

# MEDICAL SOCIETY of the STATE OF NEW YORK

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**MEMORANDUM IN OPPOSITION**

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**S.911 (LIBOUS)**

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**A.285 (WEINSTEIN)**

**AN ACT to amend the civil practice law and rules,  
in relation to accrual of certain causes of action**

This bill would amend the statute of limitations for medical, dental or podiatric malpractice to include a discovery of injury rule, allowing the current two and half year statute of limitations to run from the date an injured patient discovers, or should have discovered, that their injury was caused by malpractice. The bill would prohibit a malpractice action to be filed more than ten years after the date of the alleged malpractice. **As this measure would potentially lead to enormous increases in the cost of liability insurance for physicians and hospitals at a time when no increases can be tolerated due to the enormous changes occurring in health care delivery, the Medical Society of the State of New York strongly opposes this measure and urges its defeat.**

The effect of this drastic proposal is that it would essentially quadruple the length of the statute of limitations for every single medical malpractice case. We are advised by the state's leading medical liability insurance company that a Milliman actuarial study of substantially similar legislation indicated that if this legislation were to be enacted, **medical liability premiums would need to be increased by nearly 15%, perhaps even greater.** Given that many hospitals and physicians all across New York State are barely able to keep their door open now to continue delivering the care expected by our patients, any increases of this nature would prompt a very serious access-to-care problem throughout New York State.

It must be understood that New York physicians pay premium rates that are already among the very highest in the country, if not the highest. **Yet while dozens of other states across the country have passed legislation to reduce these costs, New York State has failed to enact legislation to address this problem.**

For many physicians currently struggling to keep their practices afloat due to the enormous changes taking place in health care delivery in large part brought on by implementation of the Affordable Care Act, this legislation could be the "final straw" to drive them out of practice.

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. 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 had by far and away the highest per-capita medical liability payments in the country, far exceeding the second highest state Pennsylvania by 57%, the third highest state New Jersey by 67%, and the fourth highest state Massachusetts by 74%.

These enormous costs are driven by an unpredictable medical liability adjudication system that numerous studies have concluded results in cases where awards are made despite the absence of any negligence whatsoever. Moreover, under the current system studies have shown that often those truly injured by negligence do not sue.

As a result of the randomness and unpredictability of the current medical liability adjudication system, physicians who treat the most high-risk patients are sued with astounding regularity in New York State. Every 5 years, 65% of our neurosurgeons are sued, as well as nearly 50% of our surgical specialists and OB-GYNs.

While approximately 2/3 of all medical liability cases brought result in no payment, even the costs of defending these cases are extensive and significantly add to the astronomical cost of medical liability insurance. For example, MLMIC spent over \$800,000,000 in the previous decade to defend physicians and hospitals on whose behalf no payment was ever made to the plaintiff.

There is no question that this legislation, if enacted, would have disastrous consequences on New York's health care system, potentially causing another malpractice crisis in this state even more serious than those in 1975-76 and 1985-86. It would also take a significant step backward from important actions taken by the State Legislature in those years to address the problem of availability and affordability of liability insurance for physicians which, of course, will have a direct impact on accessible health care for New Yorkers.

In 1975, New York State was facing a crisis so severe that no insurer was willing to write liability policies for physicians. They had determined that the risk had been so expanded in New York that it was no longer insurable. The Legislature at that time enacted several reforms to ensure at least the availability of medical liability insurance. One of the most important of these was a bill to restore, at least partially, a statute of limitations which had been completely eviscerated. In 1985 and 1986, the Legislature had to again act to prevent another medical malpractice crisis in the state. The reforms adopted by the Legislature included the certificate of merit rule, modest limitations on attorney's contingency fees and establishment of the Excess Medical Liability Insurance Program which provides a second layer of medical liability insurance for physicians. Without question, of the reforms enacted in 1975-76 and 1985-86, none was more significant than the statute of limitations changes which this bill would now decimate.

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. The implementation of the Affordable Care Act has caused many insurers to drastically cut their payments to physicians for delivering patient care. Moreover, Medicare payments have essentially remained flat for the last decade, and physicians continue to face the possibility of further

devastating cuts to their Medicare payments next year unless Congress acts to prevent these cuts. At the same time, physicians face substantial new costs, including the need to invest tens of thousands of dollars to implement electronic medical record systems and e-prescribing systems as well as the huge cost of complying with the ICD-10 code set that will be required in 2015. When factoring all these problems together, it is no surprise that regions all across New York State are beginning to see shortages in several specialties, according to reports issued by the Center for Health Workforce Studies.

Yet despite these enormous difficulties facing New York's physicians, this bill does nothing to address these problems and instead would make this problem drastically worse. Given the already enormous cost of medical liability insurance, increases of this magnitude cannot be sustained by physicians.

Proponents of this measure argue that many other states have incorporated such "date of discovery" exceptions into their statutes of limitation for medical liability actions. **However, it must be noted that well over half of these states with "date of discovery" rules also have enacted caps on non-economic damages in medical liability actions, thereby significantly offsetting the enormous costs of this provision.** Moreover, those states that have "date of discovery" rules, but no caps on damages, include Alabama, Delaware, Iowa, Kentucky, Rhode Island, Vermont and Wyoming, where physicians pay far less in medical liability insurance premiums than those paid by physicians in New York City, Long Island and the Hudson Valley.

The reforms of 1975-76 and 1985-86 were absolutely essential to assure that there would not be a health care access tragedy in New York State. We reiterate that reversing those reforms would have drastic consequences on New York's health care system, particularly at a time when demand for health care will go up significantly due to the hundreds of thousands of New Yorkers who will be newly insured starting in 2014. We also remain committed to working with you and all other interested parties to engage in a constructive dialogue regarding how best to achieve meaningful reform of the liability system in a way that is fair to all. However, we need liability cost decreases, not increases!

**Based on the foregoing, MSSNY urges that this legislation be defeated.**

Respectfully Submitted,

**ELIZABETH DEARS, ESQ.**

2/17/15

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