

MEDICAL SOCIETY of the STATE OF NEW YORK

Morris M. Auster, Esq.

Senior Vice President/
Chief Legislative Counsel

ON ASSEMBLY JUDICIARY COMMITTEE AGENDA

Division of Governmental Affairs

MEMORANDUM IN OPPOSITION

A.9028 (DINOWITZ)

AN ACT To Amend The General Obligations Law, In Relation To Settlements In Tort Actions; And To Repeal Certain Provisions Of Law Relating Thereto

This measure would repeal current §15-108 of the General Obligations Law and re-enact a new §15-108 that would encourage the settlement of cases by requiring the non-settling co-defendant in a tort action to choose whether to reduce his/her liability exposure by the stated settlement amount or the settling tortfeasor's equitable share prior to the first opening statement of the trial. Because this legislation creates the possibility that payouts will exceed an actual jury verdict, which in turn could cause physician medical liability insurance premiums to increase at a time when no further increases can be tolerated, **MSSNY opposes this legislation.**

Under current law, the plaintiff is never entitled to receive more than what has been awarded to him/her by a jury. A jury verdict is, therefore, reduced by the greater of the dollars paid by settling defendants or the share of fault allocated by the jury to a defendant who has already settled. This bill fundamentally departs from these long-standing principles by permitting the plaintiff the potential to be unjustly enriched by collecting more than the jury ultimately determined the non-settling defendants' equitable share to be if the settling defendant settles for an amount that exceeds their equitable share of the award.

Take, for example, a case with two defendants, where defendant A agrees to settle with the plaintiff for \$80,000. The case goes to trial, where the verdict is found for the plaintiff for \$100,000, with A and B each found 50% responsible. Under current law, even though defendant B would have been obligated to pay \$50,000 if defendant A did not settle, under current law, defendant B is permitted to discharge their legal obligation to the plaintiff by paying \$20,000 because defendant A has settled for \$80,000 (\$100,000 - \$80,000). Under this proposal, defendant B would be obligated pre-trial to "roll the dice" and guess whether it is better for them to be responsible for their proportionate share or reduce their obligation by the settled amount. Therefore, there is a very good chance that defendant B would have to unnecessarily pay significantly more. Defendant B could be obligated to pay \$50,000 (instead of the \$20,000 under current law), meaning that the plaintiff would be unjustly enriched by \$30,000.

New York's dysfunctional liability adjudication system is in need of systemic reforms to reduce our huge liability insurance premiums, instead of provisions such as this proposed legislation which would undoubtedly increase them. New York's health care delivery system already faces severe financial strains due to a myriad of factors. Therefore, it is imperative that the State Legislature take action to assure that physicians and hospitals remain available to deliver the care New Yorkers are expecting to receive, including acting to reduce the choking costs of medical liability insurance.

Given the extraordinary costs of medical liability insurance that many physicians must pay, combined with the enormous changes in health care delivery and payment that is placing huge new financial pressures on physician practices and hospitals, it is irresponsible to consider legislation at this time that might actually increase these costs. Many New York physicians already pay liability premiums that far exceed \$100,000 and some even exceed \$300,000! Moreover, after recently enacting a law to expand medical malpractice lawsuits that will further drive up our liability premiums, **it would be unconscionable for New York State to now pass another law that would make these problems even worse.**

Furthermore, malpractice payouts in New York State continue to be far out of proportion to the rest of country. For example, a recently released report by Diederich Healthcare showed that once again New York State had by far and away the highest number cumulative medical liability payouts (over \$700 million), more than two times greater than the state with the next highest amounts, Pennsylvania (\$315 million), and far exceeding states such as California (\$235 million) and Florida (\$223 million). This is not just a product of New York's population size. New York also had the dubious distinction of having the 2d highest per capita medical liability payouts in the country – behind New Hampshire, where one aberrant case can significantly affect the ratio.

Therefore, it is little wonder that a recent analysis from the website WalletHub listed New York as the worst state in the country in which to practice medicine, in large part due to its overwhelming liability exposure as compared to other states in the country. Legislation such as this will only make this embarrassment even worse!

At the same time physicians face these exorbitant costs, health plans continue to reduce payments to physicians by inappropriately denying, delaying and reducing payment for needed care. Exacerbating these problems are the use of high deductible health insurance plans that significant increase patient out of pocket costs. Furthermore, physicians face substantial new costs as a significant component of their revenue base will be conditioned on participation in often unwieldy value-based payment schemes both in Medicare and in Medicaid, including the need to invest tens of thousands of dollars to implement electronic medical record systems. When putting these factors together with our exorbitant liability costs, it is no surprise that regions across the State of New York face a shortage in on-call emergency specialty care, according to a recent report by HANYS.

This bill would do nothing to address the problems facing our health care system, and would instead make these problems worse. Physicians need liability cost decreases, not increases!

For all of the reasons stated above, we urge that this measure be defeated.

Respectfully submitted,

2/26/18

MMA - oppose

MSSNY DIVISION OF GOVERNMENTAL AFFAIRS