



Medical Malpractice Reform

Rising health care costs have become one of the most worrisome problems of our time. One of the greatest contributors to this problem is the frequency and size of malpractice lawsuits. A patient is “damaged,” a doctor is sued, a patient is “awarded” a sum of money, a doctor’s malpractice insurance premiums increase, and the costs of those premium increases are passed along to other patients in the form of increased health care costs. This is a very simplistic example, but it demonstrates clearly how this problem can and has spiraled out of control. This issue of *Risk Insights* is not designed to debate the pros and cons of a single payor system, the fairness of drug pricing, or the specific issues regarding the uninsured. Rather, it is intended to focus in on those items that contribute to the medical malpractice debate.

Recent Events

On March 13, 2003, The United States House of Representatives, by a 229-196 vote, approved the Help Efficient, Accessible, Low Cost, Timely Health Care (HEALTH) Act (H.R. 5). The bill would place a \$250,000 cap on malpractice awards for “non-economic” damages such as pain and suffering or mental anguish. It also caps punitive damages at the greater of \$250,000 or twice compensatory damages. “Economic” damages to a patient from physician errors — past and future medical expenses, costs of obtaining domestic services, and loss of business or employment opportunities — would remain uncapped under the legislation.

H.R. 5 also stipulates that each defendant would only be responsible for his or her share of damages, rather than being individually responsible for the entire amount. It would also require plaintiffs in most cases to bring lawsuits within three years of the date of injury or one year after the plaintiff discovers or should have discovered the harm. President Bush, who has been a staunch proponent of medical malpractice reform, has asked that the Senate quickly approve this bill.

The Independent Insurance Agents & Brokers of America (IIABA) is applauding the approval as a significant step toward fixing a medical liability system that unnecessarily restricts health care access and delivery. The 300,000-member association is pleased that both Republican and Democratic House members have recognized the urgent need to reform an inherently inefficient civil justice system that is ultimately hurting America's patients as much as its doctors.

The Independent Women's Forum (IWF) has applauded President Bush's call for meaningful tort reform in medical malpractice cases, noting that women will especially benefit.

Why Medical Malpractice Reform is Being Proposed

As already indicated, President Bush endorsed medical malpractice reform since the first days of his administration. This is very much in line with the sentiments of the American people. A recent Wall Street Journal Online/Harris Interactive Healthcare Poll showed that the majority of Americans (58 percent) support legislative efforts to limit the costs of medical liability and reduce the costs of medical malpractice insurance. Only 16 percent opposed the legislation while 25 percent remained undecided.

In October 2002, Risk Management reported that physicians in at least a dozen states felt they could no longer afford their malpractice insurance premiums. The situation has become so dire that on January 1, 2003, two-dozen surgeons in West Virginia's northern panhandle simply walked off the job. Faced with six-figure liability premiums while earning only a five-figure salary, they simply decided that they could no longer remain in the profession.

The Department of Health and Human Services recently released a report documenting numerous accounts of medical practices and services that have been disrupted or shut down because of the medical malpractice insurance crisis. Some examples include:

In July 2000, the University of Nevada Medical Center closed its trauma center in Las Vegas for ten days after its surgeons quit because they could no longer afford malpractice insurance premiums, some of which had increased from \$40,000 to \$200,000.

Six of the largest nursing home companies, both privately and publicly owned, have filed for bankruptcy in the past two years, citing as a significant factor in their financial downturn the uncontrolled costs associated with medical liability premiums and tort related expenses.

A doctor in a small North Carolina town opted for early retirement when his premiums skyrocketed from \$7,500 to \$37,000 per year. His partner, unable to afford the expenses by himself, may now be forced to close the practice.

And to make matters even worse, here is what the typical medical student will be faced with: after having paid approximately \$100,000 to complete three to four years of medical school, and then another two to three years as a resident/intern, they find that they have little or no control as to what their malpractice liability premiums will be. Further, they face the threat of financial ruin from outrageous jury awards. Why become a doctor, when you can make just as much as a lawyer with fewer risks and less than half the education? For those who recommend medical malpractice reform, this is the bottom line: relying on the risk of financial punishment to minimize mistakes may contribute to the further erosion of the quality and quantity of medical services provided in this country.

Why Medical Malpractice Reform is Opposed

The tort system's fundamental moral purpose is to punish those who harm others, and where appropriate, to force them to pay restitution to those harmed. It has been argued that capping doctors' malpractice liability for non-economic damages at \$250,000 effectively removes the deterrent the tort system is meant to create.

According to a March 2000 report by the Institute of Medicine, between 44,000 and 98,000 people die each year from preventable mistakes made by their doctors. In addition, about 1 million medication errors occur in hospitals each year. Further, the Centers for Disease Control and Prevention estimate that some 2 million hospital patients develop infections that result in another 90,000 deaths each year. Yet despite these staggering figures, fewer than 2 percent of the victims of medical malpractice ever sue their doctors, and when they do, fewer than 10 percent of the suits make it to a jury. Even then, the median payment to a victim of medical malpractice in 2000 was just \$125,000, according to the National Practitioner Data Bank. In fact, verdicts of \$1 million occur in only four percent of medical malpractice cases, and they are usually reduced to a median of \$235,000 upon final judgment.

In many instances, those who oppose a law limiting damages would agree to it if certain exceptions would be made for particularly egregious acts of malpractice. The perfect example for this position would be the case of a woman from Wisconsin whose doctor mistakenly performed a double mastectomy on her even though she was cancer-free. It is difficult to argue that she should not receive a judgment in excess of \$250,000. Finally, according to the NPDB, just five percent of all U.S. doctors are responsible for 54 percent of all malpractice claims. Clearly the argument here would not be for a change in the tort system, but rather for the removal of incompetent doctors.

State Reforms

Over the last two years, one out of twenty West Virginian doctors has moved to another state, restricted their practices to exclude risky procedures, or retired. The primary reason given for making these decisions was the escalating costs of medical malpractice liability insurance. In order to keep doctors on the job and/or from leaving the state, West Virginia governor Bob Wise attacked the situation by delivering an income tax credit to the state's doctors. In addition, he capped non-economic damages in malpractice suits at \$250,000, adjusting it slightly annually for inflation. This bill has been approved by West Virginia's House Judiciary Committee, and has since moved to the state's House floor, where it is expected both will pass.

Pennsylvania's governor Ed Rendell has promised a \$220 million bailout to the state's medical community. Rendell's proposal would cut doctors' payments to a state insurance fund by two-thirds and require insurers to pay into the fund. Health insurance companies would finance the bailout through a one-time surcharge on their reserves, and insurers would be prohibited from recouping their costs from the bailout by hiking premiums.

Wisconsin, Indiana, and Louisiana have already passed legislation aimed at reducing medical liability insurance costs. And Ohio governor Bob Taft recently signed off on tort reforms that will enable insurance companies to better predict medical liability losses and (hopefully) stabilize liability rates for doctors.

Medical malpractice reform enacted in California (Medical Injury Compensation Reform Act of 1975 [MICRA]) remains the standard bearer from which many other states try to model. Prior to the passage of this legislation, California was a national medical malpractice loss leader. MICRA capped non-economic damages in medical negligence cases at \$250,000, limited attorney contingency fees, and established a statute of limitations for medical malpractice claims. It also required juries to be informed when plaintiffs had other sources of income, and it provided for damage awards in excess of \$450,000 to be paid over time rather than in a single lump sum. Almost immediately, dozens of pending cases settled rather than continue to trial, and the state's medical liability claims joined the national average.

Still, the overall effectiveness of these individual state measures coupled with the response by health care consumers could best be described as mixed or too early to tell.

Frivolous Malpractice Lawsuits

In addition to the increased frequency and size of payouts for damages, the high proportion of frivolous malpractice lawsuits has contributed to the problem. As a response, Medical Justice™ Corporation has begun partnering with insurance brokers to protect physicians from these frivolous cases.

The patented Medical Justice™ processes works in two ways. First, Medical Justice™ provides insurance that pays for countersuits. Second, Medical Justice provides a deterrent package using the option of countersuits and other proprietary means to prevent these "frivolous" malpractice lawsuits from being initiated in the first place. Physicians are essentially being provided with a counterbalance to the lack of a disincentive for frivolous lawsuits. From the physician's point of view, Medical Justice™ puts the scales of justice in balance. Whether Medical Malpractice Legislation passes or not, the prevailing notion is that frivolous malpractice lawsuits will decrease as a result of the coverage Medical Justice™ provides.

Medical Justice™ Corporation went to market in early 2002. While it has just entered into partnerships with leading medical malpractice insurance brokers in North Carolina and Ohio, it is also available in FL, CA, SC, GA, AL, LA, and Puerto Rico.

Passage of medical malpractice reform at the federal or state level will have a profound effect on your overall insurance program. Being well-informed and up-to-date will be vital when making your ongoing business decisions.

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