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Judiciary Committee

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Good morning. I am Jonathan Rhoads, Jr., a surgeon from York and President of the Pennsylvania Medical Society, the largest physician organization in the state. With me is Betty Cottle, M.D., an anesthesiologist from Hollidaysburg.

First, let me thank each one of you for attending, and especially you, Chairman Gannon, for holding this hearing. It starts a process to fix a problem which physicians across our Commonwealth tell us is of great concern in the practice of medicine – and that's the current medical liability situation in Pennsylvania.

Medical liability has been governed by Act III since the mid 70's. Initially it required all cases to go through arbitration panels, and the catastrophic loss fund was to be funded by a 10% surcharge on the basic premium. The arbitration panels were struck down by the courts, and the requirement to carry insurance as a condition of licensure and the CAT Fund remained without the protection that arbitration panels afforded physicians. Since that time the amount of basic insurance required has doubled; the surcharge for the CAT Fund in 1995 was 170% of basic premium, and in 1996 it is 164%. The magnitude of settlement and awards has grown dramatically.

I have no doubt that the CAT Fund surcharge is what got us to this point today, but the CAT Fund itself isn't the whole problem. It's just a funding mechanism that camouflages a very serious problem -- the current medical liability system.

The rewards of medical practices and legal risks are seriously out of balance: a physician may expect to receive $40 or $50 for a service such as an office visit, but is required to carry insurance up to $1,200,000 per dependent for liability arising from that office visit. I know a dermatologist who saw a patient for athlete's foot, and was later sued for failing to diagnose an intra-abdominal cancer. Physicians have been deeply concerned about liability for many years, and several times have proposed legislation to reform the current system.

According to a Rand Institute study, 57% of the premium goes for legal and administrative expenses, and only 43% out to the allegedly injured party. I don't think anyone would disagree that a system in which only 43 cents out of every dollar collected goes to injured patients is a system which is broken. That means that 57 cents out of every medical liability insurance dollar goes to lawyers for both sides and for administrative costs. A system in which only 43 cents goes to the injured party is unacceptable.

Of course, this doesn't even scratch the surface on the subject of defensive medicine. I know what the trial attorneys are going to say about the issue of defensive medicine -- they will say what we are practicing isn't defensive medicine, it's good medicine. But I think that only a physician can know what's happening out there, and I can tell you with complete certainty that we are doing tests and procedures now to cover ourselves in the event of a malpractice suit -- procedures and tests which have little or nothing to do with improving the care we give patients and which sometimes have their own risks. One of my colleagues says that if he orders a test, the patient's insurance pays for it. If he fails to order it, his liability insurance may pay for it. He orders a lot of tests.

Let me emphasize right away that **HB 2122** will not fix all the problems with the medical liability system, but it is a moderate first step to leveling the playing field for patients and for physicians. It does not contain caps on awards for pain and suffering, a provision which has worked well in other states to help contain the ever-increasing cost of health care. We know that the cap has been a stumbling block in the past negotiations in this process, so although we believe it would help, we are not advocating its inclusion in House Bill 2122 at this time.

Let me review a few features of the bill which would help to fix the current broken system:

House Bill 2122 would impose sanctions on attorneys who file frivolous lawsuits. Sanctions like this aren't new. The provision in House Bill 2122 mirrors federal Rule 11. The principle is very clear. Litigation is extremely costly and time consuming. The court's time is too precious to be wasted by foolish lawsuits. Nationally some 80 percent of all cases are closed without payment.

The trial lawyers use this as an example to show the system is working. They say the system culls out unfounded cases. We say that this very fact is a disgrace and is a reflection of a system that needs to be fixed. It is very expensive to defend a non-meritorious suit. The 80 percent represents time and money that is wasted and could well be used to provide more health care for our patients.

The frivolous lawsuit portion of this bill will simply require attorneys practicing in the state courts to perform to the same standard as they do in federal court. The courts will be allowed to impose sanctions against attorneys who file frivolous lawsuits, including paying defendant's reasonable expenses such as court filing fees and attorneys' fees. This hardly seems unfair. In fact, the current system is one that seems unfair.

House Bill 2122 would require certification that an expert has reviewed the case and is prepared to testify on the plaintiff's behalf. This requirement would help eliminate frivolous suits early in the process.

House Bill 2122 would require that an individual testifying as an expert witness must have a similar medical license or board certification as the defendant. In today's legal environment, there seems to be no shortage of medical experts. This bill would require the expert be licensed and have been actively engaged in the direct patient care in the same medical specialty. In addition, if the defendant is board certified, the expert must also have that designation. Given the increasing complexity of modern medicine, this provision merely says that the expert testifying against the defendant doctor should be at least as expert as the defendant.

House Bill 2122 would eliminate duplicate payments for the same injury. Under present law it is not possible for defense attorneys to inform the jury of all the sources of compensation available to the plaintiff. The result is that frequently plaintiffs are compensated a second time for expenses already paid under some form of insurance.

This bill would allow defense attorneys to inform the jury of compensation already received by the plaintiff. Benefits from life insurance, a pension or a profit-sharing plan could not be considered duplicate payments.

Approving this provision will actually translate into an important policy decision. It would show whether the legislature wishes to compensate a plaintiff twice for expenses incurred or whether once is enough.

House Bill 2122 will clarify informed consent requirements. Physicians will continue to be required to obtain informed consent prior to a "major invasive procedure" except in an

emergency or where the court deems inappropriate. Otherwise, the patient must be given a description of the procedure along with the risks and alternatives. A written signed consent presumes informed consent.

Patient consent is always necessary but the question centers around when we need to give detailed information on treatment risks and alternatives. We must have a clear description to help resolve if appropriate consent has been given.

House Bill 2122 places reasonable limits on punitive damages. Currently, punitive damages are intended to be a deterrent and punishment for outrageous conduct and they are unlimited. Instead, they are used by attorneys to intimidate defendants. This tactic is abusive since punitive damages cannot, by law, be covered by insurance or the CAT fund.

House Bill 2122 says that punitive damages can only be awarded if there is clear and convincing evidence that the defendant acted with an evil motive or ignored a high degree of risk. It further limits the damages to not more than 200 percent of compensatory damages. It does not eliminate punitive damages, but it does limit the opportunity of the attorneys to demand punitive damages without sufficient grounds.

House Bill 2122 strengthens the definition of statute of limitations. Under current law, an action can be brought within two years of discovery, regardless of when treatment occurred. This means that the tail which must be insured is indeterminable.

This bill would require medical negligence claims to be filed within two years of discovery or four years from the act which caused the injury, whichever is earlier. The four-year limit would not apply to injury caused by foreign objects left in the body. And cases involving children under age eight would have to be filed within four years after the parent or guardian

knew or should have known of the injury or within four years of the child's eighth birthday, whichever is earlier.

The main purpose of these provisions is to reduce the very long tail for medical liability which complicates reserving for possible claims. A shorter tail would allow more accurate reserving and reduce guesswork in setting rates.

House Bill 2122 would permit periodic payment of future damages. Under present law it is possible in the case of large lump sums for the plaintiffs to receive a windfall because all future damages are received before they are incurred. This bill would allow awards with future payments exceeding $200,000 to be paid in periodic or installment payments. This would assure that money is there in the future when expenses arise.

House Bill 2122 will allow patients to arbitrate medical malpractice claims. Many patients and physicians would prefer the simplicity and less adversarial nature of the arbitration process. This provision would give them the option while putting safeguards in place to assure that patients aren't coerced into signing such agreements. It even guarantees patients the opportunity to reconsider such agreements after receiving treatment and would require the CAT Fund to be bound by such agreements. Those who take advantage of this option should be able to receive more of the award more quickly.

These are the highlights on the bill you are considering today. I don't think they can be considered radical by any means. We think this bill is a moderate step to achieving some sort of parity in a system that is tilted against the majority of patients and physicians.

It is also a system which seems to be synonymous with the lottery. It is a system where people with injuries may or may not be compensated. Two people with identical injuries may come

out of the system with completely different awards, or worse, one of them with no award at all. I remind you we are dealing with a system where 57% of the premium dollar is going for legal and administrative expenses, and 43% to the aggrieved parties. At best, this system is inefficient and expensive, and in addition, is not guaranteed to be fair to those with alleged injuries.

Furthermore, some cases are patently ridiculous - for example, the case of a woman who was a Reader and Advisor. Following a CAT scan she sued for loss of her "psychic powers", and she was awarded $600,000. To the medical community this is clearly a travesty.

Medical liability tort reform is a contentious issue to be sure, and one with a long and sometimes ugly history. Everyone in this room knows that it has historically been categorized as the trial lawyers against the doctors with both of us claiming to have the patients on our side, and honestly, that is correct. I can't speak for the trial bar, but I'm sure that they agree with us that injured patients deserve to be compensated, so we both agree with the basic premise. But it is beyond that premise that the disagreements begin. We've been at this long enough to know that it will be said that this is a pocketbook issue for physicians. And I would be less than honest if I didn't admit that cost is a piece of our concern. But I must also tell you that we are to the point that if we had a commitment from you that nothing would be done to make the cost of malpractice insurance more reasonable, but that in return a fair portion of the money collected would go to injured patients instead of to lawyers on both sides and administrators, we would support it wholeheartedly.

Again, I commend you for giving this issue a fair hearing. I was especially heartened to learn of this meeting after I read in a recent issue of the Central Penn Business Journal, a comment by a representative of the trial lawyers that HB 2122 didn't have a chance of passing the Judiciary Committee. Physicians view this hearing as the committee's willingness to address, in a

moderate way, the inequities in the current system for our patients -- your constituents -- and the difficulties physicians are facing. We are glad you are willing to hear both sides of a difficult issue.