

TALKING POINTS IN OPPOSITION TO DATE OF DISCOVERY BILL (A.285/S.911)
("Chase Your Doctor out of New York Act")

IMPACT

- This bill would change the Statute of Limitations (SoL) for medical, dental and podiatric malpractice actions, to make it a "discovery" statute. **Your legislators need to be informed that the bill would lead to enormous increases in the cost of physician/hospital liability insurance at a time when no increases can be tolerated.**
- The current SoL is 2.5 years from the date of the alleged negligent act. There are several exceptions, including where a foreign object has been left in the patient's body, where there has been continuous treatment, for minors (up to 10 years) and where there has been deliberate concealment.
- Under the proposed bill, the SoL would not begin to run until the plaintiff discovered the alleged negligent act —no matter how long into the future that may be. A Milliman actuarial study indicated that if legislation to change the Statute of Limitations to a "date of discovery" rule were to be enacted, **medical liability premiums would need to be increased by nearly 15%**. Any increase even approaching this amount would prompt a very serious access-to-care problem throughout New York State at a time when over 2,000,000 New Yorkers are obtaining health insurance for the first time through implementation of health care reform and New York's Exchange.

NEW YORK ALREADY HAS WORST MALPRACTICE CLIMATE IN U.S.

- New York physicians pay premium rates that are already among the very highest in the country. **Yet while many other states have passed legislation to reduce these costs** (more than 30 states have passed some limitations on non-economic damages), **New York State has failed to enact legislation to address this problem.** In fact, comprehensive tort reform was a major component of Budget discussions just a few years ago.
- 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 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%.

HISTORY OF NEW YORK'S STATUTE OF LIMITATIONS

- 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.
- The 75-76 and 85-86 packages, while helpful, have only placed a tenuous control on the cost of malpractice insurance in New York State. Many physicians are struggling to pay the premiums they face now, and many hospitals can barely afford to stay open.
- 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. Moreover, Medicare payments have essentially remained flat for the last decade, and physicians face potentially another 25% cut to their Medicare payments at the end of 2013 unless Congress acts to prevent the cut. When factoring all these problems together, it is no surprise that regions all across New York State face shortages in several specialties, according to reports issued by the Center for Health Workforce Studies.

OTHER STATES

- While some have argued that many other states have incorporated such "date of discovery" exceptions into their SoLs, **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.** These states include California, Colorado, Florida, Georgia, Hawaii, Indiana, Kansas, Louisiana, Massachusetts, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Utah, West Virginia, and Wisconsin. Moreover, almost all of these states have "outside" limits on the time an action can be brought.
- 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 vast majority of these states, furthermore, have an outside limit on the time within which a malpractice lawsuit may be brought.