AMERICAN ACADEMY of ACTUARIES

March 21, 2012

The Honorable John Boehner
Speaker
U.S. House of Representatives
H-232 U.S. Capitol Building
Washington, DC 20515

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
H-204 U.S. Capitol Building
Washington, DC 20515

**Re: H.R. 5, the Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act**

Dear Speaker Boehner and Minority Leader Pelosi:

On behalf of the American Academy of Actuaries'[1] Medical Professional Liability Committee, I appreciate the opportunity to provide you and your colleagues with some actuarial perspective on implications of Title I of H.R. 5, the "Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2012."[2] As actuaries play a key role in the pricing of medical professional liability insurance contracts, we are uniquely qualified to address certain cost implications of the proposed legislation. The comments below address the following aspects of H.R. 5 and additional relevant information.

- Historical Perspective and General Nature of Tort Reforms;
- The Maximum Statute of Limitations;
- Limitations on Noneconomic Damages;
- Limitations on Attorney Contingency Fees; and
- Authorization of Periodic Payments.

Historical Retrospective and General Nature of Tort Reforms

Title I ("The Health Act") of H.R.5 appears to follow the model of the State of California's Medical Injury Compensation Reform Act (MICRA). MICRA was enacted in 1975 in part in response to the California healthcare crisis. Citing a potential breakdown in the healthcare delivery system, the California legislature sought to address the lack of access to quality healthcare by reforming the tort system via limitations on noneconomic damages awards from jury trials, a sliding scale on attorney contingency fees, abrogation of the collateral source rule, shortened statute of limitations, and

[1]The American Academy of Actuaries is a 17,000-member professional association whose mission is to serve the public and the U.S. actuarial profession. The Academy assists public policymakers on all levels by providing leadership, objective expertise, and actuarial advice on risk and financial security issues. The Academy also sets qualification, practice, and professionalism standards for actuaries in the United States.

[2] As of the time of this publication, H.R. 5 was scheduled for floor consideration during the week of March 19.

allowance of periodic payments for certain large awards. It can be said that the benefits of MICRA are most evident in lower average premium increases in California compared to other states. Since MICRA was enacted, total medical professional liability insurance premiums have increased by approximately 4.1 percent per year in California and 8.5 percent per year nationwide.[3] The American Academy of Actuaries has provided expert testimony on many previous occasions to congressional committees on this model of reform.[4] Tort reform efforts represent a movement to reduce the volume and associated costs of tort litigation in the judicial system, often through legislation that, among other things, may restrict the legal theories that can be used to support plaintiffs' claims or cap damage awards, especially non-economic and punitive damage awards.[5]

Statute of Limitations

By establishing time limits for bringing civil suits, statutes of limitation are intended to provide diligent and prompt resolution of claims, thereby providing greater predictability and faster resolution for both plaintiff and defendant. The intent is also to resolve claims while evidence is still reasonably available.

H.R. 5 would establish a statute of limitations of three years after the date of manifestation of injury or one year after the claimant discovers, or should have discovered the injury, whichever happens first (a "discovery trigger"). A significant concern with the "discovery trigger" would be its uncertainty—the date of the injury ("occurrence trigger") is most frequently known with some accuracy, whereas the date that a plaintiff "should have discovered an injury" is subjective and adds uncertainty to the process. Depending on how or if it is integrated with state law, a discovery trigger could lengthen the statute of limitations in cases, particularly in the many states that currently use an occurrence trigger to begin "running the clock" in the process.

Shortened statutes of limitation often reduce the time to resolution of claims while also reducing damage awards. Some of the severe cases—such as birth injury to infants—have not only the longest statutes of limitation and the longest times to resolution, but also the highest expected costs. H.R. 5 would significantly shorten the process for claims involving minors, while also reducing award amounts. Some of that reduction may arise from additional claims being time-barred, but that may not be the only effect. Possibly more significant is that under a shorter statute of limitations period, plaintiffs will seek to more quickly file their claims, resulting in faster final settlement or verdict.

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[3] Source: Derived from annual insurance industry statutory financial statements. Does not include premiums costs not reported to state insurance departments or self-insurance costs.

[4] Prior Academy work on this issue can be found at: http://www.actuary.org/pdf/casualty/medmal_032404.pdf; http://www.actuary.org/pdf/casualty/medmal_051204.pdf; http://www.actuary.org/pdf/casualty/medmal_feb05.pdf; http://www.actuary.org/pdf/casualty/medmal_031405.pdf; and http://www.actuary.org/pdf/casualty/medmal_may06.pdf.

[5] A fuller discussion of typical tort reform provisions can be found here: http://www.actuary.org/pdf/casualty/tort_fact_oct09.pdf

When the settlement or verdict is resolved more quickly, the payers of the loss (generally an insurer or a self-insured defendant) achieve certainty more quickly. This allows for more accurate pricing of future policies and a more stable market for medical professional liability insurance, regardless of its cost.

Limitations on Non-Economic Damages

Various states have implemented tort reform legislation similar to MICRA. The most effective cost-lowering provisions in such legislation is the limitation on noneconomic damages. In part, this is due to the limitation itself, but an examination of states that implemented caps on non-economic damages also shows that such a limitation leads to fewer claims being filed, which may be attributed to the reduced incentive for attorneys to file cases in jurisdictions that have noneconomic damage caps. As an example, in 2003, Texas enacted a noneconomic damages cap of $250,000. The average number of closed claims per doctor fell by 58 percent, while the average cost per claim fell 23 percent.[6] The decrease in the number of observed claims is influenced by a number of factors, and decreases during this period were also observed in non-tort reform states. However, it is generally acknowledged that the frequency of reported claims tends to decrease after damages caps are imposed, and states with damages caps generally have lower reported claim frequency than those without.

The effect of any federally-imposed limitation on noneconomic damages will vary by state. For example, in states such as California and Texas, where noneconomic damages are currently limited to $250,000, similar federal legislation will likely have minimal effect. In other states, where a limitation on noneconomic damages does not currently exist, but the number of noneconomic damages awards in excess of $250,000 is small, the overall impact of such legislation would also be small. Federal tort reform legislation like H.R. 5 can be expected to have the greatest impact in states that currently do not have a limitation on noneconomic damages or whose limitation is greater than $250,000, and where there is a sufficient number of claims with noneconomic damages in excess of $250,000 for the legislation to have a significant impact on costs.

[6] Source: National Practitioner Data Bank Public Use Data File; physicians in Texas and countrywide obtained from the American Medical Association. Tort reform in Texas applied to all claims filed on or after September 1, 2003. The claims closed during 2004 and part of 2005 typically were filed before this date, so one does not observe the effect of tort reform in Texas in the above tables until 2005 or 2006. Averages for prior to reform figures are based on claims closed 1999-2005. Averages for post reform figures are based on claims closed 2006-2011. Comparable changes in nationwide claims are a decrease of 37 percent in the average number of claims closed and an increase of 21 percent in the average cost per claim, respectively.

Limitations on Attorney Contingency Fees

In medical professional liability cases, plaintiffs' attorneys typically take cases on a contingency fee basis. A contingency fee reduces the percentage of the damages award that goes to the injured plaintiff. As such, the intent of limiting contingency fees is to increase the percentage of the award that goes to the plaintiff. Damages in medical professional liability cases can vary significantly. The contingency fee is typically a portion of the damages award, so the lawyer's compensation will likewise vary. A large award in a medical professional liability case will result in a large fee for the claimant's lawyer.

The following issues should be weighed when considering limits on contingency fee arrangements:

- Medical professional liability cases are highly complex and therefore can be difficult and expensive to resolve. This affects injured parties seeking restitution as well as the claimant's lawyer, who may incur substantial expenses during the litigation process.
- Without the availability of contingency fee-based attorney services, the costs of seeking compensation in a medical professional liability case might be prohibitive for many. Contingency fees allow parties to utilize attorney services without having to commit large sums of money up front.
- When representing a client on a contingency basis, an attorney is compensated only if a verdict is rendered in favor of his/her client. Therefore, the attorney risks losing money when representing a client on a contingency fee basis. For that reason, attorneys will only accept a contingency-fee case if they believe that they are likely to win the case and if the expected value of their compensation is enough to cover their expenses. The greater impact on smaller damage claims could be somewhat mitigated by the proposed structure in H.R. 5, which allows for a larger contingency fee percentage on lower layers of damages and provides for a decreasing fee for larger awards.

The impact of limiting contingency fees will also be affected by other provisions within the bill. For example, the proposed limit on noneconomic damages further reduces the potential for contingent fees.

Authorization of Periodic Payments

Section 107 of H.R. 5 provides an option for periodic payment of damages. When nominally-valued damages are reduced to present value, there is clearly a direct savings—this savings grows with increasing interest rates. Still, while a lump sum settlement does contemplate the time-value of money, savings may still be realized if an insurer's anticipated investment return exceeds that considered in the amount of the settlement. In any case, the reduction to present value tacitly makes more funds available for compensating patient injury.

Perhaps more importantly, structured cash flows can help ensure that needed funds are available when anticipated future services are required. Settlements can be made contingent on the injured patient's survival, reducing the risk that the settlement will be outlived. Investment and longevity risks are transferred to insurance companies, which are better able to manage these risks than individuals. Moreover, when settlements are structured, claimants are less likely to exhaust resources and shift their expenses to government programs.

Again, thank you for this opportunity to comment on H.R. 5. If you have any questions or would like to discuss these comments further, please contact Lauren Pachman, the Academy's casualty policy analyst at (202) 223-8196 or pachman@actuary.org.

Sincerely,

Richard B. Lord, FCAS, MAAA
Chairperson, Medical Professional Liability Committee
American Academy of Actuaries

CC: Members of the House of Representatives