NEW YORK COUNTY LAWYERS’ ASSOCIATION COMMENTS ON STATE BAR COMMITTEE ON TORT SYSTEM MEMORANDUM

This Report was approved by the Board of Directors of the New York County Lawyers' Association (NYCLA) at its regular meeting on March 14, 2011.

I. Recommendation

NYCLA should support the New York State Bar Association’s (NYSBA) opposition to the caps on non-economic medical malpractice damages set out in Proposal Number 131 of the Medicaid Redesign Team. 1 As described below, the proposed caps:

- impinge upon powers traditionally left to the finder of fact and the independent judiciary;
- would not bring about significant cost savings since medical malpractice costs amount to an infinitesimal percentage of total health care spending;
- have not necessarily resulted in decreased medical malpractice premiums in other states where such caps have been implemented;
- would unacceptably affect senior citizens, women and children, groups that rely disproportionately on suits alleging non-economic damages, to the extent that they are less able to claim lost wages and other economic damages; and
- have been adopted after a flawed procedural process and should be subject to additional notice and comment.

II. Background

A. Summary of Proposal Number 131

On February 9, 2011, Medicaid Director Jason Helgerson presented Proposal Number 131 of the Medicaid Redesign Team (“MRT”), a proposal that would create a Neurologically Impaired Infant Medical Indemnity Fund2 and would institute a cap on non-economic damages for medical malpractice awards.

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1 These comments were prepared by NYCLA Board Member Vincent T. Chang. The views expressed herein do not reflect the views of the author’s law firm. The comments were reviewed and approved by the NYCLA Tort Law Section, chaired by Ronald J. Katter.

2 This memorandum, like the NYSBA Memo does not address the Fund.
Proposal Number 131 would cap non-economic damages in malpractice cases at $250,000. It would also allow:

- peer review privileges to be extended to defendants;
- early pre-trial showing of each defendant’s involvement in the case;
- some protection of statements of remorse and acceptance of responsibility; and
- require a 182-day pre-suit notice period.  

The proponents of Proposal Number 131 claim that the proposal would save Medicaid around $234 million, with a total savings of about $469 million.

B. NYSBA Response

Pursuant to a longstanding policy, NYSBA has come out strongly in opposition to Proposal Number 131. The NYSBA Memo articulates the following reasons for such opposition:

1. **Substantive Reasons for Opposition**

   - “The purpose of our tort system is to make whole or compensate the victims of harm caused by negligence by others.”
   - “To cap this type of compensation would unjustly discriminate against accident victims who suffer the most devastating physical and psychological losses.”
   - “Considering only economic loss would discriminate against persons with little or no earnings such as homemakers, children and retirees.”
   - “Awards for non-economic injuries serve to deter corporate and governmental misconduct and to protect innocent citizens.”
   - Case filing numbers for medical malpractice actions “have remained relatively flat” for the last 20 years.

2. **Procedural Reasons**

   - Review and redesign of Medicaid “should be conducted separate and apart from review and analysis of medical malpractice.”
   - “[T]he MRT is considering broad changes to the civil justice system, while excluding from the decision making team those groups most knowledgeable about that system.”
   - The working group included “no representatives of the civil justice system and few, if any, representatives of patient safety organizations.”

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3 The foregoing summary is largely derived from the New York State Bar Association (“NYSBA”) memorandum in Opposition to Medicaid Redesign Team Proposal Number 131 (approved by the NYSBA Executive Committee on February 23, 2011) (the “NYSBA Memo”). This memorandum, like the NYSBA’s, focuses on the damages caps and not on the other provisions of the proposal.
III. Proposed NYCLA Response

NYCLA opposes Proposal Number 131 for the procedural and substantive reasons outlined above. However, NYCLA also opposes the Proposal for several other reasons not contained in the NYSBA Memo.

First, Proposal Number 131 impinges upon rights and powers historically left to the civil justice system, including the core power of the assessment of damages in civil cases. The setting of damage awards has historically been left to the finder of fact, subject to the oversight of the independent judiciary. This longstanding historical practice should not be jettisoned in the absence of compelling justification. In 1987, the ABA House of Delegates adopted a policy providing that medical malpractice awards should be tempered only by the judiciary’s historic powers of additur or remittitur. “1987 Policy.” Resolution adopted by the House of Delegates of the American Bar Association in February 1987.

Second, no such compelling justification exists here. In recognition that the current system for the adjudication of damages functions properly, Proposal Number 131 makes no recommendation for change in the process of awarding economic damages in malpractice cases and it urges no changes outside of the narrow medical malpractice sector. The MRT’s decision to single out only this narrow sector is not supported by any principled rationale.

Third, while the proponents of Proposal Number 131 assert that the proposal would result in significant cost savings, little or no empirical data support that proposition. And the MRT itself has presented no such evidence. Recent studies show that medical malpractice premiums and other medical malpractice payments amount to less than 2% of total health care expenditures. (Congressional Budget Office, “Limiting Tort Liability for Medical Malpractice,” 1/08/04). Thus, even drastic reductions in the extent of medical malpractice litigation could have only a minimal effect on overall health spending.

In addition, there is at best an uncertain relationship between tort reform and the reduction of malpractice premiums. One recent authoritative study conducted by the National Bureau of Economic Research (NBER) found only a “fairly weak relationship” between malpractice judgments and settlements and malpractice premiums. The NBER noted that premium growth may be affected by many factors beyond increases in malpractice judgments and settlements, such as industry competition. (http://www.dartmouth.edu/~kbaicker/BaickerChandraMedMal.pdf). In California, “California doctors’ premiums increased by 450% in the first 13 years after the 1975 passage of MI CR A and only began to decrease after voters enacted the insurance reform initiative known as Proposition 103.”

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\[4\] Foundation for Taxpayer and Consumer Rights, “How Insurance Reform Lowered Doctor's Medical Malpractice Rates In California ...And How Malpractice Caps Failed,” March 2003, http://www.consumerwatchdog.org/healthcare/ep/ep003103.pdf. Notably, studies that claim substantial cost savings for tort reform often are evaluating a broad-based tort reform package, including such measures as changes to joint and several liability and statutes of limitations. Such broad packages can be expected to bring about greater cost savings than the relatively narrow caps on non-economic damages proposed here.
Fourth, while it is undeniable that medical malpractice caps will deter a number of medical malpractice lawsuits that would otherwise have been brought, as NYSBA points out, such deterrence would come at an unacceptable price and impose disproportionate hardship upon women, children and the elderly. This is because such groups often have reduced amounts of lost income and other economic damages, meaning that those groups must disproportionately depend upon non-economic damages for any recovery in malpractice cases. Any impairment of non-economic damages reduces the incentive to bring cases on behalf of such victims and imposes a barrier to access to justice. As the American Bar Association wrote in an *amicus* brief in the Supreme Court of Illinois:

“Empirical research has also shown that caps diminish access to the civil justice system for specific classes of potential malpractice plaintiffs. An analysis of jury awards in California, Florida and Maryland found that the primary impact of damage caps was on cases involving women, children and the elderly, and especially in death cases involving those groups. Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children and the Elderly*, 53 Emory L.J. 1263, 1313 (2004). As the GAO has stated: “Attorneys may be less likely to represent injured parties with minor economic damages if noneconomic damages are limited.” *Medical Malpractice Insurance* at 42. As Daniels and Martin concluded, the Texas caps led lawyers who continued to handle malpractice and nursing home cases to avoid clients who suffered severe injury or death, but who had minimal economic damages. *Texas Plaintiffs’ Practice*, at 316.”


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For these reasons and those outlined in the NYSBA Memo, NYCLA believes that the question of changes to medical malpractice caps should be considered in a more reasoned fashion, with input from attorneys, members of the civil justice system and proponents of patients’ rights. As the NYSBA Memo points out, such reasoned deliberation has not yet occurred. For that reason alone, Proposal Number 131 should be rejected.

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