



Testimony of

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On Behalf of

The American Congress of Obstetricians and Gynecologists

to the

Energy and Commerce Committee

Subcommittee on Health

United States House of Representatives

The Cost of the Medical Liability System Proposals for Reform,
including H.R. 5, the Help Efficient, Accessible, Low-cost, Timely
Healthcare (HEALTH) Act of 2011

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Summary:

- ACOG ultimately could not support passage of the health reform bill, in large part because it didn't include meaningful medical liability reform, an issue we see as critical to reforming our health care system.
- Without meaningful reform, good doctors will continue to be driven out of practice or out of their home states. When ob-gyns discontinue the practice of obstetrics, curtail surgical services, or close their doors, women's health care suffers.
- Every day Ob-gyns are faced with exposure to lawsuits for adverse events over which they had no control – unfortunate outcomes, rather than malpractice -- with jury awards that exceed \$100 million. For example, neurologically impaired infant cases account for 30% of obstetric claims, with average awards of nearly \$1 million, despite well-regarded scientific studies showing that physician action has little to do with these outcomes.
- 90% of ACOG Fellows report they have been sued at least once and ob-gyns are sued an average of 2.7 times during their careers. Nearly two thirds have changed their practice during the last three years because of the high risk of liability claims. The average age at which physicians cease practicing obstetrics is now 48.
- Our current tort system fails patients and providers. It is costly, time-consuming, inefficient, and unjust, with widely variable and inconsistent monetary judgments awarded by lay juries to injured patients. It cannot accurately distinguish bad outcomes from genuine negligence.
- A national solution, including caps on non-economic damages, and other reforms like those found in Texas and California would stabilize the medical liability insurance market, reduce health costs, eliminate physician flight from high-risk states, and protect patients' access to needed care.
- The landscape in Texas changed dramatically after implementing medical liability reform in 2003. Statewide, 21,640 doctors have been newly-licensed in Texas since its passage. Texas physicians have also seen their liability insurance rates cut, on average, 28.3 percent and claims and lawsuits in most Texas counties have been cut in half.
- Texas has gained 269 obstetricians, after a net loss of 14 obstetricians from 2001 to 2003. Twenty-two rural counties added at least one obstetrician and ten counties added their first obstetrician. Blanco County, which had no obstetricians pre-reform, added eight. In all, 57 Texas counties have seen a net gain in obstetricians, including 28 medically underserved counties and 20 counties designated partially medically underserved.

Thank you, Chairman Pitts, for holding this important hearing, entitled “The Cost of the Medical Liability System Proposals for Reform, including H.R. 5, the Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011.” I am Dr. Lisa Hollier, an ob-gyn from Houston Texas, representing the American Congress of Obstetricians and Gynecologists (ACOG), an organization representing more than 54,000 physicians dedicated to improving the health care of women. Thank you for the opportunity to present our views.

ACOG worked hard to win many of the provision in the Affordable Care Act that are important for women’s health, including private insurance reforms. Ultimately, though, we could not support passage of the health reform bill, in large part because it didn’t include meaningful medical liability reform, an issue we see as critical to reforming our health care system. We simply cannot build a reformed health system on top of a broken medical liability system.

Without meaningful reform, good doctors will continue to be driven out of practice or out of their home states. And when ob-gyns discontinue the practice of obstetrics, refuse high-risk patients, or reduce their ob surgical practice, women’s health care suffers. For these reasons, ACOG strongly supports H.R. 5, the Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act, introduced by ACOG Fellow Representative Phil Gingrey, MD. Chairman Pitts, we applaud you and the Subcommittee for holding this hearing. Additionally, we appreciate the support from the seventeen members of the Committee who have co-sponsored H.R. 5, including seven members on the Health Subcommittee. Thank you, Representatives John Shimkus, Mike Rogers, Sue Myrick, Marsha Blackburn, Bob Latta, Cathy McMorris Rodgers, and Brett Guthrie.

In childbirth, there is never a guarantee of a perfect outcome, even for patients who receive perfect ob-gyn care. Obstetrician-gynecologists are faced daily with exposure to lawsuits for adverse events over which they had no control – unfortunate outcomes, rather than malpractice -- with jury awards that exceed \$100 million. Neurologically impaired infant cases account for 30% of claims, with average awards of nearly \$1 million. Highly respected scientific studies have shown, though, that few of these cases were caused by the physician. Clearly, a high number of claims does not mean medical negligence.

- Ob-gyns win 80% of claims filed against them.
- Over one-half of claims are dropped, dismissed, or settled without payment.
- Ob-gyns win 7 out of 10 cases by a jury or court verdict.

Our Nation provides exceptional medical education, training some of the world's finest obstetricians and gynecologists. Yet, 90% of ACOG Fellows report they have been sued at least once. On average, ob-gyns are sued 2.7 times during their careers, and nearly 63% have changed their practice during the last three years because of the high risk of liability claims. 35% have either decreased the number of high-risk obstetric patients treated or have ceased providing obstetric care altogether; 29.1% increased the number of cesarean deliveries; and 25.9% stopped performing or offering VBACs due to professional liability concerns. The average age at which physicians cease practicing OB is now 48, an age once considered the midpoint of an ob-gyn's career.

I. The Need For Reform

In 2002, the non-partisan Institute of Medicine reported that:

“The current liability system hampers efforts to identify and learn from errors, and likely encourages ‘defensive medicine’. Many instances of negligence do not give rise to lawsuits, and many legal claims do not relate to negligent care. ... Volatility in liability insurance markets has led to... closure of practices and shortages of certain types of specialists and services. The committee believes that changes in the liability system are a critical component of health care system redesign.”

Our current tort system is costly, time-consuming, inefficient, and unjust, with widely variable and inconsistent monetary judgments awarded by lay juries to injured patients. It cannot accurately distinguish bad outcomes from genuine negligence and it has the potential to devastate the practice of obstetrics. The system is wholly incompatible with the Institute of Medicine’s vision of the future health care system as “safe, effective, patient-centered, timely, efficient, and equitable.”

The Financial Burden on a Few “High-Risk” Specialties.

It takes years to settle and adjudicate cases, delays are onerous, and the costs of defending oneself are enormous. It has been estimated that patients who eventually receive compensation through the current system obtain less than 50% of the amount awarded. The remainder goes largely to the plaintiff’s lawyer and court expenses.

The costs of the current tort system are borne by all obstetric caregivers -- nurses, residents, attending MDs, CNMs, and even medical students -- and the hospitals where they work, through the escalation of medical liability premiums. This contributes to a reduction in obstetric care by those currently practicing and in the number of American medical school graduates choosing to enter obstetric residency programs. As a consequence, the quality and availability of care for future generations of women in this country is threatened.

Defensive Medicine

Even though a very high percentage of liability claims are dropped, settled without payment or settled in favor of the defendant in court, the effect of fear of litigation is significant. Recent ACOG surveys show that obstetricians are performing more cesarean sections, discontinuing vaginal births after c-section (VBAC) attempts, decreasing the number of high-risk patients they are willing to care for, decreasing the total number of deliveries they do in a year, or discontinuing obstetrics entirely due to the current liability climate.

Patient Safety and Quality of Care

Meaningful reform of our broken liability system, in addition to reducing and stabilizing medical liability premiums, can make medical care safer and reduce medical errors. To further quality, comparative effectiveness medical research should take into account the role of medical liability laws in driving up health care costs and influencing practice patterns and behavior including defensive medicine. The liability climate should also be considered when assessing large variations across the country in prematurity rates and cesarean section rates.

Success in Texas

The medical liability landscape in Texas changed dramatically after implementing medical liability reform. Statewide, 21,640 doctors have been newly-licensed in Texas since passage of the 2003 reforms. The state has gained 269 obstetricians, after a net loss of 14 obstetricians from 2001 to 2003. Twenty-two rural counties added at least one obstetrician and ten counties added their first obstetrician. Blanco County, which had no obstetricians pre-reform, added eight. In all, 57 Texas counties have seen a net gain in obstetricians, including 28 medically underserved counties and 20 counties designated partially medically underserved.

Texas physicians have also seen their rates cut, on average, 28.3 percent and claims and lawsuits in most Texas counties have been cut in half. Ninety percent of Texas doctors have seen their rates slashed 30 percent or more.

A National Problem Demands a National Solution.

A majority of states continue to perpetuate a system that is needlessly expensive, inefficient, and often inequitable, while year after year rejecting significant efforts to rectify its flaws. The federal government can break the logjam. A national solution would stabilize the medical liability insurance market, reduce health costs, eliminate physician flight from high-risk states, and protect patients' access to needed health care. The federal government should provide adequate funding and other resources to states and health systems to test innovative solutions to a broken liability system as recommended by the Institute of Medicine.

II. A National Solution: H.R. 5 – The HEALTH Act

ACOG has for many years advocated reform of our broken medical liability system, including caps on non-economic damages, and other reforms like those found in Texas and California. We fully support H.R. 5, The HEALTH Act, introduced by ACOG-member Rep. Phil Gingrey, MD (R-GA), which would safeguard patients' access to health care and address the health care crisis.

Promotes Speedy Resolution of Claims

The Act balances the needs of all parties involved in litigation and promotes a fair result. Health care lawsuits can be filed no later than 3 years after the date of injury. Additionally, the bill acknowledges that in some circumstances, it is important to guarantee patients additional time to file a claim. Accordingly, the Act extends the statute of limitations for minors injured before age six.

Fairly Allocates Responsibility

Under the current system, defendants who are only 1% at fault may be held liable for 100% of the damages. This bill eliminates the incentive for plaintiffs' attorneys to search for "deep pockets" and pursue lawsuits against those minimally liable or not liable at all.

Compensates Patient Injury

H.R. 5 ensures injured patients are fairly and fully compensated. The Act does not limit the amount a patient can receive for physical injuries resulting from a provider's care, unless otherwise determined by state law. The Act only limits unquantifiable non-economic damages, such as pain and suffering, to no more than \$250,000.

Maximizes Patient Recovery

Patients will receive the money needed for their health care. H.R. 5 discourages baseless lawsuits by limiting the incentive to pursue merit-less claims. Without this provision, attorneys could continue to routinely pocket large percentages of an injured patient's award.

Puts Reasonable Limits, Not Caps, on the Award of Punitive Damages

The Act provides for reasonable punishment without unnecessarily jeopardizing a defendant's fundamental constitutional rights or risking the defendant's bankruptcy. It does not cap punitive damages, rather, it delineates a guideline, allowing for punitive damages to be the greater of two times the amount of economic damages awarded or \$250,000.

Ensures Payment of Medical Expenses

H.R. 5 ensures that injured patients will receive all of the damages to which they are entitled in a timely fashion without risking the bankruptcy of the defendant. Past and current expenses will continue to be paid at the time of judgment or settlement while future damages can be funded over time through the purchase of an annuity or other instrument of secured payment.

Allows State Flexibility

The HEALTH Act establishes a ceiling on non-economic damages, and guidelines for the award of punitive damages, only in those states where the state legislature has failed to act. A state legislature may also act at any time in the future to impose a cap the limits of which differ from those provided for in the HEALTH Act.

Saves Money

The Congressional Budget Office estimates that H.R. 5 would save the federal government \$54 billion over ten years, incorporating savings from all provisions including the collateral source rule. Direct savings come from lowering premiums for medical liability insurance and indirect savings by reducing defensive medicine. These reductions in costs would lead to lower spending in federal health programs and lower private health insurance premiums.

III. Alternatives to Current Medical Tort Litigation

ACOG is fully committed to the enactment of a national law, patterned on H.R. 5 and the Texas and California medical liability reforms. Only these solutions will fully and meaningfully solve this problem.

While we work to attain that goal, we support interim measures that address the long delays, excessive costs, and unpredictability and inequality of compensation in our current system. Successful alternatives could help guarantee that injured patients are compensated fairly and quickly while promoting quality of care and patient safety.

Early Offer

Early offer programs would allow a physician or hospital to offer economic damages - past, present, and future - to an injured party without involving the courts. This offer would not constitute an admission of liability and would be inadmissible if a lawsuit was filed in the case. Physicians would have incentives to make good faith offers as early as possible after the injury is discovered and patients would have incentives to accept legitimate offers of compensation.

Early offer programs would require the injured party to meet a higher burden of proof and negligence standard if she chose to reject the offer and file a lawsuit.

Health Care Courts

Health care courts would allow for a bench or jury trial presided over by a specially trained judge to exclusively hear medical liability cases. A judge with specialized training would resolve disputes with greater reliability, consistency, and efficiency than untrained judges or juries, and could issue opinions that define standards of care or set legal precedent. De-identified claims information would enable patient safety authorities and providers to examine and correct patterns of errors.

Expert Witness Qualifications

This alternative would limit expert witness standing only to individuals who are licensed and trained in the same specialty as the defendant, have particular expertise in the disease process or procedure performed in the case, were in active medical practice in the same specialty as the defendant within 5 years of the claim, or taught at an accredited medical school on the medical care and type of treatment at issue.

I'm Sorry

These programs encourage physicians to directly discuss errors and injuries with a patient, apologize, and discuss corrective action. The apology is not permitted to be constructed as, or offered as evidence of, an admission against the physician's interest. Discussions are inadmissible if the patient brings a lawsuit.

Defined Catastrophic Injury Systems

These systems would establish a fund for individuals with bad outcomes regardless of fault. Birth injury funds are an example. Florida's program supports children born with substantial, non-progressive, neurologic motor deficits not caused by genetic or metabolic conditions.

Certificate of Merit

A certificate of merit program would require plaintiffs to file an affidavit with the court showing that the case has merit before the case can move forward. Certificates would require the written opinion of a qualified health care provider affirming that the defendant failed to meet the standard of care exercised by a reasonably prudent health care provider, which caused or directly contributed to the damages claimed.

IV. Conclusion

Thank you again for the opportunity to provide this statement to the House Energy and Commerce Subcommittee on Health on the issue of medical liability. We applaud your commitment and leadership on this issue, Chairman Pitts, and look forward to working closely with you and the Subcommittee to win passage in the House and consideration in the Senate.