

## **MEDICAL MALPRACTICE & LIABILITY – JUST THE FACTS**

Proponents of so-called medical liability “reform” assert relentlessly that jury awards in malpractice cases are out of control and that capping damage awards will lower premium costs for doctors. They claim too that the tort system dramatically escalates healthcare costs generally, and that a “crisis” exists in many states because doctors are abandoning the practice of medicine due to the high cost of malpractice insurance premiums. The truth is that not one of these assertions is based in fact. By examining the studies, statements and conclusions of independent experts and governmental entities, the true story can be told.

### **Caps DO NOT Lower Malpractice Premiums, Just Ask...**

*Weiss Ratings, Inc* - Weiss Ratings is an independent organization that evaluates the financial strength of numerous institutions, especially insurers. According to a study by the U.S. General Accounting Office (GAO), Weiss' insurance ratings were proven to be more accurate than any of the other rating agencies. Recently, Weiss concluded that capping malpractice damages does not lower insurance premiums for doctors. Specifically, they found:

That despite caps on economic damages enacted in 19 states, “most insurers continued to increase premiums (for doctors) at a rapid pace, regardless of caps.” (Weiss Report 6/3/03)

That caps did not reduce awards, they only slowed the increase in the size of awards paid by malpractice insurers, and insurers failed to pass along any savings to those physicians in states with caps, refusing even in those states to lower physicians' insurance premiums. (Weiss Report, 6/3/03)

That the median annual premium between 1991 and 2002 actually increased *more* in states with caps (48.2 percent) than in states without caps (35.9 percent). (Weiss Report, June 2003)

That in states with caps on non-economic damages, doctors generally fared worse than doctors in states without caps. The report stated: “[D]octors in states with caps actually suffered a significantly larger increase in insurance costs than doctors in states without caps.” (Weiss Report, 6/3/03)

*The Medical Liability Monitor* – The Monitor monthly publishes the latest information on medical liability insurance rate. Its annual rate survey, reported by state and by medical specialty (e.g., internal medicine, general surgery, ob/gyn) reports the medical liability insurance rates of all the major insurers of physicians in the United States. Its data is the most comprehensive anywhere and is cited by government agencies, legislative bodies and major media. It found that:

States with caps on damages have average insurance premiums that are 9.8% *higher* than insurance premiums in states without caps on damages. (Medical Liability Monitor, October, 2004)

In the five states that recently passed new medical malpractice caps, premiums rose at nearly double the rate as states that did not pass a damage cap. Those states are: MS, NV, OH, OK and TX. (Medical Liability Monitor, October, 2004)

*The National Bureau of Economic Research (NBER)* – NBER, founded in 1920, is the nation's leading nonprofit economic research organization. Twelve Nobel Prize winners in Economics and three past Chairmen of the President's Council of Economic Advisers have been researchers at NBER. Their research found little relationship between caps and premium costs. Their findings:

“There is a fairly weak relationship between malpractice payments (for judgments and settlements) and premiums – both overall and by specialty.” (pg. 14).

(<http://www.dartmouth.edu/~kbaicker/BaickerChandraMedMal.pdf>)

“Past and present malpractice payments do not seem to be the driving force behind increases in premiums. Premium growth may be affected by many factors beyond increases in payments, such as

industry competition and the insurance underwriting cycle. (pg. 20).  
(<http://www.dartmouth.edu/~kbaicker/BaickerChandraMedMal.pdf>)

*The state of California, whose MICRA law is commonly touted as an example of how caps on damages can lower malpractice premium – California did not see lower premiums until it enacted insurance reform.*

“California doctors’ premiums increased by 450% in the first 13 years after the 1975 passage of MICRA and only began to decrease after voters enacted the insurance reform initiative known as Proposition 103.” (Foundation for Taxpayer and Consumer Rights, “How Insurance Reform Lowered Doctor’s Medical Malpractice Rates In California...And How Malpractice Caps Failed,” March 2003, <http://www.consumerwatchdog.org/healthcare/rp/rp003103.pdf>)

“While MICRA was the legislature’s attempt at remedying the medical malpractice crisis in California in 1975, it did not substantially reduce the relative risk of medical malpractice insurance in California.” (James Robertson, Assistant Vice President and Associate Actuary, SCPIE Indemnity Company (California’s second largest medical malpractice insurer), in written testimony responding to a question from an administrative law judge who is overseeing a case in which SCPIE has requested a 15.6 % rate hike. April 30, 2003)

*The state of Texas, whose second largest insurer recently asked for a rate increase despite the state having passed caps in 2003.*

Texas enacted medical malpractice caps in 2003, and despite the caps the state’s second largest insurer has requested a 19% rate increase. Medical Protective, a leading insurer, claims on its website that caps are “critical,” but then admits in its filing that caps do not lead to any significant savings. In the filing requesting a rate increase Medical Protective stated, “Noneconomic damages are a small percentage of total losses paid. Capping noneconomic damages will show loss savings of 1.0%.’...And yet a white paper dated March 2004 and posted on the Medical Protective website states that capping noneconomic damages is a ‘critical element [of tort reform] because in recent years we have seen noneconomic damages spiraling out of control.’” (The Wall Street Journal, 10/28/04, A6, “Malpractice Insurer Sees Little Savings in Award Caps”)

*The award winning publication Modern Physician - Modern Physician reported the results of a study which concluded that high premiums have to do with factors other than the litigation system.*

The article stated, “The real drivers of the rise in premiums over the past four years have been low interest rates, a sour national economy and the legacy of overly aggressive pricing policies in the years before the ‘crisis’ began in late 2000, according to the report.” (“Cycles, not suits, drive medical trends: study,” Modern Physician, October 15, 2004)

*Many of those who support medical malpractice caps – even many tort reform “experts” and insurance company executives, admit that caps will not significantly lower premiums.*

“[M]any tort reform advocates do not contend that restricting litigation will lower insurance rates, and ‘I’ve never said that in 30 years.’” (Victor Schwartz, General Counsel, American Tort Reform Association, Business Insurance, July 19, 1999)

“Insurers never promised that tort reform would achieve specific premium savings . . .” (March 13, 2002 press release by the American Insurance Association)

“Tort reform” advocates have long rejected the notion that enactment of caps on damages would lower insurance rates See: <http://centerjd.org/air/pr/Quotes.pdf>

“We wouldn’t tell you or anyone that the reason to pass tort reform would be to reduce insurance rates.” (Sherman Joyce, President of the American Tort Reform Association, as quoted in “Study Finds No Link Between Tort Reforms and Insurance Rates,” Liability Week, July 19, 1999)

“In 1986, after insurers and doctors lobbied for, and Florida lawmakers enacted, a cap on noneconomic damages for medical malpractice claims, insurers Aetna and St. Paul *increased* doctors’ premiums.

The companies argued that, despite earlier promises, malpractice caps do not actually lead to savings for doctors, much in the manner of Medical Protective in its recent Texas filing.” (News Release from Foundation for Taxpayer and Consumer Rights, “Nation’s Largest Medical Malpractice Insurer Declares Caps on Damages Don’t Work, Raises Docs’ Premiums,” 10/26/04)

"No responsible insurer can cut its rates after a [medical malpractice tort 'reform'] bill passes." (Bob White, President of First Professional Insurance Company, the largest medical malpractice insurer in Florida, talking about a proposed \$250,000 cap in the January 29, 2003 Palm Beach Post)

### **Caps DO NOT Affect Overall Healthcare Costs, Just Ask...**

*The Congressional Budget Office (CBO) – CBO reported that caps will not significantly reduce overall healthcare costs.*

It concluded that limiting or capping damage awards to victims would “only lower health care costs by only about 0.4 percent to 0.5 percent, and the likely effect on health insurance premiums would be comparably small.” (Congressional Budget Office, “Limiting Tort Liability for Medical Malpractice,” 1/08/04)

Malpractice costs amounted to “less than 2 percent of overall health care spending. Thus, even a reduction of 25 percent to 30 percent in malpractice costs would lower health care costs by only about 0.4 percent to 0.5 percent, and the likely effect on health insurance premiums would be comparably small.” (Congressional Budget Office, “Limiting Tort Liability for Medical Malpractice,” 1/08/04)

*Even the Budget Submitted by the Bush Administration – the Administration’s FY ’05 Budget did not state any savings as a result of caps.*

Despite their claims that severe caps on damages for victims will result in lower health care costs, the Bush-Cheney budget for 2005 does not include any healthcare savings associated with these caps. (Bush-Cheney FY2005 Budget)

### **Despite Claims About “Defensive Medicine,” Americans are NOT Getting the Care They Need, Just Ask...**

*The CBO disputes the claim that litigation is prompting doctors to practice “defensive medicine.”*

According to CBO’s 2004 study: “Proponents of limiting malpractice liability have argued that much greater savings in health care costs would be possible through reductions in the practice of defensive medicine. However, some so-called defensive medicine may be motivated less by liability concerns than by the income it generates for physicians or by the positive (albeit small) benefits to patients. On the basis of existing studies and its own research, CBO believes that savings from reducing defensive medicine would be very small.” (Congressional Budget Office “Limiting Tort Liability for Malpractice,” 1/8/04)

*The Institute of Medicine Institute of Medicine study, To Err is Human: Building a Safer Health System, concluded that as many as 98,000 Americans die every year from medical errors.*

*Henry J. Kaiser Family Foundation* The survey found that 78% of people believe the quality of health care has stayed the same or worsened over the past five years, and 55% say they are dissatisfied with the quality of their health care. (“National Survey on Consumers’ Experiences With Patient Safety and Quality Information” - The Kaiser Family Foundation/Agency for Healthcare Research and Quality/Harvard School of Public Health, November, 2004)

## **High Premiums are the Result of Insurance Industry Conduct, Just Ask...**

USA Today – the newspaper concluded that losses in investment income led to high premiums.

“Insurance companies are boosting rates partly to make up for price wars in the 1990s, when competition kept premiums low, and to counter recent declines in their investment incomes. That investment profit had helped offset losses from malpractice damage awards and the artificially low premiums charged to doctors.” (USA Today, “Hype Outpaces Facts in Malpractice Debate,” 3/5/03)

General Counsel for the American Tort Reform Association (ATRA) – stated that insurance was less expensive in the 1990s due to the investment market.

“Insurance was cheaper in the 1990s because insurance companies knew that they could take a doctor's premium and invest it, and \$50,000 would be worth \$200,000 five years later when the claim came in. An insurance company today can't do that.” (Victor Schwartz, general counsel to the American Tort Reform Association, "Dose of Legality," Honolulu Star-Bulletin, April 20, 2003)

Americans for Insurance Reform – A coalition of public interest organizations found that malpractice premiums increase when investment values decrease.

“Since 1975, the data shows that in constant dollars, per doctor written premiums - the amount of premiums that doctors have paid to insurers - have gyrated almost precisely with the insurer's economic cycle, which is driven by such factors as insurer mismanagement and changing interest rates.” (AIR, 10/10/02)

Weiss Ratings – Weiss found that “mismanagement” by insurance companies caused problems.

A June 2003 study by non-partisan, independent Weiss Ratings, Inc., “Medical Malpractice Caps: The Impact of Non-Economic Damage Caps on Physician Premiums, Claims Payout Levels, and Availability of Coverage,” blamed “mismanagement” for the industry's woes, and labeled the focus on caps an attempt by “insurance companies and their supporters . . . to divert the public's attention away from long years of mismanagement.” (Weiss Report, 6/3/03)

The Wall Street Journal – A Journal headline stated “Insurers' Missteps Helped Provoke Malpractice Crisis.”

The Journal showed in detail how one insurer, St. Paul, released excessive reserves, triggered a price war, and ultimately with other insurers had inadequate reserves to cover payouts, triggering sharp hikes in premiums. (WSJ, 6/24/02)

The Weiss Report – in 2003, Weiss concluded that Inflation and Other Insurance Industry Forces Drove Up Doctors' Insurance Premiums More Than Med Mal Suits.

They concluded that other factors, aside from medical malpractice suits, play a much larger role in driving up doctors' med mal premiums. These factors “continue to drive – med mal premiums up, evidently overwhelming any reduction in jury awards.” The factors include, among other things, 75 percent inflation in medical costs and dramatic declines in insurers' investment income as the stock market collapsed. (Weiss Report, 6/3/03)

## **Doctors are not Leaving - Their numbers are actually Increasing, Just Ask...**

The U.S. General Accounting Office – GAO concluded that the percentage of physicians was actually increasing and questioned the data used by the AMA in labeling certain states so-called “medical malpractice crisis states.”

“The U.S. physician population increased 26 percent, which was twice the rate of total population growth, between 1991 and 2001. During this period the average number of physicians per 100,000 people increased from 214 to 239.” (GAO Report, “Physician Workforce,” October 2003)  
Their report questioned the data used by the AMA to make its liability “crisis” state determinations. The GAO noted that an AMA survey on physicians cutting back services had a response rate of only 10% and did not specify cutbacks in specific services. And while the Florida Medical Association reported that the neurosurgeons in two counties had ceased practicing, the GAO says it found at least five such specialists at work in each county. (See Modern Physician, 10/1/03)  
The GAO also concluded that, "(M)any of the reported physician actions and hospital-based service reductions were not substantiated or did not widely affect access to health care." (Government Accounting Office, Implications of Rising Premiums on Access to Health Care, GAO-03-836 Aug. 2003)

The American Medical Association – the AMA itself reported an increase in the number of practicing physicians.

The number of physicians has risen in every state every year over the last 3 years (of available data – 2000–2002), and the numbers of physicians are higher in every state than they were in 1996. (American Medical Association, “Physician Characteristics and Distribution in the U.S.,” 2003-2004 edition)

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### **There are no “run away jury awards” - Jury Awards are Decreasing, Just Ask...**

The U.S. Department of Justice – DOJ found that jury awards are steadily decreasing.

In studies done in 1995 and 2004, the median plaintiff award in tort cases has dropped from \$50,000 in the 1990s to \$37,000 by 2001. (www.ojp.usdoj.gov/bjs/civil.htm#state; University of Chicago Law Review, Winter 1998)

Between 1992 and 2001 the number of jury trials with punitive damages remained stable (4% to 6%) and the median punitive damage award decreased slightly from \$63,000 to \$50,000. (Civil Trial Cases and Verdicts in Large Counties, 2001, Thomas H. Cohen, Steven K. Smith, Bureau of Justice Statistics, 2004)

### **Malpractice Filings are Decreasing – Just Ask...**

The National Center for State Courts (NCSC) - NCSC found that medical liability filings have dropped.

Their research in 2002 showed that since 1992, medical malpractice filings per 100,000 populations have fallen by 1%. (National Center for State Courts, “Examining the Work of State Courts 2002”)

### **Lowering Premiums & Increasing Access to Healthcare is not the “Tort Reformers” True Agenda, Just Ask...**

The General Counsel for the American Tort Reform Association (ATRA) – admitted that so-called “frivolous” malpractice cases are “very rare.”

"There is no question that it is very rare that frivolous suits are brought against doctors. They are too expensive to bring." (Los Angeles Times, October 22, 2004)

Chief Executive of CA malpractice insurer – stated that the tort system is not to blame.

"I don't like to hear insurance-company executives say it's the tort system - it's self inflicted."  
(Donald J. Zuk, chief executive of Scpie Holdings Inc., a leading malpractice insurer in California, Wall Street Journal, June 24, 2002)

The highly regarded publication Business Insurance - Business Insurance reported that limiting awards to injured patients, not lowering insurance rates for doctors, is a primary focus of ATRA.

They reported that "Sherman Joyce, president of the American Tort Reform Assn." said "tort reform is not just about lower insurance rates. 'We think the real focus (of tort reform) should be on (restricting) the payment of punitive damages,' rather than on lowering insurance costs, he said."  
(Business Insurance, 7/19/99)

Insurance Company Witnesses - insurers told the Florida legislature that there was no problem with "frivolous lawsuits."

In August 2003, tort reform advocates, including insurance industry executives, were forced to admit their arguments lacked merit after they were placed under oath by the Florida Senate Judiciary Committee. The St. Petersburg Times reported: "The Senate Judiciary Committee, frustrated by the conflicting information given it by different interest groups, discredited much of the medical malpractice rhetoric by placing witnesses under oath. Suddenly, there were no frivolous lawsuits and Florida was a profitable place for insurance companies to do business after all." (St. Petersburg Times, 8/17/03)

Political Professionals and pollsters – for political purposes, powerful interests have set an agenda that deliberately paints trial lawyers as evil.

Karl Rove, according to the book "Bush's Brain," admitted to being the mastermind behind pushing the tort reform agenda. Rove stated, "The two issues, education and juvenile justice, were on his agenda list. ... Later, we added tort reform. I sort of talked him (George W. Bush) into that one."  
(Washington Post, 2/25/03)

GOP pollster Frank Luntz wrote to GOP candidates: "It's almost impossible to go too far when it comes to demonizing lawyers. Make the lawyer your villain." ("The Attack on Trial Lawyers and Tort Law," A Commonweal Institute Report, October 1, 2003; St. Paul Pioneer Press, 7/18/04)

Spokesperson for the American Insurance Association, Dennis Kelly - admitted that reducing prices is not the goal of insurance companies.

"We have not promised price reductions with tort reform," said Dennis Kelly, an American Insurance Association spokesman." (Chicago Tribune, 1/3/05)