



Pennsylvania Health Care Association

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**Written Testimony of
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**On
Joint & Several Liability Reform
Before the
Senate Judiciary Committee**

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Chairman Greenleaf, Chairman Leach, and members of the Judiciary Committee; I appreciate the opportunity to appear before you today to discuss the joint and several liability statute as well as the overall need for lawsuit abuse reform in Pennsylvania.

My name is Stuart Shapiro, and I am President and CEO of the Pennsylvania Health Care Association (PHCA) and the Center for Assisted Living Management (CALM). PHCA/CALM is a statewide advocacy organization for the Commonwealth's elderly and disabled residents. Our mission is to ensure that Pennsylvanians receive quality care in the most appropriate setting as they age.

Our members are based throughout the Commonwealth and include proprietary and non-profit organizations that offer services that range from integrated retirement communities and multi-level care campuses to freestanding nursing homes, assisted living/personal care homes and ancillary care/homecare enterprises. PHCA/CALM represents more than 330 long term care and senior service providers that care for nearly 33,000 elderly and disabled individuals on a daily basis across the state.

My testimony will consist of three main parts. First, I would like to briefly provide the members of the Committee with a snapshot of Pennsylvania's demographics with respect to our elderly. Secondly, I will briefly discuss how the costs of defending frivolous lawsuits negatively impact an already precarious financial situation. Recently this has been compounded by the predatory practices of a Florida-based law firm descending on Pennsylvania. I believe this will further illustrate the need for lawsuit abuse reform in the Commonwealth. Lastly, I will highlight our support for the repeal of joint and several liability as well as other critical components of lawsuit abuse reform.

Demographics: When looking at Pennsylvania demographics it is important to note the dramatic shift in the population since 1960. In 1960, almost 30 percent of our population was under age 15 and only 10 percent of our population was age 65 and older. By the year 2030, it is projected that those under age 15 will make up only 18 percent of the total population and those ages 65 and older will constitute about 23 percent of the total population.

As you read this testimony, I hope you will consider the size of Pennsylvania's elderly population, which will continue to grow. This population relies on health care providers more than younger generations and, unless we can reduce the high rate of litigation in Pennsylvania, our seniors are likely to experience a reduction in their access to care.

In Pennsylvania today, there are 1.9 million citizens age 65 or older. The Commonwealth ranks 4th in the nation by percentage of population age 65 and older – behind Florida, West Virginia and Maine – with nearly one in five residents age 65 and older. PA ranks 5th in the nation in the number of residents over age 85, who are the most intensive users of nursing home and other long term care services. However, by 2020, the number of people age 85 or older is expected to increase 10 percent to more than 360,000 residents.

The first of Pennsylvania's 3.3 million baby boomers will turn 60 this year and by the year 2020, it is estimated that one out of every four people in the Commonwealth will be age 60 or older; that's more than 3 million people. Most of the baby boomers will be over age 60 by that time and may not want to be considered as "seniors" until they are "really" old.

It is anticipated that nearly 70 percent of those turning 65 this year eventually will require some form of long term care in their lifetime. Thus it is critical that there be a variety of long term care providers, and frivolous lawsuits are making survival of these caregiving services more difficult.

Costs of Care and Cost of Unnecessary Litigation: Pennsylvania currently has 725 nursing homes with nearly 90,000 beds, and demand for nursing home services remains steady. These facilities, on average, are over 90 percent occupied, compared to 87 percent nationally.

Today, almost 80 percent of nursing home residents are on Medicaid and Medicare. On average, 65 percent of residents are on Medicaid, and approximately 13 percent are on Medicare. Pennsylvania nursing homes are shortchanged an average of \$15 a day – or \$5,500 a year – for every Medicaid resident in their care. Over the past eight years, our Commonwealth's nursing homes have been under-reimbursed more than \$1 billion for the care of Medicaid residents.

In addition to state reimbursement challenges, the high costs of defending inappropriate and unnecessary liability claims adds to the economic burden on nursing homes. AON, a global provider of insurance coverage, prepared an August 2010 detailed analysis on the general liability and professional claim cost to the long term care industry operating in the United States. According to the analysis, the loss cost per occupied bed in Pennsylvania has steadily increased over the last several years to \$940 in 2009. This loss cost is over \$200 higher than our neighboring state of Ohio. The claim severity in Pennsylvania has generally increased over the last three years to a level of \$94,000 in 2009; whereas other states experienced stability. The Medicaid per diem loss cost per bed in Pennsylvania was \$2.58 per bed in 2009 – meaning that Pennsylvanians spend on average as much as \$200,000 per day to settle and defend claims.

Pennsylvania has a national reputation as having a favorable climate for plaintiff lawyers. Pennsylvania ranked dead last in the Boardroom Guide to Litigation: An Analysis of the Legal Climates in all 50 States, a study by *Directorship* and the Foundation for Fair Civil Justice. We slipped four spots from an already lackluster 32nd ranking to 36th in the U.S. Chamber Institute for Legal Reform's most recent "Lawsuit Climate: Ranking the States" study. Additionally, Pennsylvania scored a dismal 45th among the rest of the nation for its relatively high monetary tort losses and/or high litigation risks, according to the Pacific Research Institute's U.S. Tort Liability Index.

In spite of these financial pressures and the current legal environment, our members, along with long term care providers all over this Commonwealth, are providing some of the highest possible quality care to some of the frailest and sickest Pennsylvanians – all while their costs continue to rise. The Department of Health data backs up this claim. Since 2003 the number of provisional licenses issued by the Department of Health has decreased by 86 percent and the number of state enforcement actions that resulted in the nursing home being assessed a civil monetary penalty has dropped by approximately 80 percent.

Despite improved quality care in Pennsylvania nursing homes, they have become the target of a national plaintiff's firm and are thus burdened with voluminous document requests and depositions, which increase the day to day costs of doing business, both in human capital and dollars. A study published March 31, 2011, in the *New England Journal of Medicine*, that examined the relationship between the quality of care in US nursing homes and lawsuits brought against nursing homes over an eight-year period concluded that high quality nursing homes were sued at essentially the same rate as lower performing nursing homes.

Researchers said that the finding illustrates that litigation – or the threat of litigation – doesn't lead to improvements in care. Nor does it appear that superior nursing homes are rewarded for superior care in terms of fewer lawsuits.

Rather, the report illustrated the need for medical liability reforms, since lawsuits add to taxpayers' cost of caring for the frail and elderly and diminish resources that would be better spent on care.

Here in Pennsylvania, the Florida-based plaintiff's law firm that is targeting our nursing homes isn't doing so because our nursing homes provide subpar care; they are targeting them because they are located in Pennsylvania – which, as indicated earlier, has one of the nation's most favorable legal climates for trial lawyers.

They cite deficiencies in these ads that date back years and which have long been resolved through a plan of correction with the state Health Department's survey process -- but of course they don't tell you that.

To quote a headline in one of the nursing home advertisements: "If you or your loved one is or was a resident at such-and-such facility, call us." Notice how they don't say "If your loved one was **harmed** by this nursing home, call us." They simply say that if your loved one has been a **resident** of this nursing home, call us.

This isn't about a law firm getting a day in court. And it isn't about seeking justice for nursing home residents or their families. Rather, it's all about the famous Willie Sutton line when asked why he robbed banks.

These lawyers, like old Willie, go where the money is. And right now, because of our laws, Pennsylvania is where the money is.

They hope to get rich quick by preying on the fears of families that already are feeling guilty about placing a loved one in a nursing home. This law firm will do as they have done in other states: target the industry, dismantle it and leave Pennsylvania's legislators and taxpayers to pick up the pieces.

In January 2000, after a similar attack on the nursing home industry in Florida by this same law firm, AON prepared a study to quantify the severity of the litigation crisis. The study showed that the average size of a 1999 claim in Florida was projected to be 250 percent higher than the rest of the country. Despite providing a quality of care better than the national average, Florida's long term care facilities incurred more than four claims for every one claim incurred in the rest of the country; and almost half the total amount of claim costs paid for general liability and

professional liability claims in the Florida long term care industry were going directly to attorneys. In addition, the study found that the per-bed lawsuit costs in Florida were 12 times higher than the national average; and insurance companies were exiting the state in droves because of the explosion in growth of claims and the extreme unpredictability of results.

The findings demonstrated by the AON study were echoed by the Chairman and Chief Executive Officer of AIG in New York when he was quoted saying: “Nursing care cost-per-bed has gone so high that nobody can operate and the only ones benefitting are members of the trial bar.”

Florida nursing homes were being buried under a landslide of litigation; nearly 90 percent of Florida nursing homes were being sued.

The long term care industry called for reforms to change the legal climate and to help them rebuild so they could meet the needs of Florida’s elderly population. In 2001, the Florida legislature passed several medical liability reforms, including statute of limitations and punitive damage limits. Their reforms would require a plaintiff to prove punitive damages by clear and convincing evidence in cases against nursing home facilities. The law limited punitive damages against nursing home facilities to the greater of three times the award of compensatory damages or \$1million. If the motivation for financial gain was proven, the punitive damage limit increased to the greater of \$4 million or four times the award of compensatory damages. The law imposed NO LIMIT on the award of punitive damages against nursing home facilities where intentional harm is proven.

The Florida legislature did not stop at punitive damage limits and passed legislation to also limit non-economic damages in 2003. While the punitive damage caps applied to all providers, including nursing homes, the caps on non-economic damages applied to hospitals and doctors. These reforms helped stabilize a health care sector that was under siege.

And in 2006, they finally repealed the joint and several liability statute. This measure abolished the joint and several statute without exceptions. These reforms, packaged together, helped to revitalize the health care industry and more specifically, the long term care industry.

The same law firm that nearly succeeded in ruining Florida’s long term care delivery system is trying to do the same right now in Pennsylvania. Without legal reforms, it is only a matter of time until we face the same insurance and access to care issues that Florida’s providers and patients faced there.

These ads and this firm’s history of malicious actions are a perfect example of why Pennsylvania needs lawsuit abuse reform. Pennsylvania is home to excellent businesses, hospitals, doctors, manufacturers, restaurants, nursing homes – all of which have been the target of predatory trial lawyer firms.

Even Scott Cooper, an attorney with Schmidt Kramer who testified before the House Judiciary in March on behalf of the trial lawyers’ association, told legislators that he “didn’t necessarily approve” of this out-of-state law firm’s tactics, and made it clear that no one from that law firm was a member of his association. Yet our laws welcome this firm.

A state's legal climate has a direct bearing on job creation, on the costs of goods and services, on the cost and availability of health care, and it greatly impacts business decisions, such as whether companies want to move or stay here.

Pennsylvania nursing homes play a significant role in Pennsylvania's economy. In 2009, Pennsylvania's nursing homes generated more than \$11.7 billion in economic activity, which is 2.2% of the state's overall economic activity. Nursing homes employed, directly and indirectly, nearly 160,000 individuals, and paid \$5.7 billion in salaries, fringe benefits, and contract nursing services.

Liability costs have dropped significantly in other states that have passed some form of lawsuit abuse reform in the past several years. A prime example is the state of Texas. Texas enacted significant lawsuit reforms beginning in 2003 and according to the August 2010 analysis prepared by AON; the loss costs in Texas plummeted after its enactment and have remained stable for a number of consecutive years.

In 2003, Texas – much like Florida -- passed a series of legal reforms that resulted in lower costs to the provider community and more stability in the long term care delivery system. The Texas legislature enacted a constitutional amendment allowing for noneconomic damage caps and then passed caps in medical malpractice cases at a level of \$250,000 for all doctors and health care practitioners and a \$250,000 per facility cap against health care facilities such as hospitals and nursing homes, with an overall cap of \$500,000 against health care facilities, creating in effect an overall limit of noneconomic damages in medical malpractice cases of \$750,000. In addition to caps on non-economic damages, they also enacted joint and several liability reform that established proportional liability with exceptions. .

These reforms had dramatic results. Specifically, the loss cost per occupied bed decreased 81 percent from 2003 – the year prior to legal reforms going into affect – to 2009. The loss cost per occupied bed for Texas was \$460 in 2009, compared to Pennsylvania's loss cost per occupied bed of \$940 in 2009. In addition, in Texas the claim frequency per occupied bed decreased from 1.90 percent in 2003 to 0.65 percent in 2009; the severity per claim decreased from \$128,000 in 2003 to \$70,000 in 2009; and the Medicaid per diem loss cost per bed decreased from \$6.68 in 2003 to \$1.26 in 2009.

The legal reforms enacted in Texas produced dramatic gains in access to care, stabilized insurance markets, and drove down liability premiums by reducing claims losses. The savings experienced by Texas health care providers has been reinvested to offer new or expanded services and programs that have enhanced access to care and saved lives. Texas and Florida provide clear examples of the impact of lawsuit abuse reform on the long term care industry.

Lawsuit abuse reform is crucial for Pennsylvania in order for our state's health care providers to continue to provide quality care to our most vulnerable citizens. Excessive litigation and damage awards result in higher consumer prices and decreased availability of services, such as medical care. The high legal costs paid by Pennsylvania health care providers, employers, and governments inhibit job growth, increase health care costs, and limit access to medical care. Instead, we need to enact the following meaningful lawsuit abuse reforms to inject fairness, common sense, and personal responsibility into our legal system.

Recommended Components of Lawsuit Abuse Reform: Failure to act on commonsense lawsuit abuse reform has caused Pennsylvania to fall further behind other states. It's time to change that by restoring balance, fairness and predictability to a system that lacks all three – starting with a repeal of joint and several liability. Doing so will help stimulate economic growth, create jobs and lower health care costs for all consumers.

As we all know, joint and several liability is a theory of recovery that permits the plaintiff to recover damages from multiple defendants collectively or from each defendant individually. In a state like Pennsylvania that follows the rule of joint and several liability, if a plaintiff sues three defendants, two of whom are collectively 95 percent responsible for the defendant's injuries, but do not have deep pockets, the plaintiff may recover 100 percent of his/her damages from the richer defendant even though that defendant is responsible for only 5 percent of the injuries. The rule of joint and several liability is neither fair, nor rational, because it fails to equitably distribute liability. The rule allows a defendant only minimally liable for a given harm to be forced to pay the entire judgment.

PHCA supports replacing the rule of joint and several liability with the rule of proportionate liability. In a proportionate liability system, each co-defendant is proportionally liable for the plaintiff's harm. For example, a co-defendant that is found by a jury to be 20 percent responsible for a plaintiff's injury would be required to pay no more than 20 percent of the entire settlement. The opposition to the Fair Share Act—that the rule protects the right of their clients to be fully compensated—fails to address the hardship imposed by the rule on co-defendants that are required to pay damages beyond their proportion of fault. This is unjust and simply doesn't make sense.

The effect of joint and several liability is to convert lawsuits into searches for financially viable defendants. This causes defendants, like nursing homes, to settle out of court for fear of having to pay a large amount of money even though they may have been held accountable for only a very tiny part of the damages. Predatory law firms like the one that is now targeting Pennsylvania's nursing homes know this. They believe that they can come to PA and make money here.

Businesses and health care providers need to be treated fairly and not held responsible for harm they did not cause.

On two occasions, the General Assembly voted in a bipartisan manner to repeal this unbalanced and archaic legal doctrine through enactment of the Fair Share Act. Nonetheless, the Pennsylvania Supreme Court overturned the law once on procedural grounds, and then a few years later, the law was vetoed by then-Gov. Ed Rendell. The opportunity now exists to reinstate the Fair Share Act – we must take this opportunity on behalf of all Pennsylvanians once and for all.

While the focus of this hearing is on the repeal of joint and several liability, this should not in any way be the end of lawsuit reform in the Commonwealth. Alone, this is important, but it should only be the start.

Meaningful lawsuit abuse reform should also include legislation that would give health care providers the ability to express empathy without fear of their statements being used against them, fair limitations on non-economic and punitive damages, enhancements to the certificate of merit requirements, and reasonable limitations on use of misleading surveys at trial.

Apology legislation or benevolent gesture, which the House passed several weeks ago, permits a health care provider to acknowledge, express empathy for, or take ownership of an unforeseen outcome without the risk of retaliatory litigation *based solely* on the statements made at the time of the apology. Apology legislation does not relieve the health care provider of liability; it simply allows the doctor or employee to communicate openly and honestly with patients and their families without fear that their statements will be used against them.

It has long been understood that anger --- not greed --- drives most consumers to file medical malpractice lawsuits. Thus, when health care providers can change from the traditional “deny and defend” strategy, the result has been fewer claims, and customer service ratings for providers that offer this approach have improved. Although apology legislation has yet to be passed in Pennsylvania, the Central Pennsylvania Physicians Risk Retention Group, representing 1,200 health care professionals, has seen their premiums drop to 35 percent below market rates due to the adoption of this type of innovative policy. Thirty-five states, including the surrounding states of Ohio, Delaware and Maryland, have passed apology legislation enabling a disclosure program to be a viable option for doctors, hospitals and nursing homes to reduce liability claims. Not only have claims gone down, but customer service ratings have skyrocketed.

At the University of Michigan Health System, one of the first to experiment with disclosure policies, existing claims and lawsuits dropped from 262 in 2001 to 83 in 2007. The health system’s legal defense costs and the money it must set aside to pay claims have each been cut by two-thirds, and the time taken to resolve cases has been halved.¹

The Michigan health system’s chief risk officer, Richard C. Boothman, told the *New York Times*, “Improving patient safety and patient communication is more likely to cure the malpractice crisis than defensiveness and denial.”

Similarly, the number of malpractice filings against the University of Illinois dropped by half in the first two years after it started its disclosure program. And in the 37 cases where the hospital acknowledged a preventable error and apologized, only one patient has filed suit. In the almost 40 states with apology legislation, medical mistakes have become teaching opportunities, not potential cover-ups.

We hope that the best of Pennsylvania’s trial lawyers will join their colleagues in other states who have stood behind the passage of apology legislation, noting that as advocates for those who have been harmed, their core responsibility is to seek redress for their patients and families in four ways: get answers, ensure accountability, find fixes and achieve swift justice. Apology legislation accomplishes all four.

Another method to reduce costs to providers and lower litigation expenses for the entire health care continuum would be to extend the punitive damage limitations provided to physicians in the

¹ New York Times “Doctors Say I’m Sorry Before See You In Court”, May 18, 2008

MCARE Act to all health care providers. Currently, Act 13 or MCARE, places a limit on punitive damages to two times compensatory for physicians only. While punitive damages awards are infrequent, they are routinely asked for today in civil lawsuits. The difficulty of predicting whether punitive damages will be awarded by a jury in any particular case, and the marked trend toward astronomically large amounts when they are awarded, have seriously distorted settlement and litigation processes and have led to wildly inconsistent outcomes in similar cases. By extending the MCARE language on punitive damage limits to all health care providers, there would be lower costs to both providers and consumers.

Pennsylvania's punitive damages law is not in step with the U.S Supreme Court in that the burden of proof in Pennsylvania is the same for compensatory damages as it is for punitive damages. There should be a higher burden of proof for punitive damages, akin to criminal charges. Punitive damage cases are less about facts than they are about anger and inciting a response by a jury that harms the defendants. Pennsylvania courts have expressly adopted the principle that punitive damages are damages, other than compensatory or nominal, awarded against a person to punish them for outrageous conduct and to deter such person and others like them from similar conduct in the future. Punitive damages are to serve as a penalty to the defendant and are not for the purpose of providing additional compensation to the plaintiff. Shouldn't that mean a higher burden of proof?

Certificate of merit is another key component of legal reform. Current law states that the plaintiff's attorney shall file with the complaint or within 60 days after the filing of the complaint, a certificate of merit signed by the attorney or party. PHCA believes there should be a requirement that these certificates of merit be filed at the time of the claim. To allow parties months to qualify their litigation instead of requiring justification at the outset tilts the process unfairly in one direction. We support legislation introduced in previous sessions that would require the filing of a certificate as a condition of asserting a liability claim. This issue is about legitimacy in liability claims and reducing shoot-from-the-hip lawsuits that are not substantiated by a professional.

Lastly, a critical issue to our members is the hostile use of annual survey results as evidence in liability suits. PHCA supports keeping unrelated surveys out of these types of cases. The state of Ohio has enacted legislation that accomplishes this policy recommendation.

It is clear from the recent experience of our members, as mentioned previously in this testimony, that plaintiff's firms use these sources of information in a misleading, deceitful way in advertisements and as the basis of frivolous claims. Nursing homes must stand on their surveys, fix the problems that are cited and provide high quality care to their residents every day. Twisting the facts to paint a picture that enables attorneys to lure plaintiffs into potential litigation is not a system that is fair, impartial, or just.

Conclusion: Excessive litigation and damage awards result in higher consumer prices and decreased availability of services including medical care. The high legal costs paid by Pennsylvania health care providers, employers, and governments inhibit job growth, increase health care costs, and limit access to medical care.

Predatory firms from across the country are descending on Pennsylvania, and joining others, in a last ditch effort to file law suits before reform takes place.

This onslaught of law suits is not about improving the quality of care; rather, it is about attorneys preying on the frail and vulnerable elderly, their families and their providers of care.

It is time to say no to the law firms who are impersonating Willie Sutton. We cannot allow these predators the opportunity to continue to attack a health care system that cares for our greatest generation; a system that will be needed even more in the coming years by the baby boomer population.

Now is the time for Pennsylvania to pass broad based legal reforms that would not only result in a fairer legal system, but would reduce health care costs, generate jobs, and once again allow doctors and nurses and hospitals and nursing homes to spend their time caring for people, instead of giving depositions, and producing documents, in fishing expeditions by trial lawyers.

I hope my testimony has been helpful to the Committee, and that you now better understand the challenges that long term care providers in Pennsylvania continue to face with respect to medical liability and legal reform.

I would be happy to answer any questions.