



The Truth about CAPP, MICRA and Protecting Patients

The deceptively named Californians Allied for Patient Protection is backed by insurance companies reaping a huge windfall while propagating misperceptions about MICRA, medical negligence and the role of civil justice.

It's not all in a name. The group Californians Allied for Patient Protection would seem like a mom-and-apple pie outfit looking out for the interests of the Golden State's more than 37 million potential health care consumers. But their real motive seems to be helping the insurance industry profit.

The group's board is composed of executives from prosperous medical malpractice insurance firms doing business in California.¹ Those same insurance companies underwrite a big share of the operational costs for CAPP, a group created and maintained for a sole purpose – to undercut any attempt to modernize the state's outdated and unfair \$250,000 limit on civil damages for human suffering caused by medical malpractice.

Protecting that damage cap has done little to protect patients. In fact, California has continued to chalk up an uncomfortable number of "never events"² — events that are never supposed to occur, such as leaving medical equipment inside a patient after surgery — and outright malpractice cases at hospitals and other health care units. But maintaining the MICRA cap has meant big profits for the California medical malpractices insurance industry.

CAPP's math is suspect. CAPP claims that access to healthcare would be limited should California's MICRA cap on non economic damages be raised. CAPP claims that updating the MICRA cap would cause the costs of medical malpractice to balloon by 76 times over what it is today. Just doubling the MICRA limit on non-economic damages, CAPP contends, would add \$9.5 *billion* in costs to California's health care system each year. It is a startling economic claim given that the highest projected claims payout for any year in the period between 1991 and 2010 was \$355 million in 2003. The number is even smaller today – and that means more cash flowing to insurance industry. According to reports filed with the California Department of Insurance, the state's insurance companies that provide

¹ CAPP board makeup: <http://www.micra.org/about-capp/board-members.html>

² 'Never events' in California hospitals on the rise. Fierce Healthcare weblog.
<http://www.fiercehealthcare.com/story/never-events-california-hospitals-rise/2010-06-02>

medical malpractice coverage expect to pay about \$133 million in claims stemming from incidents of medical negligence that occurred in 2010.

So how does CAPP postulate that doubling the potential non-economic damages could lead to health care costs increasing 7600%? According to the group's own documentation, here is where the \$9.5 billion figure comes from:

- \$9 billion (95% of the CAPP total) stems from an estimated 3% increase in healthcare costs because of an increase in "defensive medicine," unnecessary expenses made solely because of fear of malpractice suits with no positive benefits for the patient. Unfortunately, CAPP offers no sustainable explanation as to how it arrived at that lofty figure. Instead, CAPP cites a report it produced utilizing data from 15 years ago derived from a small subset of elderly heart patients; the report applies that old and narrow data to all medical spending today for patients of all ages and medical issues.³
- Most of the rest, \$305 million, comes from an estimated 31% increase in medical malpractice insurance premiums. CAPP asks you to believe such an increase would be likely if the MICRA cap were merely doubled.

Unfortunately for CAPP's analysis, no reputable study has ever established a relationship between damage caps and malpractice insurance premiums. In fact, data derived from *Medical Liability Monitor's* annual rate survey shows that the average premium in states *with* damage caps is actually higher than it is in states without caps, the sort of data that undercuts CAPP's premise.⁴

In at least one handout from CAPP, the organization also implies (without citing any research) that doubling the MICRA cap would reduce the number of OB/GYNs in the state. Apparently the underlying argument is that increasing the cap would increase medical malpractice premiums, and some OB/GYNs would respond by leaving the state or leaving the specialty. This argument is frequently advanced because it "makes sense," in that OB/GYNs typically pay the highest malpractice premiums because they are in a position to inflict the greatest harm (mistakes in child birth can lead to a lifetime of medical care for the newborn), thus any increase in damage caps should hit them the hardest.

The reason CAPP cites no study for its assertion is that no such study exists – at least no study that shows a relationship between increasing or eliminating damage caps and declining numbers of OB/GYNs. In fact, a comprehensive study of OB/GYNs in the United States over a 10-year period, published in 2008, found that there was no connection between supply of OB/GYNs and tort reforms.⁵ The authors concluded, "Our results suggest that most OB/GYNs do not respond to

³ *MICRA and Access to Healthcare*. William G. Hamm, H.E. Frech III, C. Paul Wazzan. Nov. 2008.

http://www.micra.org/studies-research/documents/HammReport2011_000.pdf

⁴ *Medical Liability Monitor*, Oct. 2009. <http://www.justice.org/clips/premiums2009.pdf>

⁵ *A Longitudinal Analysis of the Impact of Liability Pressure on the Supply of Obstetricians-Gynecologists*. *Journal of Empirical Legal Studies*. March 2008.

http://www.americanbar.org/content/dam/aba/migrated/2011_build/medical_liability/mm_obgyns.aut_hcheckdam.pdf

liability risk by relocating out of state or discontinuing their practice, and that tort reforms such as caps on noneconomic damages do not help states attract and retain high-risk specialists.” [Source: Y. Tony Yang, David M. Studdert, S.V. Subramanian, Michelle M. Mello, A Longitudinal Analysis of the Impact of Liability Pressure on the Supply of Obstetrician-Gynecologists, *Journal of Empirical Legal Studies*, Volume 5, Issue 1, 21-53, March 2008.]

OB/GYNs aren’t the only physicians who are affected – or, more accurately, not affected – by changes in malpractice premiums. In a 2004 paper, the National Bureau of Economic Research found that increases in medical negligence insurance costs did not have an effect on the size of physician workforces and concluded:

“The arguments that state tort reforms will avert local physician shortages or lead to greater efficiencies in care are not supported by our findings.”⁶

Despite claims by medical groups that doctors are leaving states without damage caps to practice in states that have caps, there is no evidence to support that contention. According to figures from the American Medical Association, in 2009 the number of physicians per capita in states *without* damage caps was 21 percent *higher* than in states with caps, likely because the states without caps include such states as New York, New Jersey, Connecticut and Pennsylvania, states with major metropolitan areas that are attractive to physicians because of large patient populations, quality of life issues and job opportunities for spouses, among other issues. Nationally, both the number of physicians and the number of physicians per capita are at an all-time high.

CAPP also asserts that an increase in the MICRA cap would lead to less prenatal care (because of a reduced number of OB/GYNs), reduced access to HIV/AIDS specialists (apparently because it asserts there would be fewer doctors in general, although it makes no attempt to be specific about these specialists), less preventative health care and cutbacks to community centers, public hospitals and emergency rooms (apparently because of the assertion of \$9.5 billion in increased medical malpractice costs, but without any demonstration that there has been any kind of relationship leading to such cutbacks anywhere).

Likewise, CAPP says an increase in potential damage awards to patients injured by medical negligence would lead to a “crisis” in rural health care (again, asserting that doctors would end their practice or leave the state if malpractice premiums would rise, and asserting that rural doctors would be more sensitive to such increases because of sparse populations). Not only has there been no relationship found between changes in malpractice premiums and changes in physician supply, the far greater influence on the supply of physicians in rural areas are lifestyle-related issues compared to urban and suburban areas: geographic isolation, smaller

⁶ The Effect Of Malpractice Liability On The Delivery Of Health Care, Working Paper 10709, Aug. 2004. http://www.hks.harvard.edu/fs/achandr/FHPR_EffectofMalpracticeHealthCareDelivery_2005.pdf

and more scattered population bases, longer hours because of fewer colleagues, and lack of adequate employment opportunities for spouses or partners.

All those factors help explain what we like to call the “Texas Tort Reform Mirage.” As of 2009 – six years after Texas implemented damage caps – more than 130 of its counties still had failed to attract a single OB/GYN, and nearly half the state’s counties were below the national standard for number of physicians per capita. According to the Texas Department of Health Services, the number of doctors in rural counties went up 6.8% in the six years before caps, then went *down* in the first six years after caps.

What is unassailable fact is who has benefitted in California and other states that have adopted damage caps. It isn’t doctors and certainly not patients. The winners are insurance companies.

Any savings produced by limiting adequate compensation to Californians hurt by medical malpractice simply is not being passed on to doctors. From 2004 to 2010, payments to patients or their survivors went down 56%, but premiums paid by the health care industry dropped just 28%. Less than 25 cents of every dollar paid in medical malpractice insurance premiums in California in 2010 will go to those harmed by malpractice, and malpractice insurers are posting record surpluses.⁷

In short, medical malpractice insurance companies haven’t lowered premiums anywhere near as quickly as their claims payments have dropped.

In 2010 alone, companies that provide medical malpractice insurance in California took more than \$410 million more in premiums than they expect to pay out in claims.⁸ That’s nearly double the amount that would allow insurers to earn a fair profit, according to industry standards. It’s completely out of line with the percentage of premiums paid out in other insurance lines, such as homeowners or auto liability. And California’s malpractice insurers have consistently overestimated the amount they will have to pay out in claims, meaning the excess reported for 2010 will likely wind up being even greater.

Each year the California Department of Insurance requires licensed insurers to report the premiums they’ve earned and an estimate of the total amount of the claims payments they expect to make from cases in that year. This figure is estimated because medical malpractice claims can take up to ten years to be settled; claims often aren’t even filed in the year in which the malpractice occurred. The estimated claims payouts divided by the premiums earned is known in the industry as the “loss ratio.” The lower the loss ratio, the more money is available for the company’s profit, as well as to pay overhead and expenses (including executive salaries).

⁷ Annual California Property and Casualty Premium and Loss Summaries,

<http://www.insurance.ca.gov/0400-news/0200-studies-reports/0100-market-share/>

⁸ California Department of Insurance. 2010 data. <http://www.insurance.ca.gov/0400-news/0200-studies-reports/0100-market-share/2010/upload/MktShrSummary2010.pdf>

(The industry term for the estimate of claims payments is “losses incurred.” The term can be misleading to people outside the insurance industry because “losses” in this sense are not the opposite of “profits.” Any claims payment is referred to as a “loss.” When a company says it has “reduced its losses,” that doesn’t mean it was losing money and is now losing less money; it means it has reduced the amount it has paid out in claims. An insurance company can see an increase in “losses” and still be extremely profitable.)

Jay Angoff provides the framework with which to analyze loss ratios. He is a former state insurance commissioner in Missouri and served as the director of the Office of Consumer Information and Insurance Oversight in the U.S. Department of Health and Human Services; he is now senior advisor to HHS Secretary Kathleen Sebelius. In a 2008 affidavit in a California court case, Angoff wrote, “An incurred loss ratio much above 70 means the insurer is likely earning an inadequate profit; a ratio much below 65 means its profit is likely excessive.”⁹

On its web site, the California Department of Insurance provides [loss ratios for all licensed insurers](#) going back to 1991; the data for medical malpractice insurers is found on Line 11 of each year’s California Property and Casualty Premium and Loss Summary. In the last 19 years, how many times have medical malpractice insurers had a collective loss ratio above 70 percent, indicating the likelihood of an inadequate profit?

None.

And how many times have medical malpractice insurers collectively posted a loss ratio below 65 percent, meaning their profit is likely excessive (defined by the Department of Insurance as more than 6% plus the average return on short, intermediate and long-term U.S. government bonds)?

Every single year.

And in almost every year, the medical malpractice insurance loss ratio was WELL below 65%. The highest ratio between 1991 and 2010 was 57.2%, in 2001. It has been below 40% in each of the last seven years. In 2008, it was 16.4%; in 2009, 22.9%. And the largest provider of medical malpractice insurance in California, The Doctors Company, had a loss ratio in 2009 of 10.0%. That’s the lowest such figure for any of California’s major medical malpractice insurers going back to 1998, the time period for which the [data is available](#) for individual companies on the Department of Insurance website.

Compare the medical malpractice loss ratio to the loss ratio for all insurance lines written in California in 2010, which was 54.0%. For private passenger auto

⁹ DECLARATION OF JAY ANGOFF IN OPPOSITION TO DEFENDANTS’ MOTION TO REDUCE NON-ECONOMIC DAMAGES. Nov. 19, 2008. <http://www.protectconsumerjustice.org/wp-content/uploads/2010/09/Jay-Angoff-affidavit-2008.pdf>

insurance (liability and physical damage combined), the largest category of the insurance market, it was 59.3%. For worker's compensation insurance, the second largest category, it was 72.5%.

And for medical malpractice insurance it was 24.4%. That means more than three-fourths of money paid as premiums was available for general overhead, defense lawyers fees, agents' commissions and profit.

Jay Angoff said the medical malpractice loss ratio in California is "astoundingly low. It means that the insurers, rather than the doctors, are receiving the benefits" of the California law that puts a cap on the amount victims of malpractice can receive. Those same companies maintain massive – and growing – surpluses.

Norcal Mutual Insurance Company is California's second-largest writer of medical malpractice insurance, with 27% of the state market in 2010. (Norcal had traditionally been the state's largest medical malpractice insurer, but it fell to number two in 2008 when The Doctors Company, which had been number two, bought SCPIE Indemnity Company, which has been number three.) Norcal has had a surplus more than four times the minimum required by the state each year since 2003. Its 2010 surplus was its highest ever, more than \$582 million.

The Doctors Company, which had 38% of California's medical malpractice insurance market in 2010, has also had a surplus of more than four times the minimum required each year since 2003. It also had a record surplus in 2010, almost \$1.3 billion (with a "b").

"These surplus levels are perhaps the best evidence of how flush the California medical malpractice industry is today," Angoff said.

And yet, while insurance companies are sitting on hundreds of millions of dollars of extra cash, the maximum that can be awarded for non-economic damages to Californians injured by medical malpractice has not changed since 1975, not even with an adjustment for inflation.

It is also important to note that MICRA is a multi-faceted measure with limits not only on non economic damages, but also on attorney fees, collateral source payments, joint and several liability, and periodic payments. Despite this laundry list of protections, CAPP claims that merely modernizing the cap is enough to limit access to health care in California. However, after 35 years it is time to strike a balance that preserves access to health care, and access to justice. It is time to modernize MICRA.