Questions That The Medical And Insurance Establishments Would Rather The Media NOT Ask

Haven't the insurance companies admitted that caps would not guarantee that malpractice insurance rates would be lowered or even remain stable?

In a press release dated March 13, 2002, the American Insurance Association stated "The insurance industry never promised that tort reform would achieve specific premium savings"

The Center for Justice & Democracy has documented numerous instances of broken promises by the insurance industry in their report, "PREMIUM DECEIT: THE FAILURE OF "TORT REFORM" TO CUT INSURANCE PRICES," available on-line at www.centerjd.org/air/PremiumDeceit.pdf

In March 2003, The Foundation for Taxpayer and Consumer Rights released a special report entitled, "How Insurance Reform Lowered Doctors' Medical Malpractice Rates in California: And How Malpractice Caps Failed." This is available online at www.consumerwatchdog.org/healthcare/rp/rp003103.pdf

Aren't there a number of screening mechanisms already in place to make it next to impossible to file a frivolous lawsuit?

Most malpractice attorneys work on a contingency basis. They are not going to take a case that has no merit or they would quickly be out of business. Malpractice attorneys estimate that of all the calls they receive from the public about possible malpractice, only 5% to 10% are taken as cases.

Before a case can proceed in court, it must be screened by a tribunal consisting of a doctor, a lawyer and a judge, who determine whether the plaintiffs have met their burden of producing expert evidence to prove that the medical provider's conduct was below the standard of care and caused harm to the patient.

The case has to be tried in front of a jury, where doctors have a 90% chance of winning.

Judges have discretion to reduce or set aside any verdict. The trial judge can put a "remittitur" on a high jury verdict, which means that the plaintiff must accept the lower amount or go through a new trial on the issue of damages . Our appellate courts can review and set aside any verdict that is not supported by the evidence.

Wouldn't a cap affect the wrong cases?

A cap hurts those people who have already been the most seriously injured by medical negligence through no fault of their own. It would be a one-size-fits-all cap with no possibility for an exception when the injuries are permanent and disabling, as is the current state of our law in Massachusetts. The proposed cap would apply to children who suffer permanent brain damage, people confined to wheelchairs for the rest of their lives, individuals who unnecessarily lose the wrong limb, women who undergo an unnecessary mastectomy and senior citizens who are rendered blind or paraplegic.

Aren't the current medical malpractice premium increases really the result of a slumping economy and part of a predictable insurance cycle which will improve as the economy rebounds?

Americans for Insurance Reform released an important study in October 2002 which studies 30 years of medical malpractice premiums and payouts in all 50 states and concluded:

> *This study makes two major findings:*
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> *First, the amount that medical malpractice insurers have paid out, including all jury awards and settlements, directly tracks the rates of medical inflation. Not only has there been no "explosion" in medical malpractice payouts at any time during the last 30 years, but payments (in constant dollars) have been extremely stable and virtually flat since the mid-1980s.*
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> *Second, medical insurance premiums charged by insurance companies do not correspond to increases or decreases in payouts, which have been steady for 30 years. Rather, premiums rise and fall in concert with the state of the economy —insurance premiums (in constant dollars) increase or decrease in direct relationship to the strength or weakness of the economy, reflecting the gains or losses experienced by the insurance industry's market investments and their perception of how much they can earn on the investment "float" (which occurs during the time between when premiums are paid into the insurer and losses paid out by the insurer) that doctors' premiums provide them.*

Why are good doctors and bad doctors paying the same malpractice premiums?

In Massachusetts, 5% of doctors account for 100% of malpractice payouts over a ten-year period, according to the Board of Registration in Medicine. This means that 95% of doctors in Massachusetts did not have a payout made on their behalf, but their insurer is treating them the same as the problem doctors. Insurance companies do not differentiate between doctors who have never been sued and

doctors who have had multiple malpractice payouts when they calculate a physician's premiums.

Hasn't the number of medical malpractice payouts in Massachusetts been steady?

According to the Board of Registration of Medicine, the number of medical malpractice payouts has remained steady since 1990 at approximately 300 payouts per year for the entire Commonwealth of Massachusetts.

Didn't medical malpractice insurers go though a cycle of very high profits when the economy was strong?

In the 1990's, medical malpractice insurance was approximately twice as profitable as the average line of insurance from the perspective of an insurance company. In fact, in the mid-1990's, with assets reaching nearly $1 billion, the legislatively-created Joint Underwriting Association had to dissolve because it was too profitable. It converted into ProMutual Group, Inc., one of the insurers that is now claiming it needs special rules capping damages which apply only to malpractice insurers.

Isn't it a fact that medical malpractice insurance premiums and even claims paid by insurance companies account for a miniscule percentage of national health care costs?

According to the Health Care Financing Administration, medical malpractice premiums are approximately ½ of 1 % of all medical costs.

According to Best's Review, the insurance industry's premiere rating service, malpractice premiums represent .64% (64 cents of every $100) of national health care costs.

Losses paid by insurance companies (also according to Best's Review) for medical negligence amounted to .31% (31 cents out of every $100) of national health care costs.

What do you mean by outrageous, "jackpot jury awards"? Can you cite some instances?

In 2001 and 2002, there were only a handful of malpractice cases with awards exceeding $2 million in Massachusetts. Each of these involved wrongful death or a crippling injury, resulting in enormous medical bills and lost income. In many cases where there is a large verdict it involves a child who is permanently disabled as the result of medical negligence and requires a lifetime of care. Moreover, for those few jury verdicts that may sound high, the full amount is usually not collected due to limited insurance.

Don't caps on non-economic damages discriminate against women, children, senior citizens and low wage earners?

Caps on non-economic damages discriminate against everyone except high wage earners because "economic losses" (wages and medical bills) take on a disproportionate significance. This is another reason why organizations such as the Women's Bar Association of Massachusetts oppose caps on non-economic damages. United States Senator Edward M. Kennedy also strongly opposes caps based on its discriminatory nature: (see www.senate.gov/~kennedy/statements/02/07/2002730306.html).

Aren't there many examples of how our current medical malpractice system deters future malpractice and benefits all patients by providing a financial incentive for safety improvements?

Professor Michael Rustad of Suffolk University Law School, among others, has extensively documented many safety changes directly resulting from specific medical malpractice cases.

In addition, even ProMutual Group, the largest provider of medical malpractice insurance in the Northeast, has released a study on the effectiveness of its risk management programs. Here's what the insurer says about its own programs:

> *"The objective of risk management is to help policyholders avoid loss," said Maureen Mondor, ProMutual Group's vice president of risk management. "We are often asked, 'Does risk management make a difference?' In an effort to answer this question, we have completed an extensive evaluation of our risk management programs." The results are presented in the study,* ***Making a Difference: A Study of Risk Management Data****.*
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> *The study looks at office appraisals and hospital consultations conducted by risk management specialists over the past 10 years, along with anecdotal reports. It compares the results of practices that have undergone two office appraisals. If the first office appraisal indicated the need for a change, special attention was focused on this area in the follow-up appraisal. A review of 688 practices in various medical specialties that had at least two office appraisals showed an <u>improvement in every area</u> initially identified as a possible risk in the first appraisal.*

The reason the insurers have an incentive to "avoid loss" is because of the desire to avoid a lawsuit, and so the financial incentive translates into better medical care for all patients.