Understanding the Physician Liability Insurance Crisis

Just when you thought declining reimbursement and rising expenses had squeezed your practice dry, liability insurance premiums began to climb dramatically. Here’s what’s behind the increases.

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In certain areas of the country, skyrocketing medical liability insurance premiums are pushing physicians out of practice and denying patients access to needed services. In eight states, premiums increased an average of 30 percent or more last year. Another 12 states saw average premiums increase 25 percent during the same period, and problems are emerging in several other states as well. (See the map on page 49.) The hot spots are states where insurers have either left the market or gone bankrupt, where awards are particularly high or where there is very active litigation in certain areas (e.g., pregnancy-related cases). Premium increases as high as 80 percent have been reported in some areas.¹

The premium differences between these areas and those in other parts of the country are dramatic. In Wisconsin, a family doctor who delivers babies and performs cesarean sections pays about $14,000 a year for coverage that extends to infinity. Family physicians with far less coverage pay three to five times as much in some other states. Physicians in other specialties are suffering, too. In southern Florida, obstetricians spend $209,000 for $250,000 in coverage and, in effect, are essentially self-insured.

Dimensions of the problem

The most important factor in rising medical liability premiums appears to be the size of the awards, rather than the frequency of lawsuits. In Wisconsin, the number of claims filed actually decreased from 348 in 1990 to 249 in 2001.² In 1995, the national median for jury awards was $500,000 and the median pretrial settlement amount was about $350,000. By 2000, the median jury award had risen to $1 million, with the median pretrial settlement award at $500,000. In 2000, defendant doctors prevailed in 60 percent of all the cases that

The size of the awards is driven primarily by the medical care costs of the successful plaintiff.
Medical liability insurance premiums last year increased an average of 30 percent or more in eight states and 25 percent or more in another 12 states.

The increasing size of plaintiffs’ awards is a more significant factor in premium increases than the frequency of lawsuits.

Plaintiffs’ medical care costs drive the size of the awards.

Significant losses have led some insurers to leave the market and others to raise premiums dramatically.

“perfect storm” in 2001: Higher loss ratios (116 percent) occurred at the very time investment income plummeted (~8 percent yield), resulting in significant losses. Consequently, major carriers decided to leave the market. Among them was the second largest carrier, The St. Paul Companies, which reported nearly $1 billion in losses for medical liability in 2001.

Costs of medical liability
Several factors are crucial in understanding the true costs of medical liability: insurance premiums, defensive medicine, physician time and medical care costs.

Insurance premiums. The dramatic premium increases experienced recently by many physicians have much to do with stable or even decreasing premiums paid during the mid-to-late 1990s. At that time, insurers were looking for ways to avoid paying taxes on their reserves, which were growing rapidly as a result of significant gains in their investment portfolios. Rather than maintain excess capital on the books and pay taxes on that capital’s investment income, the companies bought or preserved market share by selling policies for less than their actuarially predicted risk. The market was “soft.” In other words, they sold $10,000 of risk for $5,000 in premiums to sell twice as many policies. At the time, doctors were pleased with stable or declining premiums; insurance company shareholders were happy with their rising share prices and dividends. Eventually, when the under-reserved losses finally came due and the investment economy cooled, a correction was bound to occur. That day has arrived, and the medical liability insurance market has “hardened” dramatically in the past two years.

Defensive medicine. Doing additional tests or procedures more for liability protection than patient benefit costs an estimated $40 billion to $100 billion a year.

Physician time in litigation. Physicians who are sued for malpractice spend on average about one week of their professional life dealing with the claim.

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liability coverage in the form of higher patient fees. Similarly, rising medical care costs affect liability premiums as insurance companies have to pay out more for the medical care of successful plaintiffs.

Even more distressing are the indirect costs of the medical liability system, represented by changes in physician practices and relationships with their patients.

**Practice changes.** Without question, being sued for malpractice represents a very profound experience for physicians. According to one study of about 150 doctors who were sued for malpractice, 95 percent reported significant physical or emotional symptoms during the litigation process, 42 percent stopped seeing certain kinds of patients and 28 percent stopped doing certain kinds of procedures.

Extensive media coverage of trauma centers closing in Nevada and women driving long distances to find maternity care in Mississippi spotlight the impact that the liability insurance crisis has had on access to medical care. Public and legislative interest in tort reform appears to increase when medical care access is restricted.

**Changed relationships.** Being sued can permanently change how doctors regard themselves and their patients. Some may contend that the risk of malpractice litigation is simply an inevitable cost of doing business for physicians. That point of view fails to recognize that doctoring is by its very nature an intensely personal endeavor, not one that can be treated as an arms-length commercial transaction.

**Perspectives on malpractice**

Doctors often assert that if there were fewer lawyers, there would be fewer medical malpractice lawsuits. While the U.S. has one-sixth of the world’s lawyers, studies have shown that it is the number of doctors, not lawyers, in an area that predicts the number of malpractice lawsuits.

The explanation for this finding lies in the fact that more doctors in an area means more doctor-patient encounters. More encounters means a greater chance for more unwanted or unexpected outcomes, with more lawsuits as the result.

Plaintiffs’ lawyers commonly attribute the problem to “just a few bad doctors” and point to studies such as one in Southern California that reported that 0.6 percent of Los Angeles County’s doctors resulted in 10 percent of the lawsuits and 30 percent of the

The true costs of malpractice include defensive medicine practices, physician time in litigation and higher medical care costs, in addition to higher premiums.

The indirect costs of the medical liability system include changes in physicians’ practice patterns and in their relationships with patients.

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There is more to the problem than ”just a few bad doctors.”

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The majority of the public seems to favor reasonable caps on the “pain and suffering” component of awards and limits on attorneys’ contingency fees, and most associate rising health care costs with malpractice litigation.

The tort system does not accomplish its objectives very well.

Studies suggest that there is more malpractice being committed than is being recognized, litigated or compensated.

Doctors rarely know the most likely reasons for being sued.

One of the great dilemmas of American health care is that even as doctors are able to do more and better, patients expect more and better.

Potential solutions

There are only two ways to go through a medical career and never be named in a suit. The first is to never see a patient. The second is to keep all patients deliriously happy, because happy patients do not sue. Of course neither approach is very realistic. Another “solution” doctors may contemplate is practicing without liability coverage. As tempting as this strategy may be, many states mandate coverage by making it a prerequisite to maintaining a medical license. The following are more practical strategies for improving the current malpractice climate:

Public education. One of the great dilemmas of American health care is that even as doctors are able to do more and better, patients expect more and better. It seems difficult, if not impossible, to meet public expectations. The media contribute to this
problem by sensationalizing medical advances. Physicians and the media share a responsibility to provide realistic portrayals of medical care so people have more reasonable expectations of what physicians can do.

**Improved legal defense.** Emerging science has made some types of malpractice cases easier to successfully defend. For example, studies show that the cause of neonatal seizures, mental retardation or cerebral palsy in more than 90 percent of affected children is unknown, but it is not due to the birth process.

**Tort reform.** Adopted in the 1970s in California, the Medical Injury Compensation Reform Act (MICRA) has served as a model for many tort reform efforts. Experience with MICRA-type reforms has shown that a cap on noneconomic damages (pain and suffering, loss of consortium, etc.) is the single most effective way to moderate premiums—it lowers premiums by about 15 to 18 percent.

Reducing the statute of limitations to three years for an adult also reduces premiums by about 8 to 9 percent. Restraining attorneys’ contingency fees to a sliding scale that limits them to no more than a third of the overall award will bring premiums down by about 5 to 7 percent. Two other reforms that can help to moderate premiums are the collateral source rule, which allows the jury to hear that there are other sources of money for the patient, and periodic payment, which allows for payments to be paid over time as they are needed (e.g., future medical costs), rather than in a single lump sum.

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The Help Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act, introduced by Rep. James C. Greenwood, R-Pa., would apply MICRA reforms to all states through federal law. Political pundits give the HEALTH Act a low chance for passage at this time. Many believe that the better strategy is to push for MICRA reforms at the state level in those states with the biggest problems.

**Conclusion**

Lawsuits alleging medical negligence date back as early as the founding of the Republic. The direct and indirect costs of malpractice litigation are considerable. Liability insurance premiums fluctuate based on patterns of medical care utilization and on returns from the investment economy. The key actors in the liability system all have different perspectives on the reasons and solutions for the current crisis. While the initial temptation is to push for any and all types of tort reform, experience has shown that some reforms are more effective than others and that some may actually make matters worse.

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