

MEDICAL SOCIETY of the STATE OF NEW YORK

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Division of Governmental Affairs
MEMORANDUM IN OPPOSITION

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A.244 (WEINSTEIN)

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S.1605 (BONACIC)

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.

Given the extraordinary costs of medical liability insurance that many physicians must pay, and the failure of our policymakers to comprehensively address this problem, it is irresponsible to consider legislation that

might actually increase these costs. New York physicians continue to pay liability premiums that far exceed those in any other state. After liability premiums for New York physicians shot up 55-80% between 2003 to 2008 before the Legislature intervened to impose rate freezes in 2008 and 2009, medical liability premiums have continued to steadily rise. Many New York physicians pay liability premiums that far exceed \$100,000 and some even exceed \$300,000! For example, for just a single year of coverage, the cost of medical liability coverage for the 2014-15 policy year was:

- \$338,252 for a neurosurgeon in Nassau and Suffolk counties;
- \$186,639 for an Ob-GYN in Bronx and Richmond counties;
- \$132,704 for a general surgeon in Kings and Queens counties; and
- \$134,902 for an vascular surgeon or cardiac surgeon in Bronx and Richmond counties

Moreover, malpractice payouts in New York State continue to be far out of proportion to the rest of country. For example, in 2013, according to a report by Diederich Healthcare and reported in the March 15, 2014 *Washington Post*, New York State had by far and away the highest number cumulative medical liability payouts (\$689,800,300), nearly two times greater than the state with the next highest amounts, Pennsylvania (\$356,855,500), and far exceeding states such as California (\$274,590,800) and Florida (\$199,442,450).

Additionally, the report indicated that the New York per capita medical liability payment of \$38.83 far exceeded was far away the highest in the country, exceeding the second highest state Pennsylvania by 57% (\$24.76), the third highest state New Jersey by 67% (\$23.24), and the fourth highest state Massachusetts by 74% (\$22.37). Remarkably, it was nearly 13 times greater than Texas!

Furthermore, it is noteworthy that physicians in other states which have enacted medical liability reform in recent years pay substantially lower premiums. For example, according to the Texas Alliance for Patient Access, 90% of the physicians in Texas have seen their premiums drop at least 30% since enactment of their medical liability reform law in 2003.

We can no longer sustain such an expensive, inequitable and fatally flawed medical liability adjudication system if we wish to assure that our healthcare system will be able to accommodate the demand that will inevitably come as our population ages and becomes more resource-dependent, as well as the over 2,000,000 newly insured patients who are starting to receive coverage through New York's new health insurance Exchange. In addition to exorbitant liability premiums, New York physicians face significant cuts in their Medicare payments as a result of being unable to comply with burdensome administrative requirements, as well as significant cuts in payments from health insurance companies, not to mention the fact that primary care physicians just took a 40% cut in their Medicaid payments due to Congress' failure to extend an ACA primary care payment program. As a result of all these factors, thousands of physicians across New York have been essentially forced to sell out their practices to local hospitals, impairing continuity of patient care.

With all these enormous changes occurring in patient care delivery, physicians need comprehensive reform of our flawed civil justice system and reduction in our medical liability costs, not legislation that increases costs and exacerbates existing problems.

This bill would do nothing to address these 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 respectfully urge that this measure be defeated.

Respectfully submitted,

ELIZABETH DEARS, ESQ.

2/27/15

MMA - oppose