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Statement of

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on behalf of the

American Association of Neurological Surgeons
Congress of Neurological Surgeons

Making Health Care Work for American Families:
Improving Access to Care

before the

Subcommittee on Health
Committee on Energy and Commerce
U.S. House of Representatives
March 24, 2009

Introduction

Thank you, Chairman Pallone and Ranking Member Deal, and the entire Energy and Commerce Subcommittee on Health for giving me this opportunity to address you on the critical issue of patient access to medical care.

First, if I might, let me briefly give you my background:

My name is Dr. James R. Bean. My practice is based in Lexington, Kentucky, where I have been a neurosurgeon for the past 25 years. I am currently serving as President of the American Association of Neurological Surgeons, which is a member organization of Doctors for Medical Liability Reform, the Health Coalition on Liability and Access, and the Alliance of Specialty Medicine. I have spoken widely across the country, and have testified numerous times before both the Kentucky State Legislature and this Congress, on issues related to medical liability reform, health care costs and managed care.

Access to effective medical care depends on a number of factors, but one that's too often neglected is the barrier to access created by a malfunctioning medical liability system.

We All Recognize That the System Is Broken

I think we can safely say that there is near universal agreement among physicians, patients, policy experts, opinion leaders, and policy makers on both sides of the aisle that our current medical liability system is broken and does not best serve the needs of patients or physicians.

When then-Senators Hillary Clinton and Barack Obama co-sponsored legislation in 2005 designed to deal with the mounting access-to-care crisis, they authored an article in the *New England Journal of Medicine* pointing to the deleterious effects of our broken system. Rising premiums, they wrote, are "forcing physicians to give up performing certain high-risk procedures, leaving patients without access to a full range of medical services."¹

This last October, then-candidate Barack Obama returned to the pages of the *New England Journal of Medicine* to reiterate his basic point, writing that he would be "open to additional measures to curb malpractice suits and reduce the cost of malpractice insurance," and adding forcefully, "We must make the practice of medicine rewarding again."

I would further note that the 2008 white paper released by Senate Finance Committee Chairman Max Baucus, widely considered a kind of "first draft" for healthcare reform, also explicitly acknowledges that "the current legal environment leads to the practice of defensive medicine," and calls for "alternatives to civil litigation...so that administrative costs associated with litigation, which account for 60 percent of malpractice premiums, can be reduced."²

In other words, those at the forefront of health care reform understand that it will do little good to achieve universal insurance coverage or even the most up-to-date healthcare IT, if the doctors who

¹ Stuart L. Weinstein, M.D., "Sen. Clinton admits lawsuits harm patient health care," June 2007, at www.protectpatientsnow.org.

² "Call to Action: Health Reform 2009." Senate Finance Chairman Max Baucus, November 12, 2008.

actually supply the care are being driven from business, forced to retire early, or shun potentially risky, life-saving procedures because of our broken medical liability system.

Controlling the Costs of Defensive Medicine is Critical to Health Care Reform

It is also widely recognized that we will never be able to control costs – a critical component of any health care reform that works and is sustainable over time – if we don't do something about the constantly overhanging fear of lawsuits that drive physicians and hospitals to increasingly practice defensive medicine.

Elliot Fisher of the Dartmouth Institute for Health Policy is one the leading intellectual fathers of health care reform, and is someone on whom key policymakers rely. According to Dr. Fisher's analysis, the overuse of imaging services driven by medical liability fears was associated with an increase in total Medicare spending of more than \$15 billion between 2000 and 2003.³ Updated figures for the findings of a 2003 HHS report on the overall costs of defensive medicine, put it at an astounding \$170 billion per year.⁴

A System That Is Out of Control

To those of us who work everyday in the field of medicine – the doctors on the front lines, as it were, tending patients in trauma centers, operating rooms and clinics – none of this is surprising. Allow me for a moment to examine the real-life circumstances that doctors face:

- Lawsuit abuse has gotten so out-of-control that about one-third of orthopaedists, obstetricians, trauma surgeons, emergency room doctors and plastic surgeons can expect to be sued in any given year.⁵
- Practicing neurosurgeons can expect to be sued even more often -- every two years, on average;⁶
- And nearly three out of five OB-GYNs have been sued at least twice in their careers.⁷

Most of these cases are meritless: data for 2006 show that some 71% of cases are dropped or dismissed, and only 1% of cases result in a verdict for the plaintiff. Nevertheless, the cost is staggering, with even those cases that result in no payment to the plaintiff costing an average of \$25,000 to defend against.⁸ Meanwhile, the average jury award escalated from about \$347,000 in 1997 to \$637,000 in 2006.⁹

As I've mentioned, the effect on patient access to care and the physician population has been so severe that many doctors have been forced to retire early, move out of those states where the crisis is most

³ "Malpractice Liability Costs and the Practice of Medicine in the Medicare Program," by Katherine Baicker, Elliott S. Fisher, and Amitabh Chandra, *Health Affairs*, volume 26, number 3.

⁴ "Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care 11," Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services (2003).

⁵ "Defending the Practice of Medicine," by Richard E. Anderson, M.D., *Archives of Internal Medicine*, June 2004.

⁶ "Effective Legal reform and the Malpractice Insurance Crisis," by Richard E. Anderson, M.D., *Yale Journal of Health Policy, Law and Ethics*, December 2004.

⁷ "Malpractice Maladies: Doctors continue to flee states with out-of-control medical injury verdicts," *Manhattan Institute*, 2005.

⁸ Physicians Insurance Association of America Data Sharing Project.

⁹ Physician Insurers Association of America, PIAA Claim Trend Analysis: 2006 ed. (2007)

acute, and cut back on the kinds of life-saving and life-enhancing medical procedures that expose them to greater risk of lawsuit abuse. A number of surveys of hospitals and physicians have highlighted the alarming trends:

- A survey by the American Hospital Association found that fifty-five percent of hospitals reported difficulty recruiting doctors because of the medical liability crisis;¹⁰
- Three out of four emergency rooms report diverting ambulances due to a shortage of specialists, and more than twenty-five percent of hospitals have lost specialist coverage due to the medical liability crisis;¹¹
- Forty-four percent of neurosurgeons have had to limit the type of patients they treat, and of these, seventy-one percent no longer perform aneurysm surgery, twenty-three percent no longer treat brain tumors and seventy-five percent no longer operate on children;¹²
- Fifty-five percent of orthopaedic surgeons avoid some procedures due to liability concerns; one out of five has stopped performing emergency room calls; six percent have eliminated all surgery and one out of twenty has retired early;¹³
- A survey by the American College of Obstetricians and Gynecologists found that liability concerns have forced seventy percent of all OB-GYNs to make changes in their practice and have driven some seven to eight percent to stop practicing obstetrics all together.¹⁴ According to ACOG's 2007 survey, 89 percent of all OB-GYNs have had at least one liability claim filed against them, with an average of 2.6 claims per obstetrician.¹⁵

A Bleak Prognosis for the Future

While the immediate shortages of physician care caused by the liability crisis are severe, the outlook for the future is even more troubling, as fears of exposure to lawsuit abuse are causing medical students and residents to avoid high-risk specialties and more litigious states:

- Sixty-two percent of medical residents report that liability issues are their top concern;¹⁶
- And half of all medical students responding to an AMA survey said that the liability situation was a factor in their specialty choice.¹⁷

¹⁰ American Hospital Association, 'Professional Liability Insurance; A Growing Crisis,' March 2003.

¹¹ The Schumacher Group, 2004 Hospital Emergency Department Administration Survey; cited in "Federal Medical Liability Reform," Alliance of Specialty Medicine, July 2005.

¹² American Association of Neurological Surgeons and Congress of Neurological Surgeons, 2004 Survey; cited in "Federal Medical Liability Reform," Alliance of Specialty Medicine, July 2005.

¹³ American Association of Orthopaedic Surgeons; cited in "Federal Medical Liability Reform," Alliance of Specialty Medicine, July 2005.

¹⁴ ACOG Survey, The American College of Obstetricians and Gynecologists, November 3, 2006

¹⁵ ACOG Survey, The American College of Obstetricians and Gynecologists, November 3, 2006

¹⁶ Meritt, Hawkins & Associates, Summary Report: 2003 Survey of Final Year Medical Residents 5 (2003)

¹⁷ Division of Market Research & Analysis, American Medical Association, AMA Survey; Medical Student's Opinion of the Current Medical Liability Environment (2003).

One particularly representative example of the access to care crisis is the state of Pennsylvania, where 17 maternity wards have closed down since 1997¹⁸ and there is presently no trauma center to treat the half million residents of the Philadelphia suburb of Chester County.¹⁹

I bring up Pennsylvania because it demonstrates that the outlook for the future is much much more disturbing than even the present numbers indicate. Newly graduated doctors educated in Pennsylvania are setting up their practices elsewhere because of the deteriorating liability climate. In 1992, 60 percent of residents stayed in Pennsylvania when they finished their training. Now only 20 percent do so.²⁰ In some specialties, more than 40 percent of the practicing physicians are more than 50 years old²¹ and only years away from retirement, creating a bleak future for medical care in that state – and to the extent this is representative, I would say a bleak future for our nation as a whole.

The Crisis Continues

The mechanism by which doctors are driven away from medicine is no mystery. As abuse of the legal system mounts, medical liability insurance premiums skyrocket. Like the temperature on a thermometer, the rise in premiums is a strong indication of the health of our present system and how acute the crisis is from one year to the next. As rates began to slow their rapid climb and level off in 2006, some were tempted to say that the crisis had passed. In fact, while rates have declined somewhat, they remain at or near historically high levels.

According to the Medical Liability Monitor for 2008, more than 50 percent of rates did not change between 2007 and 2008. Some seven percent of premiums increased. While the remaining 43 percent of rates decreased, most of those decreases were small—less than 10 percent.²² This is after premium increases over 100 percent a year in some states without comprehensive medical liability reforms in place.²³

The charts in the appendix give a graphic depiction of the run-up in insurance rates since the year 2000 for three representative specialty groups.²⁴ For the years 2000 to 2008:

- Premiums rose 221 percent for OB-GYNs in Philadelphia, Pennsylvania;
- Premiums rose 149 percent for general surgeons in New Jersey;
- Premiums rose 348 percent for internists in Connecticut.

In other words, the modest improvement in rates looks more like a temporary “market correction” rather than a reversal of on-going trends. From a national perspective, none of the underlying realities that produced the six-year run up have changed and the pressures remain unabated.

¹⁸ “Building for Babies,” *Bucks County Courier Times*, February 23, 2009.

¹⁹ “It’s time for a Chester County trauma center,” *West Chester Daily Local News*, July 6, 2008.

²⁰ “Pennsylvania Is Driving Its Doctors Away,” *Wall Street Journal*, October 25, 2008.

²¹ “Pennsylvania Is Driving Its Doctors Away,” *Wall Street Journal*, October 25, 2008.

²² *Medical Liability Monitor* Rate Survey Issue Results (October 2008)

²³ Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, Special Update on Medical Liability Crisis (2002), cited in *Medical Liability Monitor* Rate Survey Issue Results.

²⁴ *Medical Liability Monitor* Rate Survey Year-by-year Results

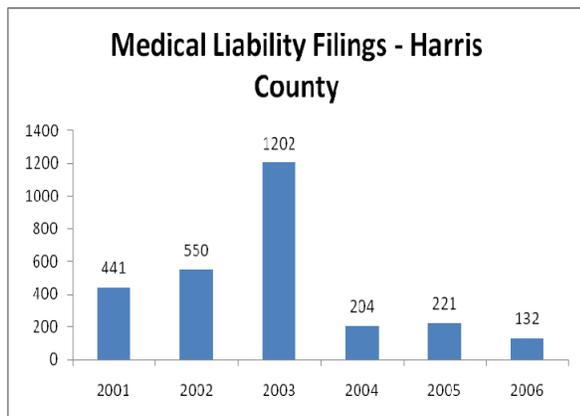
The Proven Track Record of Comprehensive Reform – the Texas Miracle

The continuing crisis persists despite a clear record of successful reform in some states. Perhaps the most dramatic – because its condition was so dire before reforms were enacted – is Texas.

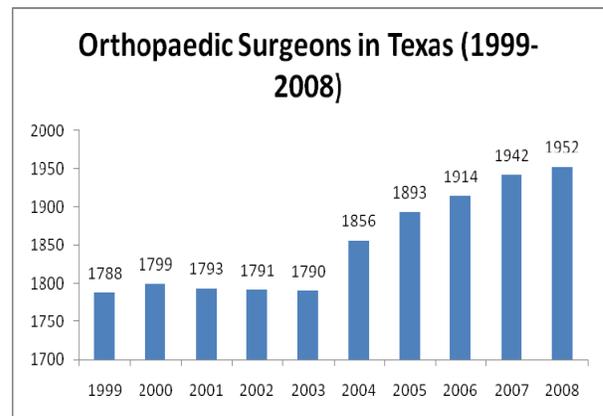
Before reform, doctors were fleeing the state, and patients suffered. Texas ranked 48th out of the 50 states in physician manpower, with just 152 MDs for every 100,000 people, well below the national average of 196.²⁵ In just four years, Texas physicians had seen their premiums rise between 22.5 and 128 percent, premiums paid by hospitals more than doubled, and nursing homes saw their rates soar 2000 percent.²⁶ In some parts of the state, there were 300 lawsuits for every 100 doctors,²⁷ helping to earn the state its designation by the American Tort Reform Association as one of America’s foremost “judicial hellholes.”

In 2003, voters passed Proposition 12, a constitutional amendment locking in the limits on non-economic damages passed earlier by the legislature. The result has become known as the Texas Miracle. The first effect is that so many doctors have come flooding back into the state that Texas’s biggest problem became a backlog in the state’s ability to license them.

The charts below give a graphic illustration of the success of reform, as liability filings dropped precipitously and previous declines in the number of specialists were turned into major increases:



Harris County District Clerk’s Office

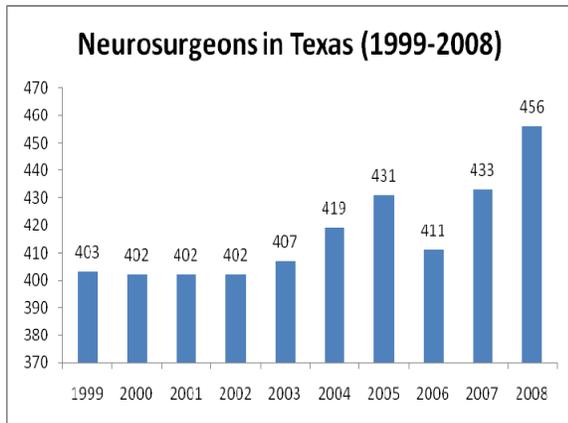


Texas Medical Board

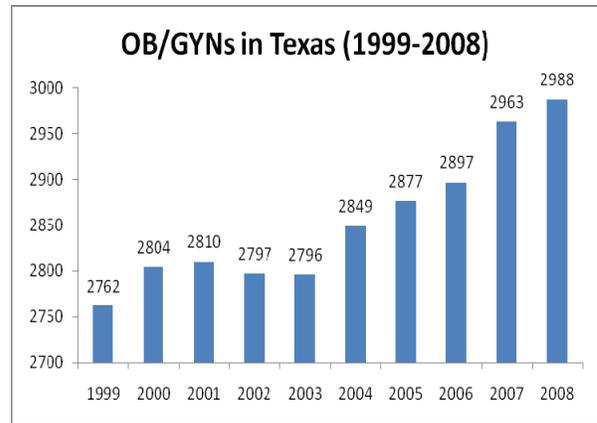
²⁵ Texas Tech Law Review, cited in “A Miracle in the Making: How Texas Became a Model for Medical Liability Reform,” at www.protectpatientsnow.org

²⁶ “A Miracle in the Making: How Texas Became a Model for Medical Liability Reform,” at www.protectpatientsnow.org

²⁷ “Ten Gallon Tort Reform,” *The Wall Street Journal*, June 6, 2003.



Texas Medical Board



Texas Medical Board

Since medical liability reform, the six largest insurers have cut their rates, with Texas Medical Liability Trust clocking a full 31.3 percent decrease, and many other private firms have entered the market.²⁸ Seventy-six counties have experienced a net gain in emergency physicians since the passage of medical liability reforms in 2003, including 39 medically underserved counties and 30 counties that are partially medically underserved.²⁹ As you know, the Texas reforms were so successful that they became the basis for reform legislation introduced in the U.S. Congress in 2006.

We strongly believe that comprehensive reforms of the kind passed in Texas should be applied nationwide. At the same time, we understand the political realities of the current Congress and believe that other reforms measures may help to ameliorate the current crisis in access to care and should be considered.

Early Offers

Among these are calls an “early disclosure” or “early offer” model, such as that contained in the Baucus Report. The early-offer process would allow defendants to make a financial offer covering the claimant’s economic damages and attorneys’ fees. If the offer were accepted, further legal action would be foreclosed. If the early offer were rejected, the claimant’s burden of proof at any subsequent trial would be increased.³⁰ Savings to the system come from the elimination of non-economic damages and the lower attorney’s fees that result from the speedier resolution of the case.

In a report prepared for the Department of Health and Human Services, an analysis of cases between 1988 and 2002 found that an early offers system would reduce claim costs by an average of approximately \$556,000 per claim and by more than \$1 million per claim for severe injuries.³¹

²⁸ Texas Medical Association.

²⁹ “Emergency Medicine Physicians Announce Significant Increase In Doctors Providing Emergency Care Across Texas,” *Blanco County News*, February 11, 2009.

³⁰ “Evaluation of Early Offer Reform of Medical Malpractice Claims: Final Report,” US Dept of HHS, June 5, 2006.

³¹ “Medical Malpractice Reform Plan Pays Off for Victims and Health Care Providers,” University of Virginia Press Release, January 10, 2007.

Specialized Health Courts

The Baucus Report also called for the consideration of specialized health courts. As in so many other proposals, health courts carry a certain promise if the details are done right. If the court's findings are not binding and further appeals are not foreclosed, it will be critical that – as with early offers – the claimant's burden of proof at any subsequent trial would be increased. Otherwise, such courts will just add one more venue in which doctors can be sued, and will do little to improve the current situation.

Evidence-Based Medicine

The American Recovery and Reinvestment Act of 2009 -- more commonly known as the stimulus bill -- contained \$1.1 billion in funding to coordinate comparative clinical effectiveness research.

Economists and health policy experts have been debating the merits of research that compares the effectiveness of medical treatments,³² often called “evidence-based medicine” by its supporters. Clearly, such research may have the potential to yield useful information. An ideal outcome for doctors who practice “evidence-based medicine” would be immunity from liability lawsuits, or at a minimum, a greater increase in the burden of proof for the plaintiff.

President Obama, in the *New England Journal of Medicine* article that I referred to earlier, endorsed just such an approach. In the article, which is titled “Modern Health Care for All Americans” and published on-line on September 25, 2008, then-candidate Obama stated that “I will also support legislation dictating that if you practice care in line with your medical societies' recommendations, you cannot be sued.”

We strongly support the President's announced position here, and look forward to its implementation as policy. At the same time, we believe that such guidelines should not be interpreted as a “one-size-fits-all” solution that implies negligence has occurred anytime a health care provider uses his/her independent judgment and expertise to offer treatments outside those boundaries.

Volunteer Liability

Finally, we strongly support legislation designed to protect health care professionals from being held liable when they volunteer their services to the victims of a declared disaster or national emergency. We note that Volunteer Liability legislation has garnered significant interest on Capitol Hill is likely to be introduced during the 111th Congress. We strongly urge Congress to pass it.

Today, not all states provide adequate protections from state liability lawsuits to physicians and other healthcare professionals who respond to national or state calls for help in major disasters such as hurricanes and earthquakes. In addition, few, if any, states provide such protections for health care providers licensed outside their state who provide care to disaster victims.

The need for such legislation does beg a central issue, however: If even volunteers in disaster areas need to be protected from the abuses of the present system, what does that say about how the system affects providers in their everyday practices?

³² “U.S. to compare medical treatments,” *New York Times*, February 15, 2009.

Conclusion

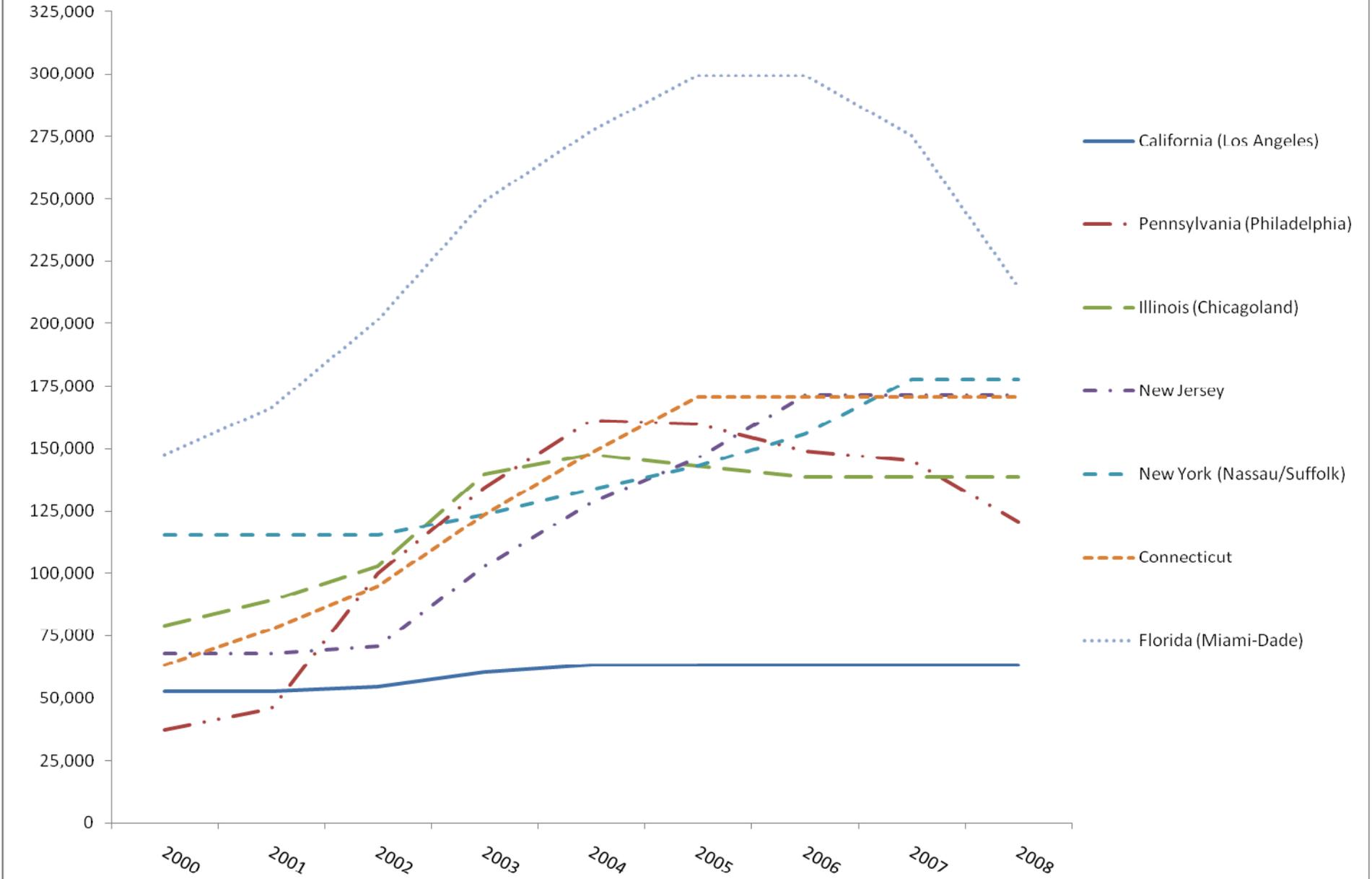
In conclusion, allow me to simply restate what we all know: the problem will not go away unless Congress takes effective action, and until it does, patient access to care will continue to be threatened by a broken medical liability system.

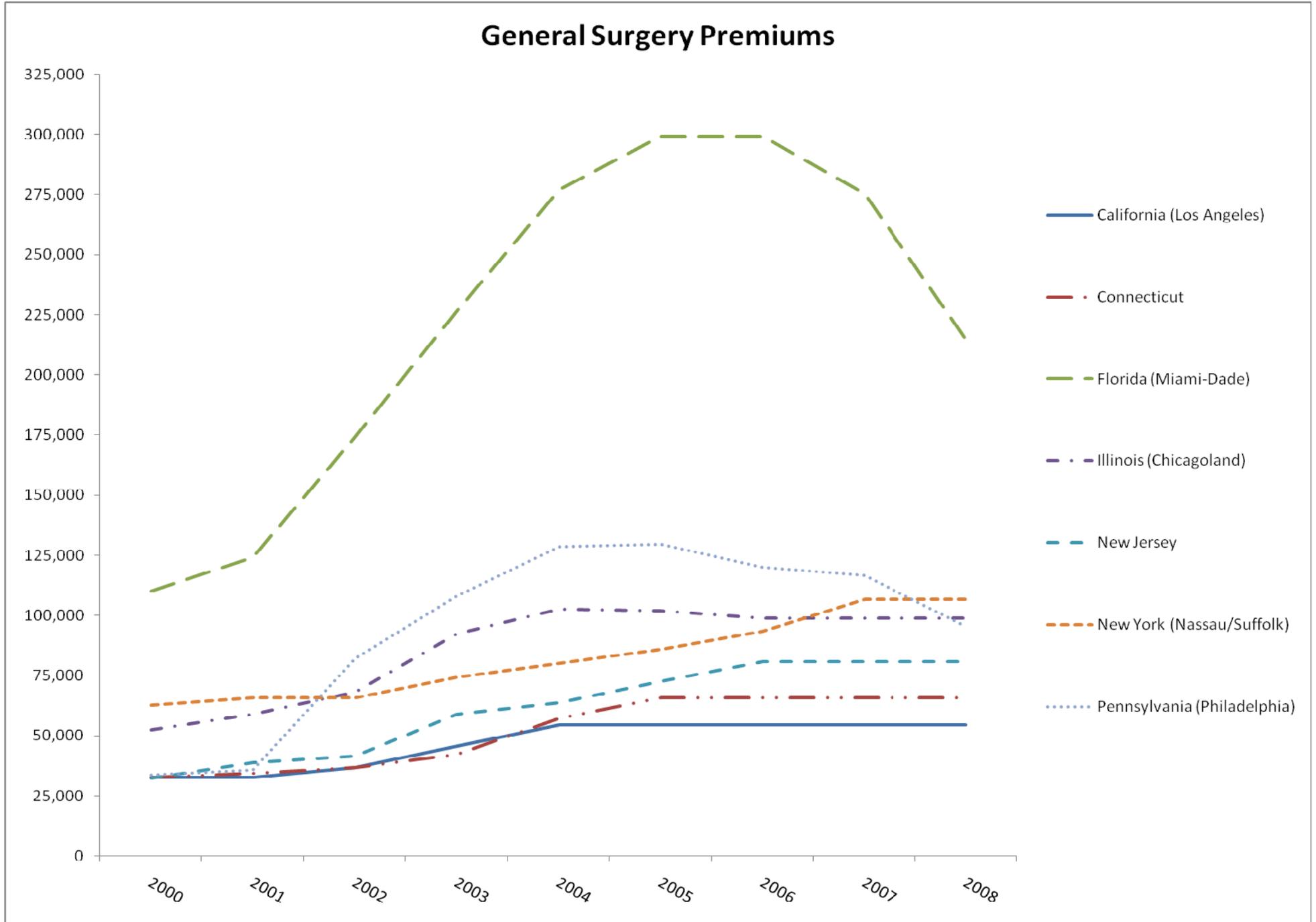
Our President and this Congress are dedicated to reforming our health care system. No other action we undertake as a nation can be so vital. But we know as well that no overall reform of our health care delivery system can be effective if the heart of the system – the physicians who care for patients – are constantly under siege and being driven from practice by an abusive system.

Nor will the future of reform be very bright if our best students, as we have seen, are increasingly becoming discouraged from taking up the arduous calling of medicine.

Access to quality care must come first in overall health care reform. That is what it is all about, after all. And ensuring patient access to care means acting now to fix our critically ill medical liability system.

OB/GYN Premiums





Appendix

