

Medical Liability Reform

The current medical litigation climate in this country is one in which orthopaedic surgeons are forced to practice defensive medicine. In addition, medical liability insurance premiums have risen steadily over recent decades, at times increasing an average of 15 percent a year. Some states and specialties, particularly OB-GYNs, neurosurgeons, and orthopaedic surgeons, have seen even more dramatic increases, making premiums prohibitively expensive for many physicians. The total costs of the current system are estimated to be over \$200 billion per year. Finally, the federal Emergency Medical Treatment and Labor Act (EMTALA) mandates that physicians on-call to the emergency department must provide emergency care, putting many surgeons at an increased liability risk.

The Agency for Health Research and Quality (AHRQ) recently issued \$25 million in grants to support patient safety and medical liability reform demonstration and planning projects and the PPACA authorized an additional \$50 million over 5 years in grants to states for the development, implementation, and evaluation of alternatives to current tort litigation over medical injury that allow for the resolution of disputes and help reduce health care errors by using patient safety data. The PPACA also paves the way for physicians to be subject to a variety of new causes of action, including those related to certain quality improvement provisions. While surgeons and anesthesiologists support testing alternatives to civil litigation, such as health courts and early disclosure and compensation offers, comprehensive, proven medical liability reform similar to laws in California or Texas, that includes reasonable limits on non-economic damages, represents the “gold standard” and is needed to truly address this problem. The Congressional Budget Office has found that such comprehensive reforms would provide \$62 billion in savings to the federal government; a figure supported by the findings of the National Commission on Fiscal Responsibility and Reform, some members of which recommend federal caps on punitive and non-economic damages.

H.R. 5, the Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011 was introduced by Rep. Phil Gingrey (GA-11) on January 24th, with Rep. David Scott (GA-13) and Rep. Lamar Smith (TX-21) acting as original co-sponsors. H.R. 5, limits non-economic damages to \$250,000, and makes each party liable only for the amount of damages directly proportional to such party’s percentage of responsibility. H.R. 5 enjoys bi-partisan support with 118 co-sponsors signing onto this bill as of press time. The AAOS Recommends the Following:

In addition, AAOS feels strongly that Congress should pass legislation that:

- Includes reasonable limits on non-economic damages, similar to laws in California or Texas;

- Ensures liability protections for physicians who follow practice guidelines established by their specialties;
- Protects physicians volunteering services in a disaster or local or national emergency situation;
- Applies the Federal Tort Claims Act to cases involving EMTALA-mandated services;
- Directly explores alternatives, including health courts and early disclosure and compensation offers, and
- Makes clear that nothing in the Patient Protection and Affordable Care Act creates a new cause of legal action.
- Congress should fully fund the \$50 million liability grant program and amend the law to prevent plaintiffs from opting out of the program once enrolled.