WISCONSIN STATE LEGISLATURE COMMITTEE HEARING RECORDS

2005-06
(session year)

Assembly
(Assembly, Senate or Joint)

Committee on Insurance (AC-In)

(Form Updated: 11/20/2008)

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THE ILLINOIS HOSPITAL ASSOCIATION SUPPORTS A REASONABLE RANGE FOR AWARDING NON-ECONOMIC DAMAGES
April 7, 2005

Presented By:

Mark Deaton
Senior Vice President & General Counsel
Illinois Hospital Association

I. Introduction:

The Illinois Hospital Association and its member hospitals are grateful for the opportunity to address the House Judiciary Committee on the subject of reforming our medical liability system. Addressing the problems caused by skyrocketing medical liability costs in Illinois is a top priority of the IHA.

The medical liability crisis in Illinois is causing an unprecedented health care access crisis throughout this state. While some areas of Illinois may be suffering more than others, the systemic problems driving these crises exist all over Illinois and show no signs of abating. In the areas hardest hit by the access crisis, we are finding the absence of obstetricians willing to treat "high risk" babies, emergency care physicians unwilling to provide trauma care, and neurosurgeons refusing to do certain complex and high-risk procedures.

Medical liability costs are starting to devour the bottom lines of Illinois hospitals – turning black ink into red and threatening the ability of hospitals – even some of the largest hospitals in the state – to carry out their mission to serve their communities.

Hospitals suffer the excessive costs of coverage directly because most hospitals in this state are self-insured. The commercial insurance market has abandoned hospitals – leaving them to pay the astronomical costs of verdicts and settlements out of their own pockets – money that should be spent on caregivers and new technology and in dozens of other ways that would benefit patients and communities. This crisis is growing. If nothing is done, the health care access barriers may become insurmountable.

This document summarizes why the IHA asks this Committee to support the passage of a reasonable range within which juries may award non-economic damages in medical liability cases.

II. Why limit non-economic damage awards?

There are two kinds of damages available in medical liability cases. One kind (economic damages) must be proven; the other kind (non-economic damages) must be imagined. Economic damages are proven through out-of-pocket expenses, lost wages and the cost of medical care. Paid bills and expert witnesses are used to establish an actual dollar value for the plaintiff's economic losses. Economic damages, such as medical expenses and lost wages, are ...

- Provable in dollars and cents.
- Predictable.
- Fairly uniform from state-to-state.

The IHA supports complete and total payment for economic damages.

Non-economic damages present an entirely different challenge for juries. There is no way to prove a dollar value for pain and suffering. There is no economist who can testify about the dollar value of physical pain or an emotional loss. Juries have absolutely no objective standards or guides in determining how much to award for non-economic damages. They are forced to guess about or imagine what such losses are worth.

Accordingly, non-economic damages, are ...

- Not measurable at all in dollars and cents – that's why they're called *non-economic* damages.
- Not predictable. Because there are no standards, the growth in non-economic damages is nearly impossible to predict.
- Volatile due to their subjectivity.

Non-economic damages are the single greatest factor in the unpredictable and unsustainable explosion in the cost of medical liability awards.

No one is saying that injured parties should get nothing for their physical pain or emotional harm. But the difficulty of assessing, predicting and paying for tremendously high non-economic losses places health care delivery and access in peril. If this element of medical liability damages is not controlled by a reasonable range for such awards, the health care system will be irreparably damaged and in some areas destroyed.

In the 20 years from its founding in 1979 through 1999 the Illinois Provider Trust (IPT), which is a risk pooling trust that is owned and controlled by the hospitals it covers (i.e., collective self-insurance) paid out 4 claims in excess of $1,000,000. In the last 5 years (2000-2004), it has paid 15 claims in excess of $1,000,000. In terms of dollars, those 4 claims between 1979 and 1999 totaled $10 million. The 15 claims since 2000 totaled $50 million. Same hospitals. Roughly the same number of claims per year. Same kinds of injuries. Cases are simply settling for double, triple, and quadruple the amount they were

reserved for. Cases that were budgeted to be worth $500,000 are settling for $3 – 4 million.

The Chicago Hospital Risk Retention Pool, which covers hospitals in Cook County has been seeing the same trends. The average settlement for CHRRP hospitals has risen from $180,000 in 1994 to $470,000 in 1999 to $1,010,000 in 2004. This represents an increased cost of 461% over ten years and 115% over five years. CPI has increased by roughly 2.5% annually since 2000. The rate of increase for CHRRP's losses has been 17% annually, 14.5% percentage points more than the CPI annually.

In terms of large malpractice settlements/verdicts, the largest claim at the end of 1994 was $5,000,000, at the end of 1999 $12,000,000 and at the end of 2004 the largest claim was $22,400,000. This represents an increase of 348% over ten years and 87% over five years. Assuming the trend in the last 5 years continues, the largest medical malpractice claim will be $47,000,000 in 2010 and $88,000,000 in 2015.

Every new record verdict raises the floor and pulls settlements up at an unpredictable and unsustainable rate. This is the situation confronting IPT and CHRRP and the actuaries of all those self-insured hospitals. They're not trying to *make up* for losses in the stock market. They're trying to *keep up* with unpredictable verdicts and settlements.

And those verdicts and settlements are largely driven by non-economic damages--monetary awards for injuries that *cannot be measured* objectively in dollars and cents. IPT and CHRRP estimate that roughly 70% of verdicts consist of non-economic damages. The chart below shows the breakdown for medical malpractice jury verdicts in excess of $5 million in Cook County for the years from 2001 – 2004. Based on these five years of data, non-economic damages account for 80% of the total award in such medical liability cases.

Medical Malpractice Jury Verdicts in Cook County, Illinois
Greater than $5 Million
From January 1, 2001, to February 2005
By Year

	2000	2001	2002	2003	2004	Cumulative
Total Cases	12	3	8	7	11	41
Total Verdicts	$212 Million	$45.6 Million	$99.1 Million	$92.6 Million	$157.2 Million	$606.5 Million
Total Non-economic Damages	$193.2 Million	$35 Million	$79.4 Million	$64.5 Million	$114.4 Million	$486.5 Million
Percent of Total Non-economic Damages	91%	77%	80%	70%	73%	80%
Average Non-economic Damages	$16.1 Million	$11.7 Million	$6.2 Million	$9.2 Million	$10.4 Million	$11.9 Million

- One of the 2004 verdicts was for $30 million .... 100% non-economic damages.

Without a legislated limit on the range for such damages, there is no predictable limit for such awards.

What will caps accomplish?

Caps work. The peer reviewed, scholarly health policy journal, *Health Affairs,* recently published a study showing that medical liability premiums in states with caps on non-economic damages are 17% lower than premiums in states without caps. Caps slow the cost of coverage by reducing the severity of claims. Texas provides us with the most recent example of how caps stabilize the unpredictable and excessive cost of coverage.

Can caps be fair to plaintiffs?

A generous range for awarding non-economic damages in medical liability cases can be both fair and reasonable to plaintiffs and still give the liability system the predictability it needs to make liability costs affordable. No one disputes the tragic losses that some plaintiffs endure. That is why providers support awarding a substantial but reasonably capped amount to be awarded for these losses. Everyone recognizes that money is a poor remedy for such losses. Providing unlimited damages in this area does not make a poor remedy better for the plaintiff. But a capped award provides a fair amount to the

individual plaintiff without damaging the capacity of health care providers to continue providing care to all Illinois residents.

What about plaintiffs that have little or no economic loss?

There is no logical connection between how much a plaintiff gets for non-economic (pain and suffering) and economic (lost wages and medical costs) damages. Amounts awarded in one area should not be considered in how much is awarded in the other.

A reasonable range for awarding non-economic damages to plaintiffs does not become unreasonable when the plaintiff does not incur economic loss. If the non-economic component of damages is reasonable that amount should not be inflated because the plaintiff has low economic loss. Nor should awards for non-economic damages be reduced for individuals with large economic losses. Non-economic damages were never intended nor should they be used as some sort of economic equalizer where plaintiffs with large economic losses get the same total recovery as plaintiffs with no economic losses. If the purpose of the liability system were to ensure that everyone with the same medical injury got the same award, we should be developing the sort of damage schedules we see in the area of workers' compensation. If opponents of reasonable caps on non-economic awards believe that a workers' compensation model for medical liability makes sense, we are willing to discuss it.

The IHA, however, is also willing to assume that unemployed individuals are entitled to recover some damages as if they were employed. The IHA believes that anyone who does not incur substantial economic loss from actual lost wages because they are unemployed can be compensated fairly by paying that person the equivalent of a wage based on the average annual wage of workers in Illinois as established by the Illinois Industrial Commission.

How will caps affect a plaintiff's ability to afford an attorney?

The IHA believes that if awards for non-economic damages are limited at a fair and reasonable level, defendants should also be required to pay for the plaintiff's reasonable attorneys' fees. These fees would be paid if the plaintiff prevails in the case and the amount would have to be capped at a level that is fair for the time, effort and risk the attorney undertakes in such cases. The IHA believes that a plaintiff's attorney's fees in a medical liability case should not exceed $1 Million per case. This amount should fairly and reasonably compensate any qualified and dedicated attorney to represent a patient in these cases.

Can a cap on non-economic damage in medical liability cases be constitutional?

Absolutely. The IHA's 2004 cap proposal is factually unlike any cap that the Illinois Supreme Court has ever considered. It differs in the following ways:

1. The ranges for awarding non-economic damages are substantially higher;

2. It protects plaintiffs who earn little or no wages;
3. It ensures that plaintiffs will be able to afford attorneys by requiring liable defendants to pay their attorney's fees up to One Million Dollars;
4. It shortens the time plaintiffs are likely to wait for recovery;
5. It reduces overall costs to the administration of justice in Illinois by resolving medical liability cases more expeditiously;
6. It only applies to medical malpractice cases to address the well-established medical malpractice crisis in Illinois;
7. It reduces the cost of liability coverage, which will help to alleviate the medical, and physician access crisis growing throughout Illinois; and
8. It creates "patient safety" incentives for hospitals to do all that they can to eliminate "never events" such as wrong site surgery.

In short, the IHA cap proposal provides plaintiffs, their attorneys, patients and the judicial system with a sufficient *quid pro quo* to constitutionally justify its adoption.

Moreover, the Illinois Supreme Court decisions on caps either do not apply to the cap we propose or support our conclusion. In the mid-1980's – during a medical liability crisis – the Illinois General Assembly *eliminated* punitive damages in medical malpractice cases. An entire category of damages available in other tort cases was eliminated. The Illinois Supreme Court *upheld* that law in the 1987 *Bernier* decision. Why?

Because (1) the legislature found that there was a medical liability crisis affecting access to health care by the public; and (2) the legislature tailored a solution directed only at medical liability cases. That's what we're proposing – and it's very different from the two cases where the court struck down caps.

In the mid-1970s, the legislature put a cap on *all damages* – economic and non-economic and the Illinois Supreme found it unconstitutional. No one is suggesting that sort of cap today. Therefore, this case is not applicable to the cap we propose. Twenty years later, in the mid-1990s the legislature found there was another medical liability crisis, but it placed a cap on non-economic damages in *all tort cases* – slip and fall, products liability, car accidents. The solution – caps in all cases – was broader than needed to address the medical liability problem. Therefore, the court struck it down as well.

These three cases tell us that the legislature has the authority to *limit* damages in medical liability cases only in order to address a public health crisis caused by the medical liability system.

The universal support of P.A. 93-848 by the Governor and every legislator in Springfield last spring shows that the General Assembly has great constitutional latitude in deciding what sort of tort cases get litigated in Illinois. P.A. 93-848, known as the "Illinois Commonsense Consumption Act," outlawed all civil actions against restaurants for injury resulting from weight gain. The Governor and General Assembly did not just cap damages in so-called "obesity lawsuits" against McDonald's. They outlawed ever suing restaurants for causing our obesity epidemic. If the Illinois constitution gives lawmakers

the ability to ban such claims, certainly it allows them to adopt a reasonable cap on non-economic damages in medical liability cases.

The IHA proposal to improve health care access by adopting graduated caps on non-economic damages should not be dismissed out of hand as unconstitutional. The Illinois constitution and Illinois Supreme Court decisions do not foreclose all avenues of capping non-economic damages if they are properly and carefully tailored to address our growing health care access crisis in Illinois. Surely our courts and constitution allow for reasonable solutions to a public health problem affecting all of us. There must be a way, if we only have the will.

Conclusion

We all pay for the right to let one plaintiff recover an unlimited amount of damages in a single case. The price of that right is loss of access to care. Given this dynamic, the need to preserve access to hospitals and physicians outweighs the need to preserve a right to sue for an unlimited amount of non-economic damages. And a reasonable cap on such damages is the correct way to strike the balance between these competing concerns.

Therefore, the Illinois Hospital Association asks that you support the adoption of reasonable limits on non-economic damages in medical malpractice cases.

Written Testimony Submitted to
Members of Illinois House of Representatives
Judiciary I Committee (Civil Law)
April 7, 2005
Medical Liability Hearing

As Chief Executive Officers of hospitals in Madison and St. Clair counties that serve patients in southwestern Illinois, we are writing to express our concern that recently enacted medical liability reforms in Missouri will exacerbate the exodus of doctors from Illinois' Metro-East region, and threaten the ability to provide healthcare to the many thousands of patients throughout southwestern Illinois who depend upon these hospitals and physicians for critical healthcare services.

Because of the reform package signed into law in Missouri on March 29th, Missouri's malpractice insurance rates will drop. Our doctors will then be able to easily commute to abundant practice opportunities in the St. Louis area without having to uproot their families, have their children change schools, sell their homes, or relocate. And, because the only real remaining malpractice carrier in our area has been forced to ration offering coverage for new physicians, our institutions will continue to be unable to recruit replacement physicians, unless we are forced to employ and self-insure these physicians or to establish our own insurance companies. Both of these alternatives divert funds that could otherwise be used to improve patient care, and if the problem is not solved, are unsustainable over time.

During the last 2-3 years, over 160 physicians have been documented as having left our two counties due to skyrocketing costs or unavailability of malpractice insurance, concerns about huge costs to purchase "tail coverage" in the event their claims-made insurance is canceled or becomes unaffordable, and absence of impartial treatment in the local court systems which forces unnecessary and unjustified settlements that unnecessarily drive up insurance costs. While we will officially update these numbers in the next few months, we believe that number has now increased to at least 180 physicians who have fled our two counties.

It is imperative that the House Judiciary Committee support meaningful medical liability reform such as the key reforms in House Bill 705 and companion SB 150 to help resolve the malpractice crisis--and to do so very soon. If not, the 180 physicians who have already left will pale in comparison to the physicians who will leave our State, without meaningful malpractice reforms.

Without the fundamental reforms enacted by at least 25 other states--many included in HB 705--unavailable or unaffordable malpractice insurance will continue to drive our physicians to other states-- where state governments care more about preserving access to high-quality, comprehensive, and conveniently-available healthcare services for their citizens. The economic well-being and future development of Southwest Illinois will also be harmed, perhaps irreparably, when many of the area's largest employers--healthcare institutions—cut back critical healthcare service availability and inevitably eliminate healthcare jobs because doctors have been forced to flee. What industries or businesses want to relocate to areas with marginal healthcare services available for their employees and families?

This committee has focused much attention on the business practices of one insurance company-- one of the two remaining companies offering only limited, selective coverage in our two counties--instead of concentrating more globally on finding meaningful crisis solutions. The caps on non-economic damages, the expanded use of annuities to pay for economic damages, and the other reforms in HB 705 which will help reduce unnecessary and unjustified settlements in our less-than-impartial local courts will bring the predictability necessary for liability insurance carriers to return to the Illinois market and re-introduce competition among carriers to help lower insurance premiums. No insurance company will reduce today's high malpractice rates until lottery-type damage awards are controlled and able to be reasonably predicted. At that point, at least one

Metro-East hospital will gladly mothball the insurance company it was forced to establish at substantial cost in 2003 to retain, to date and growing, 30 physicians whose premiums from other non-ISMIE carriers continue to skyrocket to the point of being economically unsustainable.

In November, voters in our areas sent a clear and concise message to our elected officials--they demand and expect meaningful and effective medical malpractice reforms to stop the hemorrhaging of physicians from our area and the elimination of their access to critical healthcare services for their families and themselves. This message is spreading to all of Illinois, so it is not a question of whether there will be malpractice reform--only when. The corollary question is whether the Illinois Legislature and Governor will delay such essential reforms until the healthcare system in Southwestern Illinois has been so damaged, perhaps irreparably, that it will relegated to Third World status.

Sincerely,

Harry R. Maier, President
Memorial Hospital, Belleville

Michael McManus, CEO
Kenneth Hall Regional Hospital, East St. Louis

Timothy F. Brady, Administrator
St. Elizabeth's Hospital, Belleville

Robert Klutts, CEO
Touchette Regional Hospital, Centreville

Ronald B. McMullen, President
Alton Memorial Hospital, Alton

Keith Page, President & CEO
Anderson Hospital, Maryville

William E. Kessler, President & CEO
Saint Anthony's Health Center, Alton

Claudio Fort, EVP/Administrator
St. Joseph's Hospital, Highland

Illinois General Assembly
House Judiciary 1 – Civil Law Committee Hearing

Subject: Medical Malpractice

Testimony of Lawrence E. Smarr, President
Physician Insurers Association of America

April 7, 2005

INTRODUCTION

Chairman Fritchey, Representative Hultgren and Members of the Committee, I am Lawrence E. Smarr, President of the Physician Insurers Association of America (PIAA). The PIAA is an association comprised of professional liability insurance companies owned and/or operated by physicians, dentists, hospitals and other health care providers. Our 48 domestic insurance company members insure over 300,000 doctors and 1,300 hospitals in the United States. Our members providing insurance protection in Illinois are: ISMIE Mutual Insurance Company, American Physicians Assurance Corporation, ProAssurance Corporation, OMS National Insurance Company, The Doctors' Company, PIC Wisconsin, Medical Liability Mutual Insurance Company, First Professionals Insurance Company, the Podiatry Insurance Company of America, Ophthalmic Mutual Insurance Company, and NCMIC Insurance Company. These companies, all provider owned or operated, insure almost 75% of the Illinois market.

PIAA members can be characterized as healthcare professionals caring for the professional liability risks of their colleagues - doctors insuring doctors, hospitals insuring hospitals. The provider owned/operated insurance company members of the PIAA insure over 60% of America's doctors, thus being the primary source of medical professional liability insurance coverage across the nation, and also here in Illinois. I thank the Committee for providing me the opportunity to appear here before you today to provide our perspective on the medical liability crisis on a national basis.

INSURANCE INDUSTRY UNDERWRITING PERFORMANCE

Over the past five years insurers have seen their financial performance deteriorate substantially due to the rapidly rising cost of claims. According to A.M. Best, the medical liability insurance line of business incurred $1.34 in losses and expenses for every dollar of premium it collected in the year 2000. This statistic rose to $1.55 in 2001, and has gradually declined to an estimated $1.33 for 2004, and Best estimates this statistic to be $1.31 for 2005. The impact of insurer rate increases accounts for the gradual improvement. However, Best also calculates that the industry can only incur $1.14 in losses and expenses in order to operate on a break-even basis. This implies that future rate increases can be expected as the carriers move toward sustainable operations.

INCREASING CLAIM COSTS

The primary driver of the deterioration in the medical malpractice insurance industry performance, as confirmed by both the Government Accountability Office (GAO) and the National Association of Insurance Commissioners (NAIC), has been paid claim severity, or the average cost of a paid claim.

Exhibit A

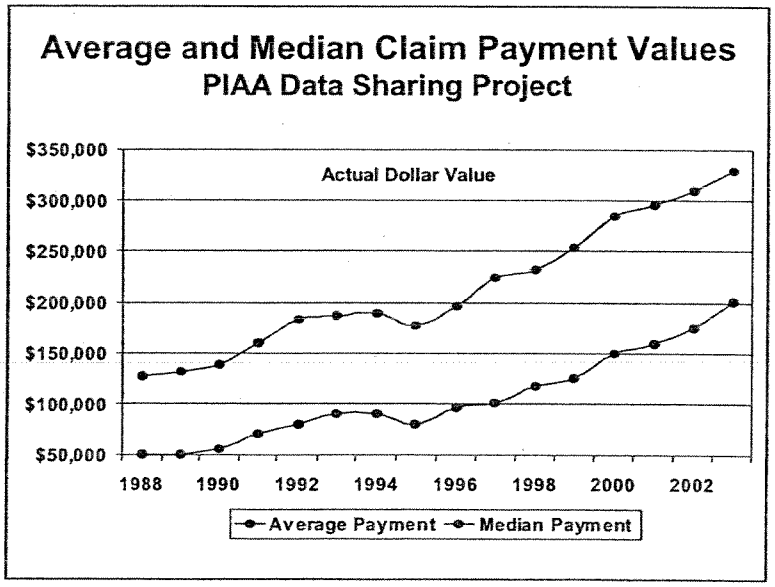
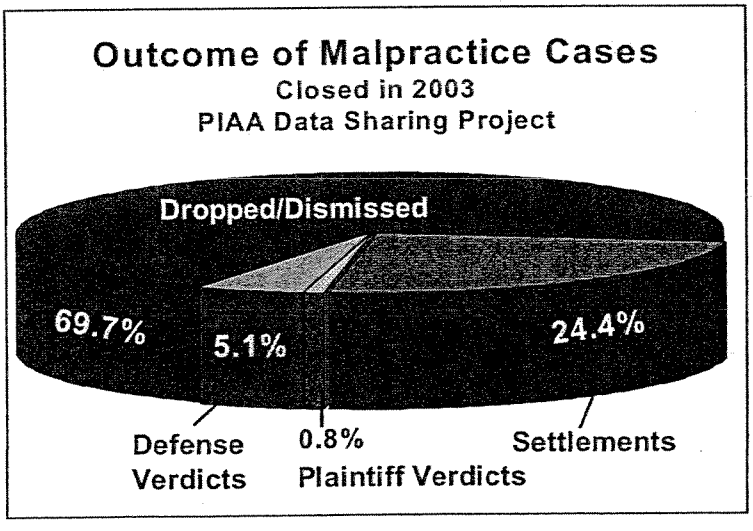


Exhibit A shows the average dollar amounts paid to plaintiffs on behalf of individual physicians since 1988. The mean payment amount has risen by 6.6% per year during this period, as compared to 2.9% for the Consumer Price Index (CPIu). The data for this exhibit comes from the PIAA Data Sharing Project, which is a patient safety database created in 1985 to identify common trends among malpractice claims. To date, over 199,000 claims and suits have been reported.

One very troubling aspect of medical malpractice claims is the proportion of those filed which are ultimately determined to be without merit, shown in EXHIBIT B. Almost 70% of all claims filed against individual practitioners reported in 2003 were dropped or dismissed by the court. When claims went to verdict, 5.1% were won by the doctor, and only .8% were won by the plaintiff. The remainder, 24.4% resulted in a settlement payment. While the experience varies somewhat from year-to-year, our long-term data shows that the plaintiff receives remuneration in only 30% of all claims filed, and when the claim was concluded at verdict, the plaintiff prevails only 20% of the time.

EXHIBIT B



A review of the average claim payment values for 2003 is revealing. As shown on Exhibit C, the mean indemnity payment amount on behalf of an individual defendant was $328,757. Average verdicts cost $431 thousand, and settlements "only" $323 thousand. Most medical malpractice cases have multiple defendants, and thus, these values are below those which may be reported on a case basis.

EXHIBIT C

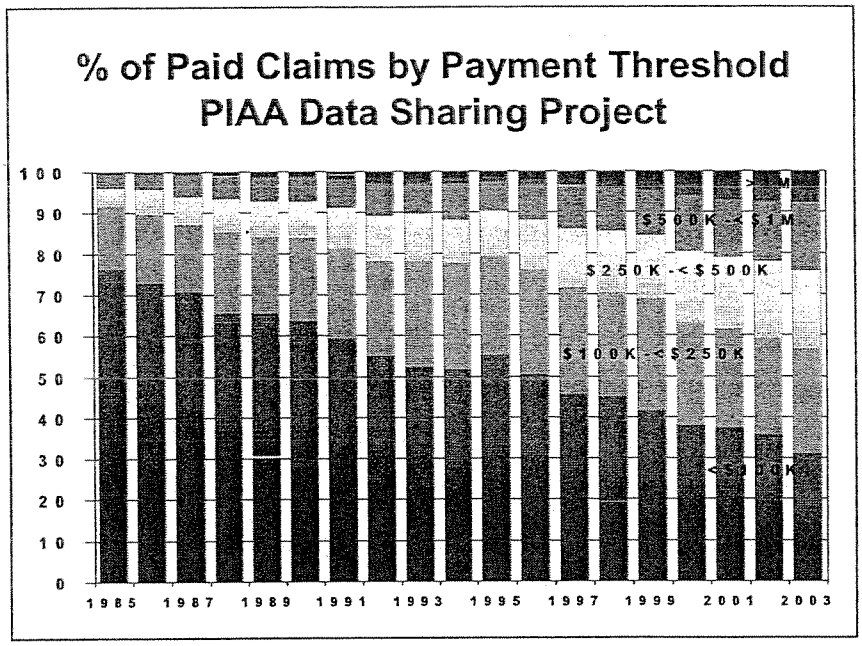
PAYMENT VALUES – 2003
PIAA Data Sharing Project (As of May 2004)

Mean Indemnity Payment	$328,757
Mean Expense Payment	$ 29,683
Won at Trial	$ 87,720
Lost at Trial	$123,543
Settled	$ 45,716
Dropped/Dismissed	$ 17,408

It is very costly for insurers to defend these cases, with the cost to proceed through trial approaching $100,000.

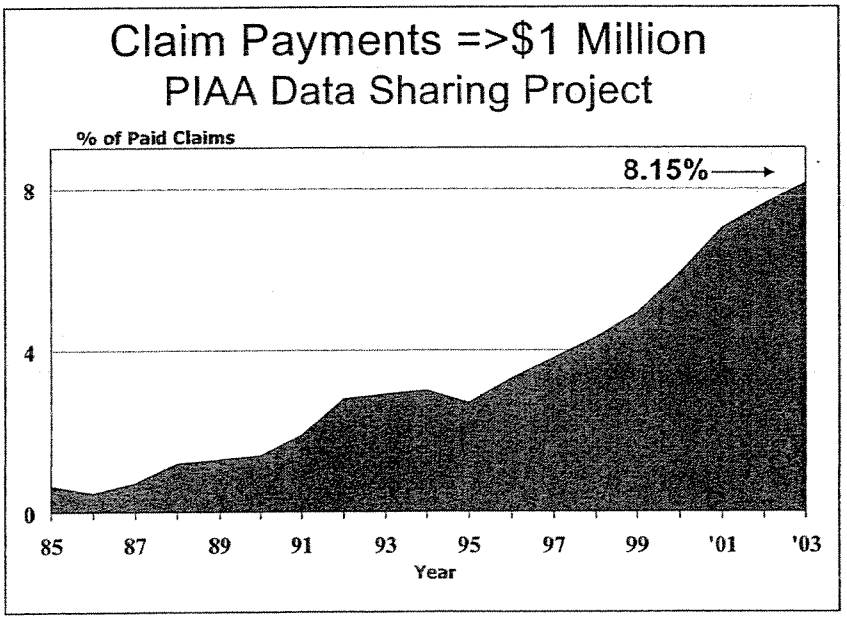
Exhibit D shows the distribution of claim payments at various payment thresholds. It can be readily seen that the number of larger payments are growing as a percentage of the total number of payments.

EXHIBIT D



This is especially true for payments at or exceeding $1 million, which comprised 8.1 percent of all claims paid on behalf of individual practitioners in 2003, as shown on Exhibit E. This percentage has almost doubled since 1998.

EXHIBIT E



THE ROLE OF INVESTMENT INCOME

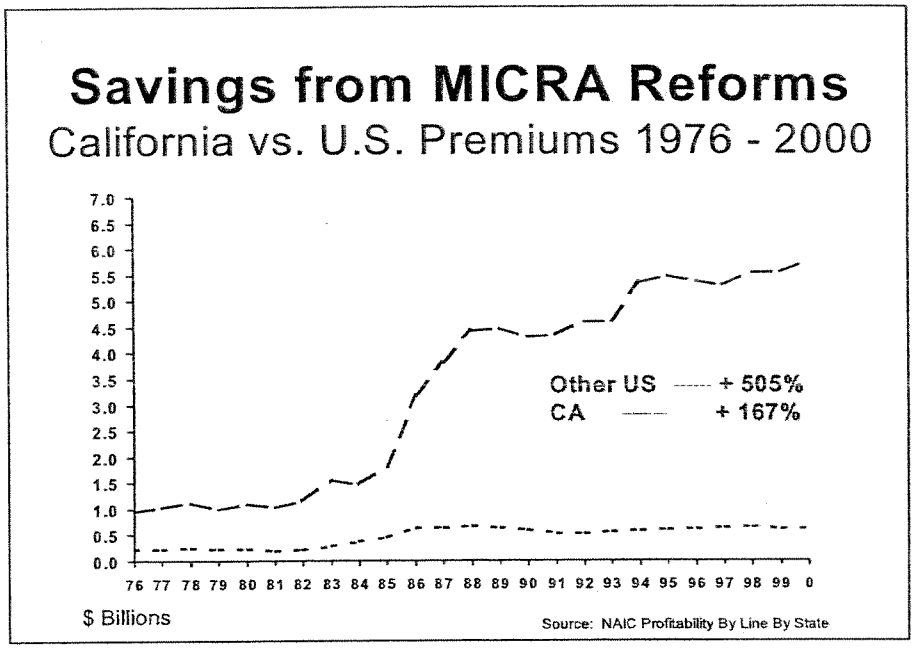
In addition to rising claim severity, like all other investors, medical liability insurers have faced declining market interest rates. Insurers invest the premiums they collect and use the resulting investment income to offset premium needs. While insurer interest income has declined due to falling market interest rates, the net investment income of insurers has remained positive in all years. While opponents of tort reform often make false allegations that the crisis is caused by insurers who lost great sums in the stock market, this is simply false. Industry analyses, which I will address later, clearly indicate that medical malpractice insurers are primarily invested in bonds, not stocks, and that market decreases in bond interest rates have had only a minor effect on increasing medical malpractice premiums.

THE ANSWER

The PIAA advocates the state and federal adoption of the reforms found in the Medical Injury Compensation Reform Act (MICRA) which became effective in California in 1976.

Using data published by the National Association of Insurance Commissioners, Exhibit F documents the savings California practitioners and health care consumers have enjoyed since the enactment of MICRA over 25 years ago. Here, total malpractice premiums reported to the NAIC between 1976 and 2000 have grown in California by 167%, while premiums for the rest of the nation have grown by 505%.

EXHIBIT F



We have been keeping track of this data over time, and the changes since 2000 are remarkable, as demonstrated on the next three charts.

EXHIBIT G

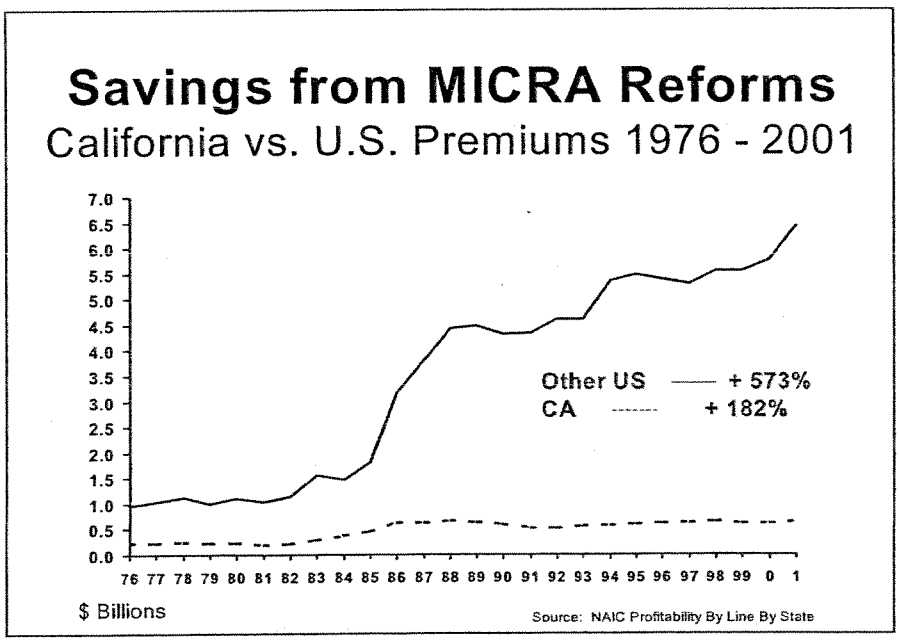


EXHIBIT H

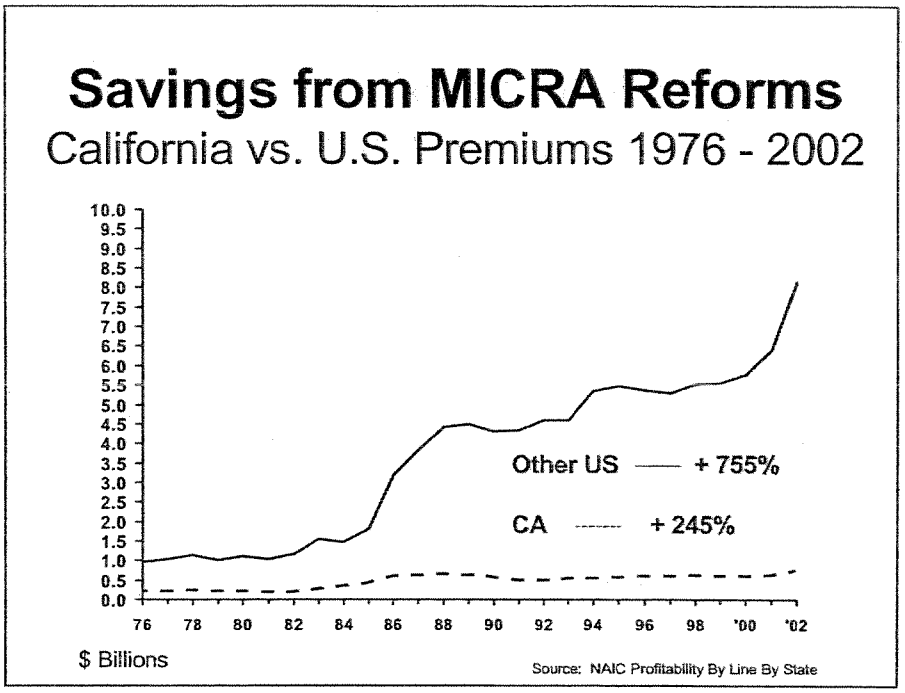
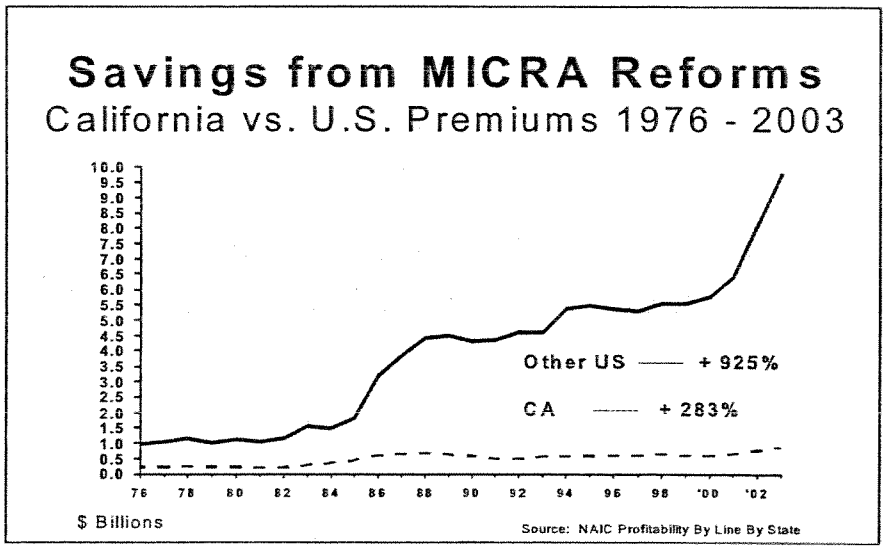


EXHIBIT I



By 2003, the latest year for which data is available from the National Association of Insurance Commissioners, total malpractice premiums have grown 3.26 times faster

in the rest of the nation as compared to California alone – proof that California's MICRA law works.

These savings are clearly demonstrated in the rates charged to California doctors as shown on Exhibit J. Successful experience in California and other states such as Colorado makes it clear that these tort reforms do work without lowering health care quality or limiting access to care. For example, an OB/GYN in Los Angeles pays $66,000, compared to his/her Miami counterpart who pays $277,000 per year. While a little better than Miami, Chicago doctors face extremely high premiums as well.

EXHIBIT J

California Premiums Low w/Tort Reform:
Data Source: Medical Liability Monitor
2004 Premium Survey Data for Selected Specialties
$1 million/3 million limits

Specialty	Los Angeles[1]	Denver[2]	Chicago[3]	Miami[4]
Internal Medicine	$13,808	$12,711	$38,424	$69,310
General Surgery	40,436	43,529	102,700	277,241
OB/GYN	66,100	39,973	147,540	277,241

1 SCPIE Indemnity Co.
2 COPIC Insurance Co.
3 ISMIE Mutual Insurance Company
4 First Professionals Insurance Company

PIAA

WHO CAN YOU BELIEVE?

You have, no doubt, been told by others who have testified before you that medical liability tort reforms do not work, and that states having non-economic damage caps do not have lower premiums than those that do. There are plenty of bogus analyses which have surfaced on this issue, such as the one produced by Weiss Ratings, which has been widely discredited. As reported by the National Association of

Insurance Commissioners in their recent market analysis[1], both of Mr. Weiss' data sources, the National Practitioner Data Bank and the Medical Liability Monitor, have disagreed with his methodology. I have our analysis of Weiss' work to provide to you, and you can be the judge. There's also the notion that something called Prop 103 is responsible for California's low premiums, and that's not true either. Prop 103 was an automobile and homeowner's insurance initiative intended to control rates in these lines of insurance. Medical liability insurers were also subject to Prop 103, which had no material effect. Contrary to what you may have been told, no medical malpractice insurer rolled back their rates one cent because of this initiative, but rather, they made a one-time return of premium in 1992 which was included as part of their normal dividend payment process. Prop 103 is unique to California, and it does not explain why other states having meaningful non-economic damage caps have similar experience, such as Colorado, Kansas and most recently, Texas, where rates for most doctors have dropped by 17% since its cap was enacted in late 2003.

Mr. Chairman, I do have a dog in this fight, and some may want to characterize me as being a little biased. Even though I fervently believe and attest that everything I have presented is accurate and truthful to the best of my knowledge, I won't be too surprised if some don't want to believe all I have said here today. But, I do ask you to also look to the independent entities which have examined this issue and give credence to what they have found in their investigations.

1) <u>United States Government Accountability Office [formerly known as the General Accounting Office] (GAO)</u>

In June of 2002, the GAO was requested by nine Democratic Members of Congress known to be opponents of tort reform, including Senator Richard Durbin of Illinois, to investigate the nature and causes of the medical liability crisis, focusing on the insurance industry. They specifically asked the GAO to

[1] National Association of Insurance Commissioners, *Medical Malpractice Insurance Report: A Study of Market Conditions and Potential Solutions to the Recent Crisis*, September 12, 2004, page 48.

investigate insurers' underwriting results, investment income, loss reserves, and market practices to see how these issues may relate to the crisis situation. The GAO's extensive report was published a year later, and here are the major findings as found on pages 4 and 5 of the report[2].

- "Multiple factors have contributed to the recent increases in medical malpractice premium rates..."
- "...increased losses appeared to be the greatest contributor to increased premium rates..."
- "...medical malpractice insurers experienced decreases in their investment income as interest rates fell on the bonds that generally make up around 80 percent of these insurers' investment portfolios."
- "almost no medical malpractice insurers experienced net losses on their investment portfolios..."
- market competition during the 1990s may have forced rates too low for some carriers
- "...beginning in 2001 reinsurance rates for medical malpractice insurers also increased more rapidly than they had in the past, raising insurers' overall costs."

I have a copy of the GAO report here to provide to the Committee for your reference, and also copies of the other documents I will now briefly address.

2) <u>Congressional Budget Office (CBO) – Scoring of the Help, Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act of 2003.</u>

The CBO was asked to perform an evaluation of federal legislation named the HEALTH Act which proposed tort reforms similar to those enacted in California in 1975 (Medical Injury Compensation Reform Act, MICRA). Identical reforms were

[2] US General Accounting Office, *Medical Malpractice Insurance, Multiple Factors Have Contributed to Increased Premium Rates,* GAO-03-702, June, 2003.

included in bills HR 4600 and HR 5 in the 108th Congress. Both bills were scored (evaluated) by CBO, and as the results are similar, I will only address the most recent bill, HR 5. The CBO estimated that HR 5 would provide savings of $18.1 billion to the Federal Government through savings in Medicare costs and the Federal Employees Health Benefits Program. State and local governments would also save an additional $8.5 billion in reduced healthcare costs and Medicaid payments over the ten years of the CBO's analysis. When evaluating the impact of the tort reforms included in the bill, CBO states:

> "CBO estimates that, under this bill, premiums for medical malpractice insurance ultimately would be an average of 25 percent to 30 percent lower than what they would be under current law." Due to variations in individual states' legal climates, the CBO further states, "There would be almost no effect on malpractice premiums in about one-fifth of the states, while reductions in premiums would be substantially larger than the overall average in about one-third of the states."[3]

3) National Association of Insurance Commissioners – Response to Senator Gregg

Opponents of tort reform often cite insurance industry misconduct as being the cause of the crisis. Senator Judd Gregg, as chair of the Senate Committee on Health, Education, Labor and Pensions (HELP), wrote to the National Association of Insurance Commissioners posing many questions regarding insurance industry operations. A copy of the February 7, 2003 response from the President of the NAIC, Arkansas Insurance Commissioner Mike Pickens, is also provided for your information. As you will see, the NAIC finds no evidence of alleged "price fixing, bid rigging, and market allocation," which have been cited by opponents of tort reform as causes for high malpractice premiums. This letter

[3] Congressional Budget Office Cost Estimate, H.R. 5, Help Efficient, Accessible, Low-cost, Timely Heathcare (HEALTH) Act of 2003, March 10, 2003.

speaks to the effectiveness of state insurance regulation in preventing such practices.

4) National Association of Insurance Commissioners Study of Market Conditions

The National Association of Insurance Commissioners recently undertook a comprehensive analysis of medical malpractice insurance market conditions and potential solutions to the crisis. The NAIC's findings are found in a report published last September. When evaluating the reasons for the crisis, they state "...the research indicates that underwriting losses were the major factor influencing the rate increases experienced by physicians and other healthcare providers over the past several years." And, they note that the GAO reached a similar conclusion in its June 2003 report. Noting that insurers are primarily invested in bonds, the NAIC states that during the period of its analysis (1992 – 2002), underwriting gains declined by 74.27 percent, while investment income was down by only 16.52 percent[4], again validating that the medical liability crisis is primarily due to increased jury awards and the settlements they drive. The NAIC further states, "Relative to changes in earned premium and, in particular, net underwriting gains, changes in investment income have been minor." Premiums earned increased by 54.09 percent during the period of the analysis, far less than the cost of claims and reduction in investment income.[5]

5) American Academy of Actuaries

The independent American Academy of Actuaries (AAA) has evaluated the medical malpractice crisis and provides us with an analysis of what has happened and the potential effects of tort reform. Like the other independent groups, the AAA finds that underwriting losses, coupled with decreased bond income and higher reinsurance costs have contributed to increasing medical malpractice insurance rates. The AAA notes that "A 2.5 percent drop in interest

[4] National Association of Insurance Commissioners, *Medical Malpractice Insurance Report: A Study of Market Conditions and Potential Solutions to the Recent Crisis*, September 12, 2004, page 27.
[5] ibid

rates, which has occurred since 2000, can translate into rate increases of between 5 percent and 10 percent.[6]" This is hardly the problem we see in the market today. While the Academy takes no official position for or against tort reform, they state that their research indicates that a coordinated package of tort reforms is more likely than individual reforms to achieve savings in malpractice losses and insurance premiums, and that key among these reforms are a cap on non-economic damages at a level low enough to have an effect, such as MICRA's $250,000, and a collateral source offset rule.[7]

CONCLUSION

Mr. Chairman, I thank you for your indulgence in letting me introduce the authoritative studies I have just referred to. These studies are produced by independent governmental and oversight groups, and are not funded or influenced in any way by insurers, plaintiffs' lawyers, doctors, or any other groups. And, they all say the same thing – that increased loss costs are the primary reason medical malpractice insurance premiums have risen, and that effective tort reforms, such as those passed in California in 1975, will mitigate the crisis. Increasing medical malpractice claim costs, on the rise for over three decades, have finally reached the level where the rates that insurers must charge can no longer be afforded by doctors and hospitals. Many will face little choice other than to move out of crisis states, such as Illinois, to less litigious states, or leave the practice of medicine altogether. This can only result in restricted access to health care in those states not able to temper our out-of-control tort system.

Mr. Chairman, that concludes my remarks. Thank you for inviting the PIAA to appear here today.

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[6] Statement of James Hurley, ACAS, MAAA, Medical Malpractice Subcommittee of the American Academy of Actuaries, before the Subcommittee on Health, Committee on Energy and Commerce, US House of Representatives, February 10, 2005, page 6.
[7] Ibid, page 9.

Comments of Mark Deaton, Illinois Hospital Association, Regarding the Medical Liability Crisis
Illinois Senate – Judiciary Committee
March 3, 2005

Good morning, Chairman Cullerton and members of the committee. My name is Mark Deaton. I am the general counsel of the Illinois Hospital Association.

The 200 hospitals of the Illinois Hospital Association appreciate this opportunity to discuss a serious and growing threat to access to health care by the residents of Illinois – the cost and availability of medical liability coverage.

I am joined today by ...

- Charles Reiter, Vice President & General Counsel of Loyola University Medical Center in Maywood.
- Richard Biondi, a principal in the New York office of Milliman USA, one of the nation's leading actuarial firms.
- William McVisk, a partner with the Chicago law firm of Johnson & Bell.

Together, we will address ...

- The effects of the medical liability crisis on the delivery of health care to Illinois citizens.
- The cause of the medical liability crisis.
- Our proposed solutions to the medical liability crisis.

Effects

I suspect that all of you are hearing from hospitals and physicians in your communities about the breath-taking increases in the cost of medical liability insurance for physicians and the alarming consequences for their patients.

- According to data in the AMA Masterfile, 37% of Illinois counties saw a decline in the number of actively practicing physicians between 2000 and 2003.
- In many parts of the state, pregnant women are struggling to find and maintain relationships with obstetricians.
- Patients with serious brain injuries are waiting longer to find neurosurgeons to treat them. This is true not only in southern Illinois, but in Rockford, the Quad Cities, Joliet, and the City of Chicago.

- Fewer doctors are available to treat emergencies of all kinds in hospital emergency rooms. Transfers of trauma patient from Illinois to St. Louis have increased by more than 50% since 2002.

- Every day, more physicians are restricting their practices, retiring early, or moving out of Illinois.

- I believe the gentlemen from the State Medical Society will offer a number of concrete examples of the effects on physicians and their patients and communities.

But today I want to draw your attention to another alarming consequence of the medical liability crisis. To date, it has gotten very little attention, but it is a very real and growing threat to the delivery of health care in Illinois.

Medical liability costs are starting to devour the bottom lines of Illinois hospitals – turning what little black ink there is into red ink and threatening the ability of hospitals – even some of the largest hospitals in the state – to carry out their mission to serve their communities.

This is happening because most hospitals in this state are self-insured. The commercial insurance market has abandoned hospitals – leaving them to pay the astronomical costs of verdicts and settlements out of their own pockets – money that should be spent on caregivers and new technology and in dozens of other ways that would benefit patients and communities.

I am going to ask Charles Reiter, General Counsel of Loyola University Medical Center, to describe the effects of the medical liability crisis on his institution.

Chuck Reiter

Before we can talk about a solution to the problem of medical liability costs, we have to understand what's causing the problem ... *and what's not causing the problem.*

There are those who will tell you that this crisis has been caused by "greedy insurance companies that are gouging customers to make up for losses in the stock market."

There are those who will tell you that the crisis has been cooked up by insurance companies with bookkeeping tricks.

There are those who will tell you that the problem is the rising cost of health care – that we're simply paying more to take care of persons injured by medical negligence.

I am here to tell you that none of these has anything to do with the crisis that is afflicting our hospitals.

First – Let's look at how Illinois hospitals insure for medical liability....

Of the 200 or so hospitals in Illinois, about 70% are either self-insured or covered by risk pooling trusts that they own and control (collective self-insurance).

42 hospitals are covered by the Illinois Provider Trust (IPT), an entity created by the Illinois Hospital Association back in 1979. The Metropolitan Chicago Healthcare Council sponsors the same kind of entity for Chicago-area hospitals, know as the Chicago Hospital Rick Pooling Program (CHRPP), founded in 1978.

Let me tell you a little about IPT and CHRPP...

- They are known as a Religious and Charitable Risk Pooling Trusts.
- They are governed by the Religious & Charitable Risk Pooling Trust Act, which is part of the Illinois Insurance Code, enacted in 1977. [215 Illinois Compiled Statutes 150]
- Under Illinois law, a Religious & Charitable Risk Pooling Trust can only cover 501(c)(3) charitable organizations (e.g., churches or hospitals), units of local government, and hospitals operated by units of local government.
- Religious & Charitable Risk Pooling Trusts are regulated by the Illinois Department of Insurance.
- They are owned and governed by the hospitals that it insures. They have no shareholders. They are not-for-profit. They are meant to be operated at cost.
- IPT does not hold any surplus – only reserves that it's actuaries say are needed to cover losses.
- IPT does not invest in the stock market – never has.

So, we come back to the question of causation ... if hospitals are not trying to maximize profits for shareholders or gouging to make up for losses in the stock market, why are their medical liability costs skyrocketing?

The answer is unpredictable increases in verdicts and settlements.

Insurers really do only one thing – make predications. The entire business of insurance amounts to them predicting how much they'll have to pay out and charging enough to make that payout.

How do they make those predications? By looking at history and trends.

If something is not predictable it is not insurable. How much do you charge for a policy when you can't predict how much you'll eventually pay out? When an insurer can't rely on history and trends, it's lost.

Here's what the Illinois Provider Trust is seeing...

In the **20 years** from its founding in 1979 through 1999 it paid out 4 claims in excess of $1,000,000.

In the last **5 years** (2000-2004), it has paid **15 claims** in excess of $1,000,000.

In terms of dollars, those 4 claims between 1979 and 1999 totaled **$10 million**.
The 15 claims since 2000 totaled **$50 million**.

Same hospitals. Roughly the same number of claims per year. Same kinds of injuries.

Cases are simply settling for double, triple, and quadruple the amount they were reserved for.

Cases that were reserved for $500,000 are settling for $3 – 4 million.

CHRPP has been seeing the same trends ....

The average settlement for CHRPP hospitals has risen from $180,000 in 1994 to $470,000 in 1999 to $1,010,000 in 2004. This represents an increase cost of 461% over ten years and 115% over five years. CPI has increased by roughly 2.5% annually since 2000. The rate of increase for CHRPP's losses has been 17% annually, 14.5% percentage points more than the CPI annually.

In terms of large malpractice settlements/verdicts, the largest claim at the end of 1994 was $5,000,000, at the end of 1999 $12,000,000 and at the end of 2004 the largest claim was $22,400,000. This represents an increase of **348%** over ten years and **87%** over five years. Assuming the trend in the last 5 years continues, the largest medical malpractice claim will be $47,000,000 in 2010 and $88,000,000 in 2015.

Every new record verdict raises the floor and pulls settlements up.

In short, in today's world of medical liability, "history is bunk."

Predictability – the foundation of insurance – has disappeared.

This is the situation confronting IPT and CHRP and the actuaries of all those self-insured hospitals. They're not trying to *make up* for losses in the stock market. They're trying to *keep up* with unpredictable verdicts and settlements.

And what's driving those verdicts and settlements?

Non-economic damages ... monetary awards things that *cannot be measured* in dollars and cents.

IPT and CHRPP estimate that roughly 70% of verdicts consist of non-economic damages. The chart below shows the breakdown for medical malpractice jury verdicts in excess of $5 million in Cook County for the 5 years from 2000 – 2004.

Medical Malpractice Jury Verdicts in Cook County, Illinois
Greater than $5 Million
From January 1, 2001, to February 2005
By Year

	2001	2002	2003	2004
Total Cases	**2**	**6**	**7**	**9**
Total Non-economic Damages	**$12 Million**	**$12 Million**	**$64.5 Million**	**$97.4 Million**
Percent of Total Non-economic Damages	**74%**	**77%**	**70%**	**82%**
Average Non-economic Damages	**$7.7 Million**	**$2 Million**	**$9.2 Million**	**$10.8 Million**

One of the 2004 verdicts was for $30 million .... 100% non-economic damages.

Economic damages, such as medical expenses and lost wages, are ...

- Easily measured in dollars and cents.
- Predictable.
- Fairly uniform from state-to-state.

Therefore, they do not explain the explosive growth of verdicts and settlements in Illinois.

Non-economic damages, on the other hand are ...

- Not measurable at all in dollars and cents – that's why they're called *non-economic* damages. Juries have absolutely no objective standards or guides in determining how much to award for non-economic damages.
- Not predictable. Because there are no standards, the growth in non-economic damages is nearly impossible to predict.

Solutions

What does the Illinois Hospital Association suggest?

The Illinois Hospital Association can only support medical liability reform legislation that will:

1. reduce the cost of liability coverage for hospitals and physicians;
2. keep doctors in Illinois; and,
3. promote patient access to health care.

Meaningful Medical Liability Legislation Must Include These Critical Reforms:

1. Reasonable caps on non-economic damages that fairly compensate plaintiffs and allow hospitals and physicians to have the resources to continue serving their patients. Such reasonable caps would not affect the full payment of economic damages to plaintiffs – e.g., hospital bills, future health care needs, and lost wages.

I am going to ask Richard Biondi, a principal with Milliman USA, to describe a study that he authored that looks at the effects of caps on non-economic damages.

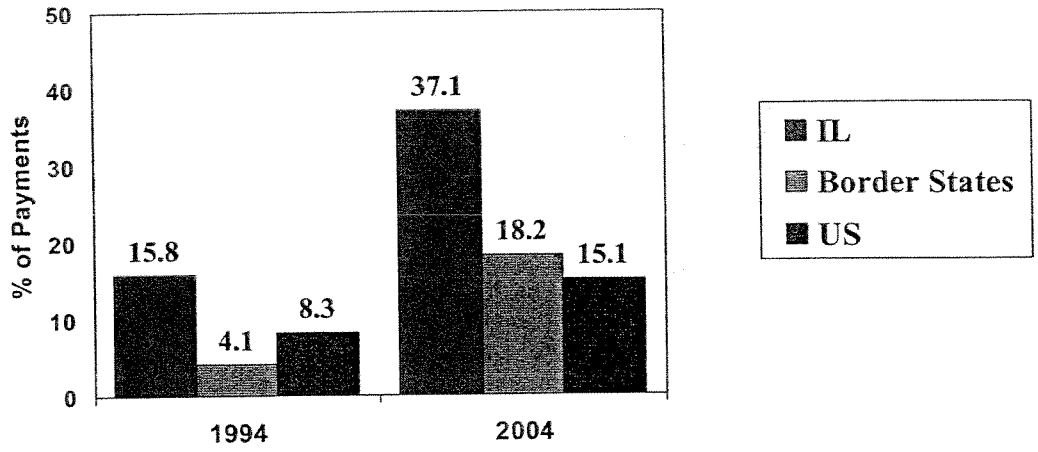
2. Structured awards that will more efficiently and reliably pay for the future medical care of injured patients (e.g., periodic payments such as annuities).

I am going to ask William McVisk, an attorney with Johnson & Bell in Chicago to describe how structuring future medical expenses will fully compensate plaintiffs in a manner that is much for efficient for defendants.

3. Real apparent agency reform that provides for straightforward disclosure processes so that only legitimate agency claims lead to liability (to protect hospitals from liability for harms they did not cause, i.e., harms caused by physicians who are not hospital employees).

4. Protection of all (100%) of a physician's personal assets from paying liability claims if the physician has at least $1 million in coverage.

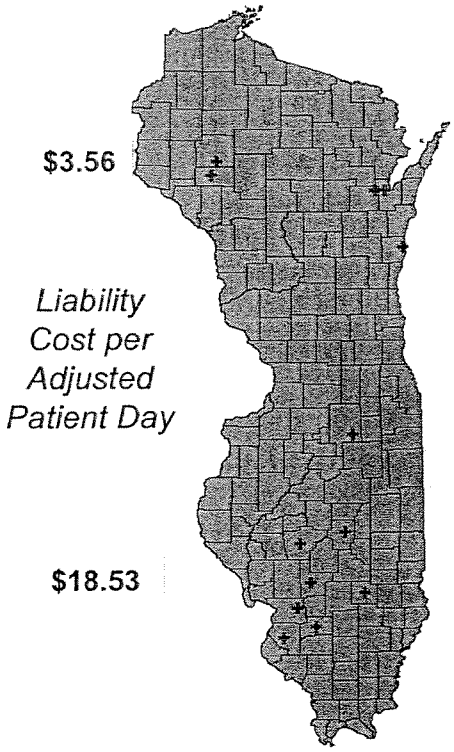
In 2004 Almost 40% of IL Medical Liability Payments Exceeded $500,000



Notes: "Border States" include IA, IN, MO and WI.

Source: National Practitioner Data Bank Public Use Data File, 12/31/2004,
US Department of Health & Human Services, Health Resources and Services Administration, Bureau of Health Professions, Division of Practitioner Data Banks

Liability Cost per Patient Day Was 5 Times Higher in Illinois in 2003

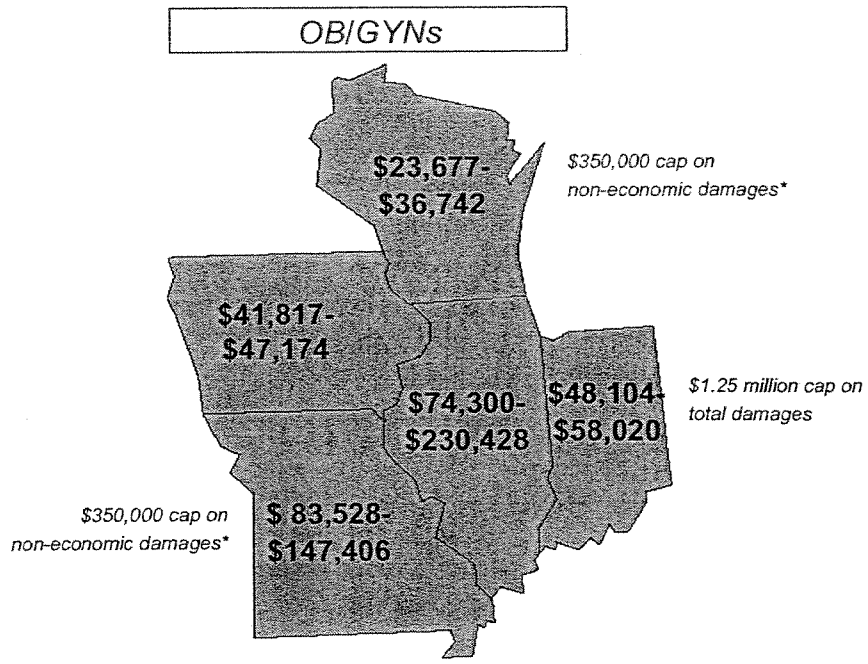


One Hospital System's Experience:	
Wisconsin	Illinois
5 Hospitals	8 Hospitals
$1.0 Million	$10.1 Million

Source: Hospital Sisters Health System, 4/2004

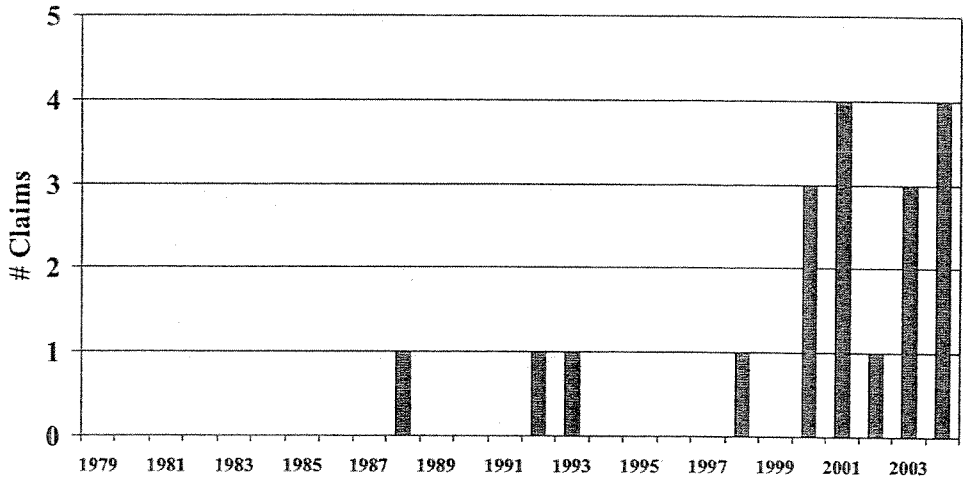
Note: an "adjusted patient day" is a measure of utilization that reflects a combination of inpatient days and outpatient volume.

Premiums for Illinois Physicians Far Exceed Those in Border States



Source: Medical Liability Monitor Rate Survey, 2004
* Damages in both WI and MO are adjusted for inflation.

Illinois Provider Trust
Number of Claims with Indemnity $1 Million or More

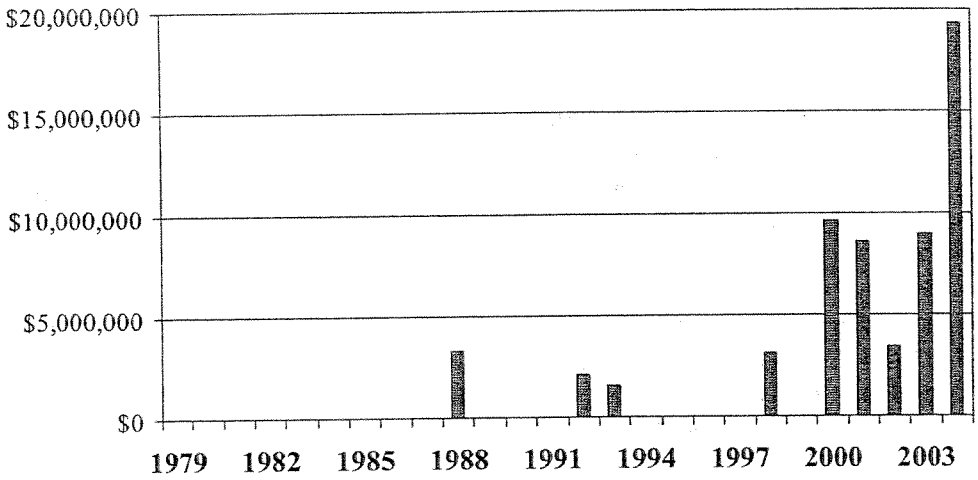


In the first **20 years** of IPT's existence, from its founding in 1979 through 1999, it paid out **4** claims in excess of $1,000,000.

In the past **5 years,** 2000-2004, it has paid **15** claims in excess of $1,000,000.

In 25 years of operation, IPT has paid 19 claims in excess of $1,000,000 – 15 of those in the past 5 years.

Illinois Provider Trust
Losses on Claims with Indemnity $1 Million or More



The 4 claims in excess of $1 million between 1979 and 1999 totaled **$10 million.**
The 15 claims excess of $1 million since 2000 totaled **$50 million.**

PERIODIC PAYMENTS FOR FUTURE MEDICAL EXPENSES

HOW DO PERIODIC PAYMENTS WORK?

Today, malpractice defendants typically pay the plaintiff a one-time lump sum to cover the plaintiff's future medical expenses. The periodic payment proposal gives defendants the ability to pay for a plaintiff's future medical and life care by purchasing an annuity contract that guarantees to pay for such care periodically for the rest of the plaintiff's life. Annuities finance large future medical care costs much more economically.

Why? Because well-financed life insurance companies are willing to risk that the plaintiff may need more care over a longer period of time than their experts believe such care will be needed. The annuity price is based on the company's expert assessment of how long the plaintiff will need such care. If a plaintiff needs less care than expected, the company benefits. If the plaintiff needs more care than expected, the company loses.

The insurance company is *taking the risk* as to how long each plaintiff will live and need care. But as with all insurance, that risk is being spread across many contracts. Given the size and financial resources of the company, it is willing and able to bear and spread this risk over many annuities, and remain in business.

WHAT ARE THE BENFITS OF PERIOD PAYMENTS?

Benefits For Plaintiffs. Through the use of high quality annuities offered by well-funded institutions, plaintiffs are assured that their entire medical needs will be covered for as long as the need exists. Studies show that plaintiffs who receive a single lump sum payment, instead of an annuity, dissipate their funds within five years, while their medical needs (and costs) continue.

Public Benefits. Plaintiffs who have spent their single lump sum payment for medical care on other items may not have the means to pay for their future medical care. These health care costs inevitably become an obligation that is borne by the state through Medicaid or some other safety net health care payment program. Annuities provide a secure and guaranteed long-term source of payment for medical care as long as the care is needed. The people of Illinois will never be asked to pay for such care.

Benefits For Defendants. Under the current civil justice system, future medical expenses are calculated and assessed on the basis of evidence that does not take into account the substantial savings offered by annuities. Juries are never told that an annuity could cover all of the plaintiff's future medical expenses at a fraction of the cost presented at trial. By allowing providers to pay for these costs through annuities, cases will settle sooner and for less without denying the plaintiff any needed health care.

Improving the Liability Insurance Market. Using annuities to pay for a plaintiff's future medical expense will improve the liability insurance market by giving insurers greater certainty in assessing the cost of claims and reducing their costs. These benefits will help to stabilize the high cost of liability coverage in Illinois.

COMMON QUESTIONS

Are Periodic Payments Used Anywhere Else In the United States? Yes. Most states, including Illinois, already have legislation authorizing the voluntary use of periodic payments for future damages. Unfortunately, the Illinois law is too complicated to be of any use. Sixteen states already give providers the right to pay for such damages periodically through annuities. Indeed, in 2002, Pennsylvania passed legislation authorizing the use of annuities for the sole purpose of paying a plaintiff's future medical expenses. Illinois should also adopt a more economical and reliable way to pay for a plaintiff's future medical expenses.

Can Periodic Payments Be Adjusted Over Time? Yes. If the jury finds that a plaintiff's medical expenses might change over time, the annuity can be structured so that these contingencies are fully funded. In this way annuities offer a more reliable source of payment than single lump sum awards.

Should Awards for Medical Care Only Fund Medical Care? Yes. A number of concerns about the use of annuities are based on the idea that an award for future medical expenses does not have to be used for medical care. Some say these funds should also be used in the following ways:

- Plaintiffs should be able to invest or spend awards for future medical expenses as they wish.
- Plaintiff's survivors should continue to receive payments for future medical expenses even when medical care is not needed.

All of these non-health care related uses of these funds miss the fundamental point that the jury's award was designed to fund the plaintiff's health care. It should be limited to that purpose and annuities assure that they are.

How Are Attorneys' Fees Handled? The Code of Civil Procedure already addresses plaintiff's attorney's fees when future damages are paid periodically. (735 ILCS 5/2-1114).

Are Annuities Dependable? Yes. Annuities from highly rated, well-financed institutions are some of the most safe, secure and reliable investment vehicles available today. A commitment to pay future medical expenses from one of these companies is virtually guaranteed. We know of no case where an annuity commitment failed because the company failed.

Are Annuities Taxable? No. Under Section 104 (a)(2) of the Internal Revenue Code, amounts received for personal injuries are not taxable --- whether received as a periodic payment or lump sum.