas Became a Model for Medical Liability Reform," *Texas Tech Law Review*
- <sup>56</sup> *Ibid.*
- <sup>57</sup> "Ten Gallon Tort Reform," *Wall Street Journal*, June 6, 2003.
- <sup>58</sup> Texas Medical Association
- <sup>59</sup> "Texas Alliance for Patient Access, 2010.
- <sup>60</sup> "Why Democrats won't cross the trial lawyers," *Washington Examiner*, August 26, 2009.

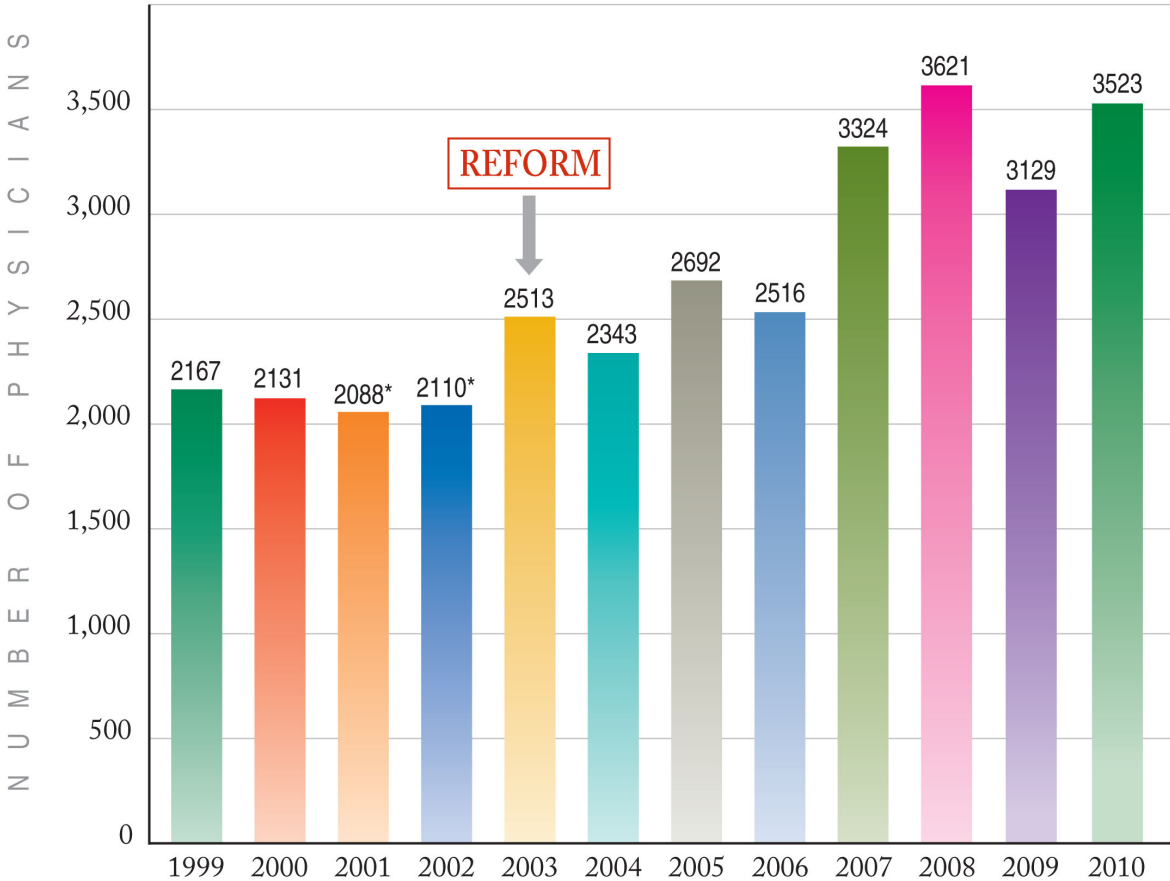




**APPENDIX C:  
EIGHTY-TWO TEXAS COUNTIES SEE GAINS IN ER DOCS**

**APPENDIX D:  
NEWLY-LICENSED TEXAS PHYSICIANS (1999 – 2010)**

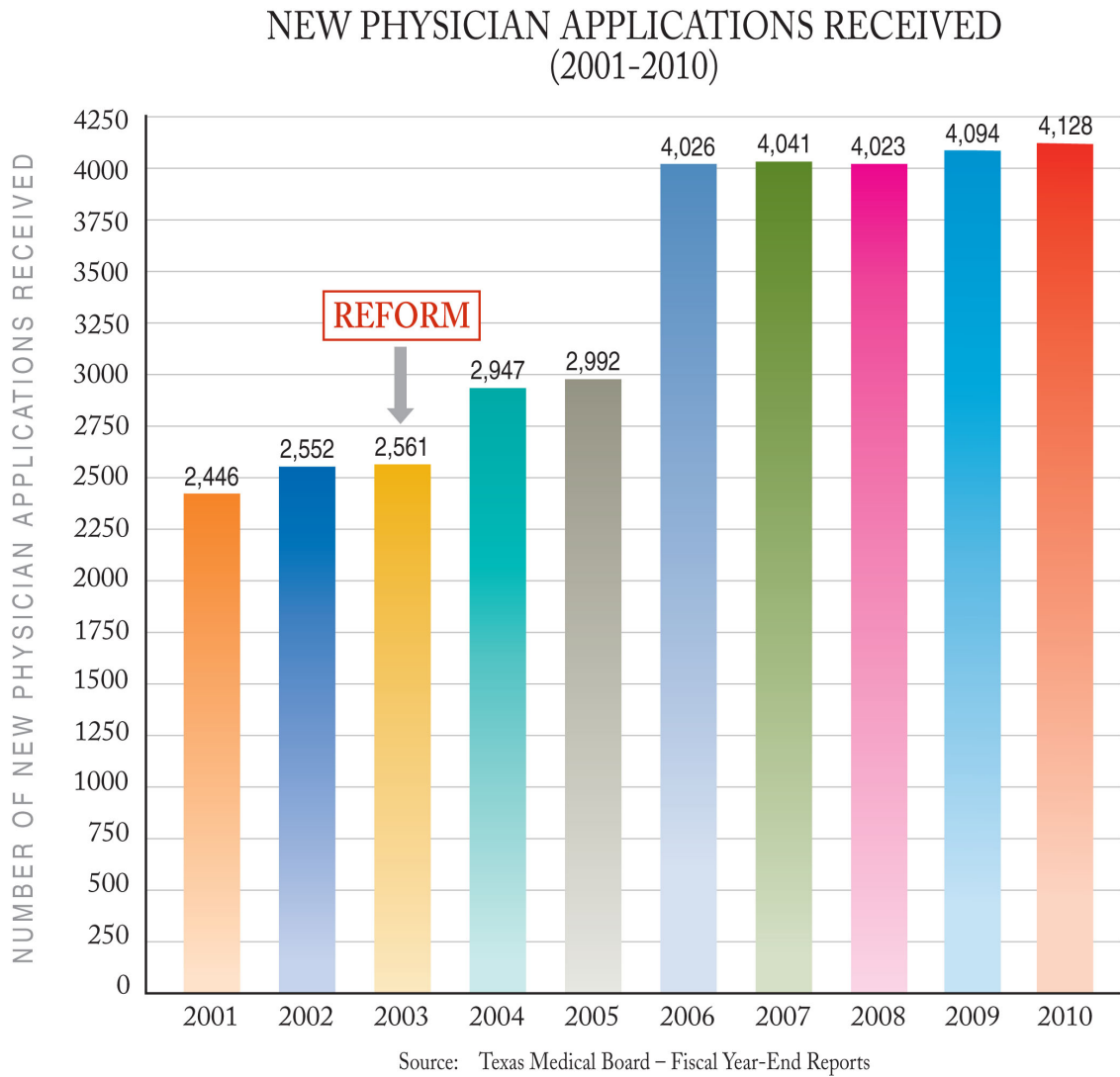
NEWLY-LICENSED TEXAS PHYSICIANS  
(1999 - 2010)



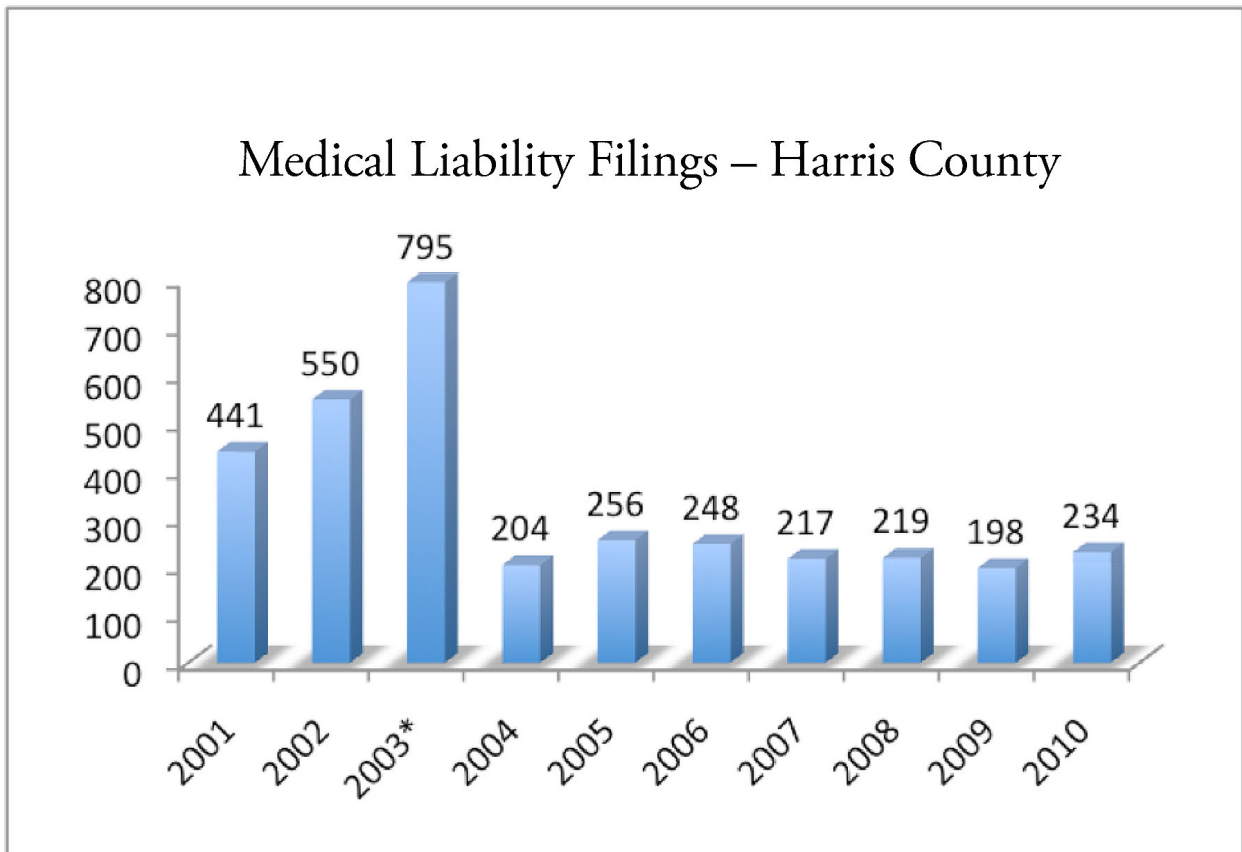
Source: Texas Medical Board  
Medical Education Department, Texas Medical Association

*\* In FY 2001, the Texas Medical Board meeting scheduled for late August was postponed until September 2, 2001, moving it to FY 2002. At that meeting, 701 initial licenses were issued and 17 licenses were reissued. The statistics have been adjusted based on the assumption that the group licensed in September (FY 02) would have been licensed in August (FY 01).*

**APPENDIX E:  
NEW PHYSICIAN APPLICATIONS RECEIVED (2001 – 2010)**



**APPENDIX F:  
MEDICAL LIABILITY FILINGS – HARRIS COUNTY**



\*Denotes rush to courthouse to beat effective date of new law