PATIENT PULLOUT POSTER INSIDE

chicago medicine
CHICAGO MEDICAL SOCIETY
THE MEDICAL SOCIETY OF COOK COUNTY
Newsletter, September 2004, Vol. 107, No. 12

## WHERE THE CANDIDATES STAND

# Public supports federal liability legislation

*Patients are aware of the impact of lawsuits on health care costs--76% of those surveyed in a Wirthlin Worldwide poll favor a law that would guarantee an injured patient full payment for lost wages and medical costs and place reasonable limits on awards for "pain and suffering" in medical liability cases. A Gallup poll confirms that public opinion. The poll results, released Feb. 4, 2003, show that 72% of Americans support limiting the amount patients can be awarded for "pain and suffering."*

**President Bush** has long called for changes to the nation's broken liability system, so "that if there ever is a verdict, the people who benefit are those who got injured, not the lawyers." As governor of Texas, he made it tougher for plaintiffs' lawyers to win big verdicts and as president, he wants to do the same. **Senator Kerry** opposes capping non-economic damages for medical malpractice. He has chosen a trial attorney as his running mate, one who specialized in medical liability, earning at least $110,000,000 suing physicians. On this issue, and on other health-related proposals, the choices are clear. *Here is a quick look:*

## Bush and Kerry: A comparison of health plans

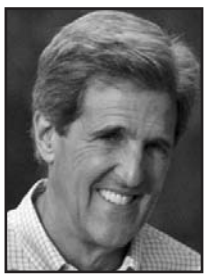
### *BUSH*

● **PRESIDENT BUSH SUPPORTS MEDICAL LITIGATION REFORM.** The Bush plan would cap medical liability awards for non-economic damages at $250,000. Punitive damages would also be capped. President Bush says that medical liability reform will save $60 billion in con-

*(Continued on page 2)*

### *KERRY*

● **SENATOR KERRY OPPOSES CAPPING NON-ECONOMIC DAMAGES IN MEDICAL LIABILITY CASES.** Senator Kerry has proposed legislation for certificates of merit, non-binding mediation of medical litigation claims before trial; he would institute some punitive damages, and employ a "three strikes and you're out" policy for frivolous claims. He would "work to eliminate the special privileges that allow insurance companies to fix prices and collude in ways that increase medical malpractice premiums."



● The Kerry plan would give small businesses tax credits to cover up to 50% of premiums for low to moderate income workers. The proposal would allow individuals to buy into the Congressional Health Plan to ensure access to coverage, and provide tax credits to make it more affordable.

● Senator Kerry would create a premium rebate

*(Continued on page 2)*

## *BUSH (continued)*

sumer health care spending annually and $28 billion in federal spending.

- Passage of the Medicare prescription drug benefit accomplished many of the president's reform goals. The program will subsidize seniors' drug purchases for 10 years and make coverage available to 40 million.
- The Bush plan favors Health Savings Accounts, tax-exempt, portable accounts to help families pay routine medical expenses and provide a tax-deferred means of saving for future health care needs, including payment of premiums for long-term care insurance.
- President Bush proposes a tax credit to help uninsured Americans purchase private health insurance. Under the Bush plan, individuals earning $25,000 or less would get a $1,000 tax refund every year and be able to use this money to buy insurance. Families earning $60,000 or less would get $3,000 back in taxes and use this money for family coverage.
- To help uninsured children, Bush supports sending approximately $3.2 billion in unused money back to the states to fund State Children's Health Insurance Programs.

## *KERRY (continued)*

pool to cover losses over $50,000. The pool would reimburse employer health plans for 75% of the catastrophic costs they incur above $50,000 so long as the savings are used to reduce the costs of workers' premiums.

- Under the Kerry plan, states would expand Medicaid and the State Children's Health Insurance Program, with the federal government picking up the full cost of more than 20 million children.
- Senator Kerry supports the re-importation of prescription drugs from Canada. He would allow the HHS secretary to negotiate lower drug prices and bring generic drugs to market faster.

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**NEWS FOR CHICAGO PHYSICIANS**

chicago medicine

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THE MEDICAL SOCIETY OF COOK COUNTY

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# We need a national solution

*Although some states are attempting to address the medical liability crisis at the state level, a federal plan of action is sorely needed. As the record below shows, U.S. Senate Democrats have blocked every effort toward reform.*

## U.S. Senate

● June 26, 2003--Senator John Ensign (R-NV), Senate Majority Leader Bill Frist (R-TN), and Senate Majority Whip Mitch McConnell (R-KY) introduced S. 11, the "Patients First Act of 2003." S.11 is similar to H.R. 5 as introduced in the U.S. House, except that it includes a provision to reform expert witness requirements.

● July 9, 2003--Despite strong backing by the Senate Republican leadership, S. 11 failed to acquire the 60 votes needed to overcome a Democratic filibuster, thereby preventing the Senate from proceeding to a full debate. Forty-nine Senators voted in favor of breaking the filibuster, while 48 voted against--despite support from President Bush, the House of Representatives, and 72% of the American public.

● Feb. 24, 2004--The Senate had a procedural vote on S. 2061, the "Healthy Mothers and Healthy Babies Access to Care Act of 2003," which was introduced by Senate HELP Committee Chairman Judd Gregg (R-NH) and Senator John Ensign (R-NV). If enacted the legislation would have applied certain MICRA-type reforms to physicians who provide obstetrical and gynecological services related to childbirth. S. 2061 failed to acquire the 60 votes needed to overcome a Democratic filibuster.

● April 7, 2004--The Senate again attempted to advance medical liability reform legislation. This time, the Senate had a procedural vote on S. 2007, the "Pregnancy and Trauma Care Access Protection Act of 2004." If enacted, S. 2007 would apply certain MICRA-like reforms to physicians and provide trauma/emergency services and services related to childbirth. S. 2207 failed to acquire the 60 votes needed to overcome a Democratic filibuster.

## U.S. House of Representatives

● Feb. 5, 2003--Representative James C. Greenwood (R-PA) introduced H.R. 5, the HEALTH Act (Help Efficient, Accessible, Low-cost, Timely Healthcare Act of 2003), which is modeled after the successful MICRA statute.

● March 13, 2003--The House passed H.R. 5, the HEALTH Act, by a vote of 229-196.

● May 12, 2004--The House passed H.R. 4280 (the HEALTH Act of 2004, virtually identical to H.R. 5) by a voted of 229-197.

*Source: American Medical Association. Reprinted with permission.*

***Vote smart! This election season, be sure to talk to patients about the medical liability crisis…and the importance of supporting candidates who support tort reform.***

**DOCS ARE BAILING OUT**

# *The liability landscape in Illinois*

*Tort reform is needed now more than ever as the following examples indicate:*

● Drs. B. Theo Mellion and Sumeer Lal, the last two brain surgeons in Southern Illinois, left their practices because of medical liability insurance premiums of nearly $300,000 a year. Both doctors, of Neurosurgical Associates of Southern Illinois, turned in their resignations last spring to Southern Illinois Healthcare. (*UPI,* Feb. 25, 2004).

● Dr. Susan Hagnell grew up in Chicago's Rogers Park neighborhood, attended medical school in Illinois and delivered well over 700 babies at hospitals in the northwest suburbs. But when her liability insurance bill soared from $71,848 to $118,742, Dr. Hagnell decided to jump the border. Now she practices in Wisconsin. "If I knew what was going to happen, I would never have become an obstetrician/gynecologist." *(Chicago Tribune*, March 12, 2004).

● Chicago ob-gyn Eileen Murphy, MD, was at the peak of her career when she decided to give up medicine last April to become a middle school science teacher. Faced with premiums of $92,000, which were scheduled to go up to $157,000 next year, Dr. Murphy grew weary of working 60 to 85 hours a week and missing out on family events. According to Dr. Brian Locker, president of the Illinois-based OB-GYN Crisis Coalition, "We see people leaving in droves." (*Chicago Sun-Times* April 5, 2004).

Since the early 1970s, the Illinois Supreme Court has overturned effective medical liability reforms. Then, the Illinois Legislature passed into law legislation instituting a cap on non-economic damages, a review panel, and a loser pays provision. The Illinois Supreme Court ruled the measures unconstitutional in 1976. In 1985, legislation providing for attorney contingency fees, pre-trial screening panels, a loser pays policy, structured verdicts, affidavit of merit, abolition of punitive damages and collateral source offset passed the legislature. In 1995, the Legislature passed a $500,000 cap on all non-economic jury awards. However, this and other effective litigation reforms were declared unconstitutional in 1997.

Most recently, the Illinois General Assembly refused to pass meaningful reform. ISMS just completed a marathon session this spring supporting and promoting Senate Amendment 5 to HB 4847 and House Amendment 5 to SB 2239. The proposed legislation would have reduced the number of frivolous lawsuits filed against physicians; protected physicians' personal assets; enhanced medical discipline, and increased regulation of malpractice insurance companies.

Unfortunately, House Democrat leaders blocked all efforts to hold a concurrence vote on the bills. In late May, to the surprise of many, the Democratic-controlled House voted on Amendment 4 to SB 2241, which would cap non-economic damages in medical liability cases at $500,000. The proposal received overwhelming bi-partisan support but was not called for a final vote.

Litigation reform advocates also supported SJRCA 54 and HJRCA 36, which called for a constitutional amendment that would allow the General Assembly to pass caps on non-economic damages. Both were blocked as Democratic leaders of both the House and Senate refused to allow votes on the amendments.

In short, over 80 substantive bills addressing medical liability reform were introduced this session. Notably, the only proposals that received bipartisan support were ISMS initiatives. Unfortunately, many of those same initiatives were blocked by Democratic leadership in the House.

**Now is the time to contact your state lawmakers and urge them to support meaningful reform by voting for Amendment 5 to SB 2239 when the General Assembly reconvenes later this year. Ask your patients to call their legislators today. Tell them access to quality medical care depends on it.**

*To locate your state legislator, go to: www.cmsdocs.org or www.isms.org.*

## *Judicial ratings to appear on CMS web site*

WATCH OUR WEB SITE IN THE FUTURE FOR recommendations on Cook County judicial candidates. CMS is collaborating with the Chicago Bar Association to post this information well before the election. Go to www.cmsdocs.org. In the meantime, go to the Illinois Civil Justice League's web site at www.illinoisjudges2004.com, which posts positive choices on tort reform-related issues.

## Two Illinois towns exercise home rule

CLAIMING THAT STATE LAW GIVES HOME-rule cities in Illinois the authority to act when the state has not, the Illinois towns of Carbondale and Marion have passed municipal ordinances limiting non-economic damages in medical malpractice cases to three times the amount of economic damages.

Under home rule, cities have a broad right to pass laws dealing with issues of particular concern in their communities. Cities with more than 25,000 residents are entitled to home rule automatically. Residents in smaller cities can adopt these powers through a referendum.

The ordinances are intended to end the practice of venue shopping, and require that medical malpractice cases be heard in the county in which the medical treatment occurred.

No one is sure whether these measures will hold up before the Illinois Supreme Court, which in the 1990s struck down a state law that capped non-economic damages. City officials hope that because they have not set the caps at a specific dollar amount, the high court might find the ordinances constitutional.

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## *LIABILITY REFORM:*

## FACTS FOR PHYSICIANS AND PATIENTS

- The median medical liability award in medical liability cases jumped 114% from 1996 to 2002, topping $1 million.
- The average award reached $3.9 million in 2001, and increased to $6.2 million dollars in 2002.
- In the period 1996-97, 37% of all verdicts that specified damages assessed awards of $1 million or more. By 2001-2002, 52% of all awards were for $1 million or more. 25% of all awards exceed $3.5 million.
- Nearly 70% of medical liability claims in 2002 were closed without payment to the plaintiff. Plaintiffs lost the majority of their cases that went to a jury. Of the 7% of claims that went to jury verdict, the defendant won 82.4% of the time.
- Physicians who win at trial still have large fees to pay for their defenses. Defense costs averaged $91,803 per claim in cases where the defendant prevailed at trial. And in cases where the claim was dropped or dismissed, costs to defendants averaged almost $16,160 per case.
- 45% of hospitals reported that the professional liability crisis has resulted in the loss of physicians and/or reduced coverage in emergency departments.
- According to the HHS, 2001 premium increases in states without litigation reform ranged from 30% to 75%. In 2002, the situation has deteriorated. States without reasonable limits on non-economic damages have experienced the largest increases so far, with increases of between 36% and 13% in 2002. States with reasonable limits on non-economic damages have not experienced the same rate spiking.
- Medical residents' growing concerns about liability issues may cause them to avoid choosing high-risk specialties or practicing in a crisis state. 62% of medical residents reported that liability issues were their top concern in 2003--surpassing any other concern, and representing an enormous increase from 2001, when only 15% of residents said liability was a concern.

*Source: American Medical Association. Reprinted with permission.*

## LOCAL LIABILITY UPDATE

### CMS tackles liability reform with Chicago City Council

WITH MEANINGFUL MEDICAL LIABILITY reform stalled in both the Congress and Illinois General Assembly, CMS has collaborated with the Chicago City Council to prepare a resolution addressing the loss of patient access to care in Chicago and Illinois. CMS Immediate Past President Neil E. Winston, MD, worked with Alderman Ed Smith, chairman of the Committee on Health, to craft language to be presented to the City Council. Already, as a result of the resolution, the City Council committee has held a hearing to assess the impact of the medical liability crisis.

CMS will be working with the committee over the coming months through public hearings to inform patients that frivolous lawsuits are driving physicians out of the state. CMS also will be monitoring the exodus of physicians from specific regions of the city and reporting those findings to the Council.

### Members can support judicial reform in Madison County

THE ELECTION OF JUDGE LLOYD KARMEIER, the Republican candidate running for the Illinois Supreme Court in southern Illinois, is a critical step toward reforming Illinois' court system. The 5th Judicial seat includes Madison County, which has been rated a "judical hellhole" by national watchdog groups. Democrats now hold a 5-2 majority vote on the Court, which in 1997 declared unconstitutional a law to cap non-economic damages in civil cases. Judge Karmeier, a Washington County Circuit Court judge, is the clear choice for reform.

The winner will serve on the Supreme Court for the next ten years.

Let's make that a 4-3 advantage! Help support the election of Judge Karmeier.

***Contributions can be sent to IMPAC, 20 N. Michigan Ave., Suite 700, Chicago, IL 60602; or to Citizens for Karmeier, P.O. Box 303, Nashville, IL 62263.***

## PATIENT HANDOUT

### THE MEDICAL LIABILITY CRISIS: COMMON MYTHS AND MISPERCEPTIONS

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

**FACT:** Annual statement data summarized in Best's Aggregates & Averages, Property-Casualty, 2003 edition, showed that the Investment Yields of medical liability insurers have been stable and positive since 1998. Those returns have ranged from 4.5% to 5.4%, and include income from interest, dividends, and real estate income. The facts simply don't justify anyone trying to place blame on the insurance industry for an out-of-control legal system.

**MYTH:** The crisis is nothing more than the natural "insurance cycle."

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

**MYTH:** The crisis is due to lack of insurance regulation by the states.

**FACT:** The American Association of Health Plans finds that "all state insurance departments and other state governmental agencies heavily regulate and monitor the solvency of medical malpractice carriers…and require extensive reporting." These regulators place strict limits on the types and riskiness of investments insurers can purchase. Also, the insurers are required to report annually on the status of their investments. The fact remains that in states without medical liability reforms, insurers are choosing to no longer write policies or to leave the state altogether.

**MYTH:** The crisis is a result of bad insurer investment practices, including putting too much money in the stock market.

**FACT:** The AAHP also reasoned that if the stock market were to blame, the crisis would resonate across the country to all medical liability insurers. This is not the case, as evidenced by the fact that it is mostly physicians who practice in states without meaningful medical liability reform who are significantly affected. Furthermore, as noted in this article, insurers do not heavily invest in the stock market. Rather, insurers' investments are mostly in bonds and other positive-yield markets.

**MYTH:** Proposition 103, not MICRA, is responsible for lowering medical liability premiums in California.

**FACT:** Proposition 103 (The Insurance Rate Reduction and Reform Act) is not responsible for keeping California's medical liability premiums down. Rather, MICRA has been the force behind California's success. MICRA (Medical Injury Compensation Reform Act of 1975) is perhaps the most successful example of reform at the state level, slowing the rate of growth in medical liability premiums (167% versus 505% in the rest of the country from the period 1976 to 2000) in California. Under MICRA, the state has a $250,000 cap on non-economic damages, allows for binding arbitration agreements, collateral source offsets, limits on contingency fees, advance notice of liability claims, statute of limitations, and periodic payment of damages.

**FACT:** Proposition 103 does not cover all entities that offer insurance.
***a)*** Only about one-half of medical providers in California are insured by entities that are subject to Proposition 103.
***b)*** The remaining half of medical providers are covered by a combination of risk retention groups and self-insured institutions, both public and private, that are not subject to Proposition 103.

**FACT:** Proposition 103 did not have any substantial effect on liability premiums.
At the time of Proposition 103's passage in 1988, MICRA had been declared constitutional, and liability premiums in California already had begun to stabilize due to insurers' confidence that the courts were beginning to uniformly apply MICRA.

*Source: American Medical Association. Reprinted with permission.*

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