

**BEFORE THE COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES**

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TESTIMONY ON H.R. 5 (GREENWOOD)
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Mr. Chairman and Members of the Committee:

Thank you for the invitation to share with you the background of how California learned to control what was once its own runaway medical liability insurance crisis.

From 1974-76, I was immersed in an emergency over the cost and availability of medical liability insurance for California doctors and hospitals – first as the consultant to the Legislative Committee that studied its causes and predicted its occurrence, and then as advisor to the Governor and the Legislature who had to come to grips with it through the enactment of legal reforms. Now and for the past four years I have served as CEO and General Counsel to CAPP, a broad based organization of health care providers, professional medical associations, medical liability carriers and community clinics dedicated to preserving and protecting those very legal reforms that took effect in 1976 and tamed our state’s medical liability crisis. This almost thirty year journey of biography as history underscores that what we learn from the past may help us to avoid repeating its unfortunate excesses. It also counsels CAPP and our allies to support federal efforts to bring uniformity and certainty to the malpractice crises now afflicting numerous states through legislation modeled on California’s experience, such as HR 5. Here, in a “nutshell” is that history.

The California Experience, or Deja Vu All Over Again

In late 1974 California physicians and hospitals were shocked by announcements from the major insurance companies writing medical liability coverage for them that their premiums needed to be raised 400%. This calamity was predicted by the Assembly Select Committee on Medical Malpractice in a report issued earlier that summer by its chairman, Assemblyman Henry A. Waxman, which warned that:

[M]edical malpractice group insurance rates for doctors have increased more than four hundred percent (400%) in just two brief years between 1968 and 1970; [moreover,] [t]he medical malpractice insurance market is a highly unstable one and, if rates continue to escalate as they have in the past few years, malpractice insurance carriers may be priced outside the market.

(*PRELIMINARY REPORT*, Assembly Select Committee on Medical Malpractice, June 1974, Pp. 3-4.)

Waxman's warning was prescient, though it did not anticipate the suddenness or severity of California's medical malpractice insurance crisis. Alarmed hospitals and physicians responded to it by restricting medical care to emergencies. Access to needed health care was jeopardized for Californians in the same way it is today threatened for citizens in Florida, New York, Nevada, Kentucky, Ohio, Pennsylvania, West Virginia and other states undergoing their own medical malpractice insurance crises. Within a few months newly elected Governor Jerry Brown called an extraordinary session of the Legislature in which he proclaimed:

The cost of medical malpractice insurance has risen to levels which many physicians and surgeons find intolerable. The inability of doctors to obtain such insurance at reasonable rates is endangering the health of the people of this State, and threatens the closing of many hospitals. The longer term

consequences of such closings could seriously limit the health care provided to hundreds of thousands of our citizens.

(Proclamation of Governor Edmund G. Brown, Jr. to Leg. (May 16, 1975) Stats. 1975 (Second Ex. Sess. 1975-1976) p. 3947.)

Not everyone agreed at the time that there was a real crisis in California. Personal injury attorneys charged, as they do today about the catastrophes sweeping other states, that California's malpractice insurance emergency was "contrived," a result of bad stock market losses by insurers. To separate fact from fantasy California's Joint Legislative Audit Committee ordered the Auditor General to undertake a study to determine the reasons for the crisis. In December 1975 that study, contracted by the Auditor General to Booz-Allen Consulting Actuaries, reported that "premiums paid by California doctors for medical malpractice insurance have increased significantly over the past fifteen years, but have not kept pace with increasing claim costs; [and] the average premium in 1976 is expected to be about five times higher than the 1974 average." (*CALIFORNIA MEDICAL MALPRACTICE INSURANCE STUDY*, Report by Booz, Allen & Hamilton, Inc. for the Office of the Auditor General, State of California, Dec. 5, 1975, Pp. 1-2.).

By the time the Auditor General reported that California's malpractice insurance crisis was indeed "real," the Legislature enacted the Medical Injury Compensation Reform Act of 1975 ("MICRA"). MICRA's purpose is stated in its preamble:

The Legislature finds and declares that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the

quality of health care available to citizens of this state. The Legislature, acting within the scope of its police powers, finds the statutory remedy herein provided is intended to provide an adequate and reasonable remedy within the limits of what the foregoing public health and safety considerations permit now and into the foreseeable future.

(Stats. 1975, Second Ex. Sess. 1975-1976, ch. 2, § 12.5, p. 4007.)

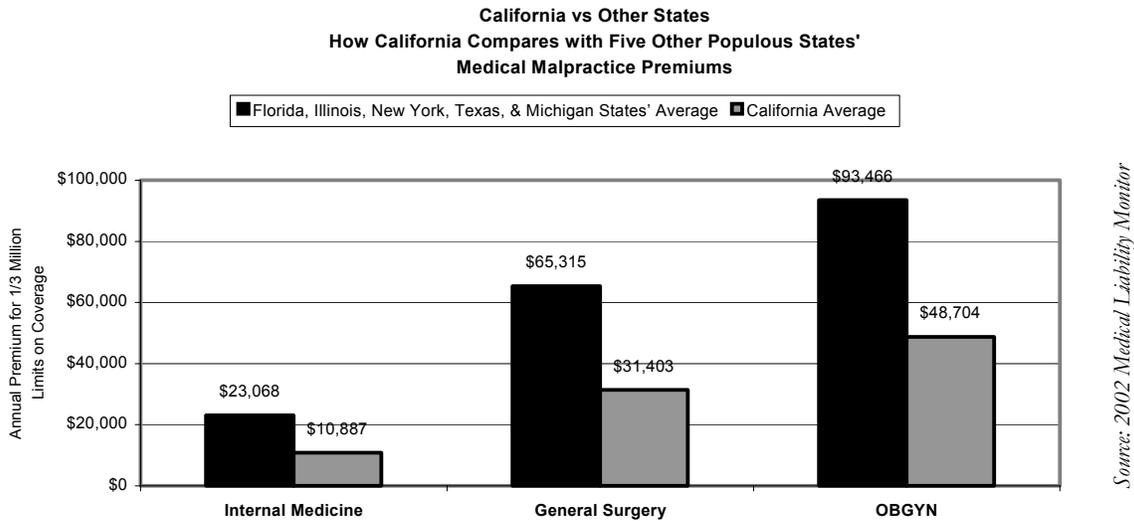
***The “Key Legal Reforms” for Taming Runaway
Malpractice Litigation and Liability Premiums***

The “statutory remedy” that tamed runaway malpractice premium costs was comprehensive and dealt with major changes in the regulation of the medical profession, insurance and legal reforms. Most of these reforms were recommended by the Assembly Select Committee on Medical Malpractice that Henry Waxman chaired in 1974 and Governor Jerry Brown urged be adopted in his proclamation calling the Legislature into a special session to solve the crisis. MICRA’s legal reforms curbed unfair practices and inefficiencies in our system for resolving medical malpractice disputes. It put a ceiling of \$250,000 on exploitive non-economic “pain and suffering” damages, and assured full compensation for economic losses: wages, medical bills, rehabilitation and custodial care for as long as necessary.

MICRA also permits arbitration of medical liability disputes, lets the jury know of other payments a plaintiff is receiving for the same injuries sued on, marshals and preserves resources for ongoing care of the plaintiff by allowing periodic payment of future damages, and assures that the most severely injured plaintiffs get a proper share of any recovery by requiring that attorneys’ contingency fees be paid on a sliding scale — the larger the recovery the smaller the lawyer’s percentage.

MICRA achieved for California stable and, in comparison to the rest of the country, reasonably affordable malpractice insurance premiums charges. States

without MICRA reforms are now experiencing their own version of California’s mid-1970s medical liability crisis. Since 1975, California’s premiums have risen 168 percent, while the average U.S. premium has increased 420 percent. Today, as the chart below shows, the average annual liability premium for an Ob/gyn doctor in California is \$ 48,700, half the average doctors pay in the rest of the country.



The Importance of the \$250,000 Ceiling on Non-Economic Damage

A seminal opinion upholding the validity of MICRA against constitutional attack affirmed that “the goal of [the \$250,000 limit on recoverable non-economic damage] [is] to ensure the availability of health care and the enforceability of judgments against health care providers by making medical malpractice insurance affordable. The amount of non-economic damages is still limited to \$250,000 for each injured plaintiff and thus will not result in ‘the unknown possibility of phenomenal awards for pain and suffering that can make litigation worth the gamble.’” (*Fein v. Permanente Medical Group* (1985) 38 Cal.3^d 137, 163.)

Courts have consistently and repeatedly made clear the purpose of MICRA and its non-economic damage provision:

The legislative history of MICRA does not suggest that the Legislature intended to hold down the overall costs of medical care but instead demonstrates . . . that the Legislature *hoped to reduce the cost of medical malpractice insurance, so that doctors would obtain insurance for all medical procedures and would resume full practice; indeed, in this respect [available] statistics suggest that MICRA was in fact successful.* The statistical information before the Legislature indicated, however, that insurance costs amounted to only a small percentage of overall medical costs (see, e.g., Assem. Select Com. on Medical Malpractice Preliminary Rep. (June 1974) p. 49), and thus in an era of substantial inflation – as experienced in the late 1970’s – even the total elimination of malpractice insurance premiums could not reasonably have been expected to reduce the overall cost of medical care.

(*American Bank & Trust Co. v. Community Hosp. of Los Gatos* (1985) 36 Cal. 3^d 359, 373; italics added.)

Restricting recovery for non-economic loss is neither a novel nor radical notion. Former Chief Justice Roger Traynor, the father of modern products liability law and advocate for “spreading the loss” of injury compensation through insurance, long ago recognized the need to cabin these subjective and highly elastic damages. In *Seffert v. L.A. Transit Authority* (1961) 56 Cal.2^d 498, Traynor dissented from approval of a non-economic damage award of \$134,000 in a negligence action to a woman whose foot was injured while boarding a city bus and whose economic losses were about \$54,000.

There has been forceful criticism of the rationale for awarding damages for pain and suffering in negligence cases. Such damages originated under primitive law as a means of punishing wrongdoers and assuaging the feelings of those who had been wronged. They become increasingly

anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation. . . . [¶] [A]ny change in this regard must await reexamination of the problem by the Legislature.

When the Legislature followed Justice Traynor's suggestion and reexamined the problem of non-economic damage awards in the context of the malpractice insurance crisis of 1975, it decided to cap them at \$250,000. The considered judgment of the Legislature and the Governor was that limiting recovery for non-economic damages to that amount would dampen the skyrocketing cost of medical malpractice insurance. This policy decision has withstood numerous legal challenges because it is right.

The continuing availability of adequate medical care depends directly on the availability of adequate insurance coverage, which in turn operates as a function of costs associated with medical malpractice litigation. Accordingly, MICRA includes a variety of provisions, all of which are calculated to reduce the cost of insurance by limiting the amount and timing of recovery in cases of professional negligence. [¶] MICRA thus reflects a strong public policy to contain the costs of malpractice insurance by controlling or redistributing liability for damages, thereby maximizing the availability of medical services to meet the state's health care needs. With specific reference to [the ceiling on non-economic damage], this court has also observed that "[o]ne of the problems identified in the legislative hearings was the unpredictability of the size of large non-economic damage awards, resulting from the inherent difficulties in valuing such damages and the great disparity in the price tag . . . different juries place on such losses. The Legislature . . . reasonably . . . determined that an across-the-board limit would provide a more stable base on which to calculate insurance rates."

(*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 112, citing and quoting from *Fein v. Permanente Medical Group, supra*, 38 Cal.3^d at 163.)

MICRA's non-economic damage cap and those from nineteen other states echoing it have arrested spiraling malpractice insurance premium charges. As one scholarly study¹ states:

The weight of empirical evidence suggests that . . . some of the legal reforms had the intended effect of stabilizing liability insurance markets and reducing the overall level of medical malpractice payments. The largest reductions in payments and premiums were attributable to a few provisions, *notably caps on awards* and modifications of the collateral source rule . . .

Other studies about the benefits of the damage cap on malpractice insurance rates reached the same conclusion. A 1995 study by the American Academy of Actuaries found, for example, that in California (since MICRA was enacted) medical malpractice costs have fallen substantially from about 28 percent of the national total in 1975 to about 10 percent in 1994 – while California's share of physicians held steady at 15 percent.² Paralleling this decrease, the state's portion of national malpractice premium costs was sliced in half. In New York, however, where a damage cap was never enacted despite the adoption of other piecemeal reform measures over the years, there were no observable improvements in the state's relative

¹ Bovbjerg & Sloan, *No-Fault for Medical Injury: Theory and Evidence* (1998) 67 U. CIN. L. REV. 53, 62 (italics added). For empirical evidence on the impact of tort reforms, see Danzon, *The Frequency and Severity of Medical Malpractice Claims* (1984) 27 J.L. & ECON. 115; Hamilton, Rabinowitz, & Alschuler, Inc., *CLAIM EVALUATION PROJECT* (1987); Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence* (1986) 49 LAW & CONTEMP. PROBS. 57; Sloan et al., *Effects of Tort Reforms on the Value of Closed Medical Malpractice Claims: A Microanalysis* (1989) 14 J. HEALTH POL. POL'Y & L. 663.

² *Actuaries Use States' Experiences To Argue For Comprehensive Malpractice Reforms*, 22 HEALTH LEGISLATION & REGULATION 47 (Nov. 27, 1996)(Faulkner & Gray, Inc.).

costs. New York’s physician population hovered between 12 and 14 percent of the national total, but its malpractice losses zigzagged from just above 16 percent of the national cost in 1975 to 22 percent in 1979, to about 15 percent in 1985, and back to above 22 percent in 1993.³ Ohio experienced a gradual decline – about one percent from 4 to 3 percent – in costs following tort reforms enacted in 1975.⁴ This package included a cap on damages that was challenged in court in 1982, resulting in sharp increases that peaked in 1985 (at 6 percent) when the cap was overturned. Ohio’s loss payments remained fairly constant until this year, when premium charges spiraled over the top for doctors in high risk specialties.⁵

In 1995, the congressional Office of Technology Assessment also confirmed that “caps on damage awards were the *only* type of State tort reform that consistently showed significant results in reducing the malpractice cost indicators.”⁶ This same conclusion was recently reached by the federal Department of Health and Human Services (HHS), which reported that “a major contributing factor to the most enormous increases in liability premiums has been the rapidly growing awards for non-economic damages in states that have not reformed their litigation system to put

³ *Id.*

⁴ *Id.*

⁵ “A study released this week by *Medical Liability Monitor* . . . found that four insurers are charging Cleveland-area obstetricians from \$74,581 to \$152,496 this year for malpractice coverage. . . . A bill pending with the Ohio legislature would place a \$300,000 cap on non-economic awards for pain and suffering in medical malpractice Nineteen states already have limits, ranging from \$200,000 to \$1 million. . . . [T]he average premium for obstetricians nationwide was \$56,546. In states with tort reform, that figure ranges from \$17,786 to \$55,084.” (Powell, *Docs Preach at Practices* – Physicians Say Limiting Malpractice Awards will Lower Insurance Costs, *AKRON BEACON JOURNAL*, Oct. 10, 2002, p. 1.)

⁶ U.S. Congress, Office of Technology Assessment, *Impact of Legal Reforms on Medical Malpractice Costs*, OTA-BP-H-119, p. 64 (Washington, D.C.: U.S. Gov’t. Printing Office, Oct. 1995).

reasonable standards on these awards.”⁷ The HHS report emphasizes that the medical malpractice insurance crises now engulfing twelve states “is less acute in states that have reformed their litigation systems. States with limits of \$250,000 or \$350,000 on non-economic damages have average combined highest premium increases of 12-15%, compared to 44% in states without caps on non-economic damages.”⁸

The HHS study credits MICRA, especially its ceiling on recoverable non-economic loss, for holding down medical malpractice insurance rate increases and keeping open access to health care:

California has more than 25 years of experience with this reform. It has been a success. Doctors are not leaving California. Insurance premiums have risen much more slowly than in the rest of the country without any effect on the quality of care received by residents of California. Insurance premiums in California have risen by 167% over this period while those in the rest of the country have increased 505%. This has saved California residents billions of dollars in health care costs and saved federal taxpayers billions of dollars in the Medicare and Medicaid programs.⁹

MICRA’s substantial public benefits through reduced malpractice premium costs have *not* come at the expense of plaintiffs’ ability to be fairly compensated for their losses. “Leading malpractice carriers report that between 1984 and 1997 payments to [medical] malpractice plaintiffs . . . increased 139 percent while inflation

⁷ *Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing our Medical Liability System* 12 (Health and Human Services: July 24, 2002).

⁸ *Id.* at p. 14.

⁹ *Id.* at p. 17.

grew less than half that amount (54.5%) and health care costs rose less than 120 percent.”¹⁰

A plaintiff in a \$400,000 medical malpractice case in 1984, where half the award was for non-economic damage, today would receive \$1.195 million, or \$442,500 more than what the injury is worth measured by the rise in the cost of living. This result is likely due to plaintiffs’ attorneys creatively exploiting what they get (unlimited economic loss) to offset the MICRA limit [on non-economic loss].¹¹

Numerous scholarly studies show that the \$250,000 ceiling on non-economic damages is a major factor accounting for the principal difference between California’s stability and the chaos of other states in professional liability coverage costs. Despite these savings, the average malpractice settlement and award in California, adjusted for post-MICRA inflation, is greater today than it was before MICRA. Without MICRA, pay outs by California carriers on behalf of health care providers sued for professional liability would mirror the claims experience of other states and send corresponding coverage costs through the roof.

California’s medical malpractice disputes are settled 23 percent faster than in the rest of the country. The cost of settlements is 53 percent lower than the national average. The Congressional Budget Office stated that medical malpractice reform like California’s will result in savings of \$1.5 billion over ten years. The congressional study does not include the hidden costs of defensive medicine. A Stanford University study shows that California’s medical liability reforms would save the national health

¹⁰ Hiestand, *MICRA Management*, *LOS ANGELES DAILY J.*, March 4, 1999, p. 6.

¹¹ *Id.*

care system \$50 billion a year in defensive medicine costs. Reducing health care costs safeguards access to medical care for those who lack basic health coverage.

MICRA is a proven success. Medical liability no longer deprives our citizens of access to health care. Congress and other states now look to the California experience as they try to fashion solutions to the growing emergency with medical liability insurance. MICRA continues to prove that providing fair and equitable compensation for those negligently injured can be achieved in ways that preserve an orderly insurance marketplace and maintain access to quality health care. It is a success for Californians, and if enacted by Congress will benefit patients and taxpayers nationally.

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