The Business Council

Testimony to

Senate Standing Committees on Insurance, Health and Codes

Medical Malpractice Reform

Presented by

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I am Kenneth Adams, President and CEO of The Business Council of New York State, Inc. We are a statewide organization representing employers of all sizes in all of the state's economic sectors. I would like to thank Senators Breslin, Duane, and Schneiderman and your respective committees for holding today's hearing.

With New York's economy in a tailspin and the migration of people and businesses out of the state, medical malpractice system reform and - more broadly – reform of New York's legal system is essential for the state's economic recovery.

Real reforms of the legal system could lower the cost of government, spur construction activity, lower the cost of health care and health insurance, and make New York a more attractive place to do business. Reforming our civil justice system will help businesses without spending a dime of taxpayer money.

Dr. Lawrence McQuillan of the Pacific Research Institute accurately sums up how New Yorker's would benefit from legal reform in his November 2009 report titled, An Empire Disaster: Why New York's Tort System is Broken and How to Fix It. In his report Dr. McQuillan states that:

"Most people do not realize that they are paying these costs because the costs are buried in the price of every purchase or the costs are "foregone benefits" that are not tangible or transparent. Everyone is paying for lawsuit abuse whether they realize it or not. The good news, however, is that everyone can benefit from lawsuit reform—except perhaps personal-injury lawyers."

We urge you to consider the following reforms:

- a $250,000 cap for noneconomic damages;
- a $500,000 cap for punitive damages;
- fixing joint-and-several liability laws.

In addition, we urge you to reject any new and increased taxes on insurers and their policy-holders to further subsidize malpractice premiums for physicians. With $137 million in HCRA-funded subsidies financing the excess medical malpractice pool, system reforms rather than new and higher taxes should be the route New York takes to address the direct and indirect costs associated with medical malpractice.

State Economic Conditions – Unemployment; Taxes, Spending and Deficits; and the Outward Migration of People and Businesses

Unemployment

The unemployment situation in New York is terrible. Like other private sector employers around the country, this year many Business Council members have been forced to cut their workforces due to the economic downturn. Salaries

remain frozen or are being cut. Those employees with health coverage are being asked to shoulder more of the cost burden.

The most recent unemployment data for New York shows this recession is proving to be deep and lasting. New York has lost 450,000 jobs since August 2008 when the recession started hitting New York state, and the unemployment rate here reached 9 percent in October 2009. Today there are more than 850,000 New Yorkers out of work, according to the New York State Department of Labor.

Although less than the national rate of 10.2 percent, unemployment was still more than four percentage points higher in New York than it was two years ago.

Taxes, Spending and Deficits

New York faces a cumulative General Fund gap of up to $27.5 billion through fiscal year 2011-12, even as the Governor and the Legislature confront a deficit in the state's current budget that could exceed $4.1 billion, according to Comptroller DiNapoli.

More than $11 billion used to close the $17.9 billion fiscal year 2009-10 General Fund gap was either non-recurring "one-shot" or temporary revenue, including nearly $4.9 billion in federal stimulus funding (scheduled to end in FY 2010-11), $1.7 billion in non-recurring actions and $4.5 billion in temporary revenue actions (ranging in duration from three to five years).

The financial sector from which the state generated so much of its tax revenue will rise again in some form. But the industry that rises from the ashes of last year's meltdown will be far leaner, more heavily regulated and less profitable than Wall Street was at the peak of the last bubble. So, when the recession ends, the fiscal trouble will not be over for New York.

Outward Migration

According to the Empire Center for New York State Policy and the Pacific Research Institute, the Empire State is being drained of an invaluable resource – our people. From 2000 to 2008, in both absolute and relative terms, New York suffered the nation's largest loss of residents to other states - a net domestic migration outflow of over 1.5 million, or 8 percent of its population at the start of the decade.

Based on the latest data from the Census Bureau and the Internal Revenue Service (IRS), a report from the Empire Center found that since 2000:

- Nearly 60 percent of the New York out-migrants moved to southern states - with Florida drawing nearly one-third of the total. Thirty percent moved to the neighboring states of New Jersey, Pennsylvania and Connecticut.

- Households moving out of New York State had average incomes 13 percent higher than those moving into New York during the most recent year for which such data are available.

- In 2006-07 alone, the migration flow out of New York drained $4.3 billion in taxpayer income from the state.

New York State's net domestic migration loss during this decade is the continuation of a longer-term trend. Yet, even with its large domestic migration losses, New York's total population has grown slightly since 2000, thanks to a large influx of immigrants from foreign countries. But New York's share of U.S. population is still shrinking. A continuation of the domestic migration trends highlighted here will translate into slower economic growth and diminishing political influence in the future.

New York's Medical Malpractice System – On Life Support

New York's medical malpractice insurance system is on life support and the prognosis is dire, yet the state has not administered the necessary treatment. New York imposes an annual tax on health insurance policies that provides $137 million of taxpayer subsidized medical malpractice liability insurance for physicians and a pool of dollars for attorney fees. Additionally, New York artificially freezes medical-malpractice insurance rates leaving only four companies providing coverage and causing another to become insolvent.

However, New York's outlook only gets worse. The Business Council has obtained a copy of Draft Bill 12035-02-9, which would impose two additional insurance taxes that provide additional taxpayer subsidized medical malpractice liability insurance for physicians.

Frozen medical malpractice liability insurance premiums expire June 2010. The rate freezes have lowered the reserves of the medical malpractice insurance providers and will inevitably lead to a dramatic rate increase for physicians.

The reserves of one of the two major medical malpractice insurance carriers – MLMIC - were approximately $1B in 2008. In 2009, its reserves were down to $300 million. In March 2009, the other insurance carrier, Physicians Reciprocal Insurance, had an "operating deficit" of $43 million. Legislation introduced by Senator Klein and Assemblywoman Carrozza allowing for cash-flow accounting in some insurance lines should be rejected. Cash-flow accounting for insurance abandons traditional models that account for future exposures through reserves.

Year after year, a portion of the HCRA surcharge subsidizes medical malpractice insurance for physicians. For 2009-10, the total subsidy is $137 million. This subsidy comes from more than $4 billion in HCRA and other health and insurance taxes on those with private health insurance. In some parts of New York, ten percent of the cost of health coverage can be attributed to these taxes. In our conversations with physicians, most would prefer to scrap this "dollars for doctors" program in exchange for meaningful reform.

Draft Bill 12035-02-9 has two taxes in sections 10 and 11 of the bill that would create a taxpayer-subsidized fund by taxing all insurance premiums in New York. Section 10 imposes an assessment on "insurers" and Section 11 imposes an assessment on policies of liability insurance. It is unclear what portion will be used for physician malpractice insurance.

Fixing New York's Medical Malpractice Crisis

Throughout The Business Council there is widespread agreement that the cost of employee health care and how to pay for it is our members' most significant cost-of-doing business issue.

As the costs of health care and health coverage continue to rise, these costs have become an increasingly heavy burden on employers – particularly New York's small businesses.

To reduce the cost of coverage and make it more affordable for more New Yorkers, we have to get to the underlying cost drivers. These underlying cost drivers include defensive medicine, which is driven by physicians' concerns over malpractice liability. These concerns lead to increased utilization of medical services, which in turn drive the cost of health coverage higher.

New York desperately needs legal reforms that would place a $250,000 cap for noneconomic damages, a $500,000 cap for punitive damages and fixing joint-and-several liability laws. In an October 9th letter to Senator Orrin Hatch, the non-partisan Congressional Budget Office estimated that the implementation of caps for noneconomic and punitive damages, modification of the "collateral source" rule, statute of limitations from the date of discovery, and replacement of joint-and-several liability would reduce total national premiums for medical liability insurance by about 10 percent.

Thirty-seven states have implemented legal reforms in recent years. The state of Texas, for example, has experienced significant improvements in a number of areas, including job growth and overall economic conditions and the cost of medical malpractice coverage since a series of legal reforms were enacted starting in 1995. These included: a limit on punitive damages, reformed joint and several liability provisions, a $750,000 limit on non-economic damages, and product liability reforms, among others.

According to an analysis by the Perryman Group, many doctors saw average rate reductions of more than 21 percent; some saw reductions of almost 50 percent. The analysis reported that physicians and hospitals are using their savings from liability insurance to expand services, provide more charity care and establish innovative programs. Perryman also found that due to legal reforms, approximately 430,000 previously uninsured Texans have health insurance, and the Texas economy grew by approximately 8.5 percent since 1995, including almost 500,000 permanent jobs.

Conclusion

The prognosis for New York's medical malpractice system is dire, and the only cure is legal reform. We simply cannot continue raising taxes and creating excess medical malpractice liability pools to remedy the situation.

The employer community and the millions of workers facing rising health insurance costs – as well as individual taxpayers across the state - want reform of our civil justice system now to help get health care costs under control. Real reforms of the legal system would cost businesses and other taxpayers nothing, yet would lower the cost of government, spur construction activity, lower health care costs and make New York a more attractive place to do business.

I am asking the Committees to consider the following: prior to any formal consideration of introducing Draft Bill 12035-02-9 or any other similar version of it, the Legislature should hold statewide public hearings and provide a cost analysis of Sections 10 and 11 of the bill text.

Based on the evidence from Texas and 36 states that have implemented legal reforms, we know that legal reform works and is the only solution to New York's medical malpractice crisis.