



**Testimony of Pennsylvania Orthopaedic Society**  
**Pennsylvania House Judiciary Committee**

**Tuesday, May 14, 2002**

The Pennsylvania Orthopaedic Society (POS) welcomes this opportunity to present written testimony to the House Judiciary Committee regarding the elimination of Joint and Several Liability. The POS applauds the efforts the General Assembly has taken this session with the enactment of Act 13 of 2002 (HB 1802). As we said in March, Act 13 is a good first step toward meaningful tort reform, but it will bring little immediate relief to doctors, particularly specialty physicians. HB 1802 contained important financial reforms and directed certain MCARE Fund discounts to specialists.

Likewise, we applaud the efforts of the Pennsylvania Supreme Court in promulgating a Pennsylvania equivalent of Federal Rule 11. This restriction on frivolous lawsuits is a vital action by the court.

But these actions do not fundamentally change Pennsylvania's tort system. And we need fundamental reform.

For the record, *the POS opposes the elimination of Joint and Several Liability unless such action is contained in a comprehensive tort reform package.* But first, we will present background information on the liability insurance crisis.

### **Medical Malpractice Liability Insurance Crisis**

Throughout April and May, news story after news story has recited the continuing liability insurance crisis. Orthopaedic surgeons in Scranton cannot get coverage. OB-Gyns in Montgomery County are non-renewed. Cardio-vascular surgeons in Western Pennsylvania must go to the JUA for insurance. Act 13 did not solve the medical malpractice liability insurance crisis. The crisis is still here, and it will only get worse.

The POS has consistently stated to various House and Senate committees, as well as to individual members of the General Assembly, that the liability insurance crisis is two-fold. It is a crisis of availability and a crisis of affordability. For many high-risk specialists, insurance is simply not available. As for the insurance that is available, including JUA coverage, it is simply not affordable.

As you know, liability insurance premiums have steadily increased for the last decade. But during that time, Pennsylvania had many insurers willing to write policies. As recently as last summer, members of the House Insurance Committee were told that

over 90 companies were operating in the Commonwealth. Throughout the 1990's, physicians were not pleased with the rising cost of liability insurance, but at least coverage could be obtained.

Today, there are no longer 90 liability insurers in Pennsylvania. That figure is now down to a handful. Those that remain may not renew their physician customers' policies. By January, most high-risk specialists will likely be without private insurance. In a nutshell, this is availability crisis.

During that same decade, physician reimbursement did not keep pace with the rising cost of insurance. At first, the difference between the rising cost of insurance and the reduction in reimbursement was gradual enough that most high-risk specialists absorbed the loss as part of doing business in Pennsylvania. But the premium spikes of the last two years have been more than any business can handle. Thus, you have the affordability crisis.

Make no mistake; physician practices are first and foremost businesses. Medicine is our livelihood as well as our passion. Physicians are business people -- employing workers, purchasing from vendors, and paying local, state, and federal taxes -- the same as any manufacturer or retailer. And like any other business, if we cannot earn the type of living we desire in Pennsylvania, we will go elsewhere. Many of our colleagues already have.

So, how do we as a Commonwealth solve the medical malpractice liability insurance crisis? A two-fold crisis obviously needs a two-fold solution.

First, we must create an insurance environment in which liability insurers will want to operate. Second, we must increase high-risk specialty physician reimbursement.

### **Bringing Liability Insurers Back**

Liability insurers want predictability and profitability. Predictability is gained when insurers understand the extent of their potential liability and the timeframe for that liability. Profitability comes when they can price their products based upon the predictability of their liability. They have neither currently in Pennsylvania.

Act 13 provides a small measure of predictability in regard to how a payout can be structured, but it provides no limits on liability. Hence, no true predictability or profitability.

To give liability insurers the predictability they need to re-enter Pennsylvania's market, the state government should consider several meaningful tort reform measures. Some of these reforms are in the preview of the General Assembly and some are in the state Supreme Court's jurisdiction. All will help revitalize the Commonwealth's liability insurance marketplace.

Needed tort reforms include:

- **Cap Awards** – requires constitutional amendment
- **Cap Attorney Fees** – requires constitutional amendment
- **Limit Recovery of Punitive Damages** – amend Title 42
- **Reform Venue Practice** – enact HB 1972 and HB 1973 or change the Rules of Civil Procedure
- **Lower Mandatory Malpractice Insurance Coverage Levels** – enact HB 2232
- **Restrict Frivolous Lawsuits** – enact SB 406 or change Rules of Civil Procedure

With these and other vital reforms, the POS would gladly support the elimination of Joint and Several Liability. Until such comprehensive package is enacted, however, we will oppose the current effort to end this long-standing legal doctrine.

### **Physician Compensation**

For more than three years now, the POS has been sounding the alarm regarding physician compensation. We fought attempts by the insurance industry to lower HMO and Workers' Compensation reimbursement rates. We proposed solutions like the Joint Negotiations legislation, sponsored this session by Rep. Robert Godshall. We will continue to bring the General Assembly information and solutions regarding physician compensation.

With the pending merger of Highmark and Independence Blue Cross and their proposed conversion to for-profit status, however, we can safely say that physician

compensation will not improve in Pennsylvania. In fact, if Highmark and IBC do merge and they are allowed to convert, they will hold a virtual monopoly on the Commonwealth's health insurance market. Without a competitive health insurance market, Pennsylvania's hostile business environment for doctors will only worsen.

The POS, therefore, requests the House Judiciary Committee to closely examine any attempt by the Blue Plans to merge and thoroughly scrutinize any legislation that would allow them to easily convert to for profit status.

### **Conclusion**

In conclusion, the POS firmly believes that the elimination of Joint and Several Liability is appropriate if accompanied by other meaningful tort reforms such as those outlined above. As a stand-alone proposal, however, we oppose the elimination of Joint and Several Liability.