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White Paper - Medical Malpractice Damages Cap Legislation - S-2526 (Bark); A-4080 (Bodine/Chatzidakis)

NJ-ACEP White Paper

May, 2005

S-2526 (Bark); A-4080 (Bodine/Chatzidakis)

Legislation that limits non-economic damages in medical malpractice actions arising from emergency care rendered in hospitals or other health care facilities at \$250,000. This cap would only apply in cases in which a physician, surgeon, dentist, nurse or other health care professional did not have an existing provider-patient relationship with the injured plaintiff, but did have a duty to act, such as when an individual arrives in an emergency room in need of emergency care.

This bill is intended to compliment the "New Jersey Medical Care Access and Responsibility and Patients First Act," P.L.2004, c.17, which implemented a number of reforms relating to medical malpractice tort liability. One of these reforms expanded the State's "Good Samaritan" law to provide civil immunity to health care professionals providing emergency care, while under no affirmative duty to do so, during a life-threatening emergency within a hospital or other licensed health care facility, or a State psychiatric hospital. Under this bill, those health care professionals required to provide emergency care under similar circumstances because of an affirmative duty would only face limited liability concerning any medical malpractice claim, provided there is no existing provider-patient relationship.

Talking Points in Support of Special Liability Protection in Emergency Care Cases

- Emergency medicine is an essential public service that involves unique challenges and circumstances that should be recognized and addressed in state medical liability statutes.
- On-call and Emergency physicians must make immediate, lifesaving decisions regarding diagnosis and treatment without the benefit of a prior relationship to the patient and often without any knowledge of the patient's medical history.
- Emergency departments are mandated by federal law (and in some cases, similar state laws) to treat anyone who comes to an emergency department, regardless of the nature, severity or complexity of their condition.
- Emergency departments treat everyone regardless of their ability to pay and provide a large and growing amount of uncompensated and under-compensated care.
- The high-risk nature of emergency medicine results in escalating liability insurance rates. These skyrocketing costs coupled with lost revenue from uncompensated care seriously threaten the future viability of the emergency care system.
- Many insurers will not write policies for on-call and emergency physicians resulting in a crisis of availability, as well as affordability of insurance in many parts of the country.
- Specialists providing essential on-call services to emergency patients are often in critically short supply, due largely to increased liability exposure, higher liability premiums and reduced reimbursements for providing emergency care.
- Several other states have recognized the unique needs and circumstances of emergency care and have enacted special liability protections for emergency care providers, including placing lower caps on non-economic damages and requiring a higher standard of negligence that must be proven in emergency care cases.

What makes emergency medicine different?

- Emergency Departments (and the on-call and emergency physicians who staff them) are compelled by federal and state law to treat every patient who presents at an emergency room for treatment. This essentially becomes a unilateral contract. Therefore, the physician, in performing this essential government function, becomes an arm of the state, as the instrument of state public policy to provide universal emergency care.
- While physicians are required to treat all patients, neither the government, nor the patient, nor the insurer (if there is one) is obligated to pay for the care given.
- Even though no one is obligated to pay for this care, patients have unlimited access to the courts for services delivered in good faith.
- On-call and Emergency Physicians operate in a high complex, high-risk environment, using rushed procedures, often late at night. Hundreds of independent judgments must be made without benefit of the patient's prior medical history. This puts the physician at greater risk, since adverse outcomes are more likely to occur even when care is properly given.
- The Emergency Department remains on the first line of response to a terrorist attack, especially if it involves a biological, chemical or nuclear release.

- In every community statewide, the Emergency Department represents the only universal access to health care for low-income and indigent patients. Typically, one out of every three patients seen by an Emergency Physician is indigent.
- Fewer and fewer specialists, especially those in high-risk areas such as obstetrics, orthopaedics and neurosurgery, are willing to go "on call" in Emergency Departments due to rising malpractice premiums. This means more transfers and diversions to facilities that may have specialists on call, threatening patient care.

Action Requested

- Join other health care organizations in support of A-4080/S-2526. A unified strategy will be to secure to discuss this important initiative with key legislators and Administration officials, secure co-sponsors, and obtain a committee hearing to begin the dialogue.