

## **SEPARATING POLICY FACTS FROM POLITICAL FICTION:**

### ***A GUIDE TO MEDICAL LIABILITY REFORM***

*America's health care system is facing a litigation crisis. Medical liability claims are exploding. Damage awards are skyrocketing. Medical liability premiums are soaring, forcing doctors to cut back services or close up their practices altogether.*

*Not surprisingly, the trial lawyer industry – one of the most powerful and well-funded special interest in America – and the politicians they support are pulling out all the stops to block reform.*

*It's time to separate the policy facts from the political fiction on medical liability reform.*

#### **Separating Fact From Fiction**

##### ***Political Fiction #1:***

*Medical liability reform won't lower health insurance costs and states that have tried medical liability reform have not seen lower premiums for doctors or lower overall health costs.*

##### ***The Policy Facts:***

- A landmark medical liability reform bill was passed in California in 1975 known as the Medical Injury Compensation Reform Act (MICRA) – legislation that included reasonable guidelines to limit non-economic damages. Since then, medical liability premiums have risen by 569% nationwide, compared to just 182% in California. *(Californians Allied for Patient Protection, Physician Insurers Association of America, National Association of Insurance Commissioners)*
- California's successful medical liability reform efforts have translated into dramatic savings on insurance premiums for California doctors. An OB/GYN in California can expect to pay between \$33K-\$78K in medical liability premiums compared to \$80K-\$124K in Connecticut, which has no reform. *(Medical Liability Monitor, October 2003)*
- Academic studies suggest that replicating California's reforms nationwide would generate billions in health care savings. A report published in the Quarterly Journal of Economics estimates that common sense liability reforms – such as limiting non-economic damages – would reduce health care costs by 5-9%, generating savings of \$60-\$108 billion a year. *(U.S. Department of Health and Human Services, July 24, 2002)*

***Political Fiction #2:***

*MICRA and limits on non-economic damages did not solve the medical liability crisis in California. The problem wasn't solved until the passage of Proposition 103 – an insurance reform measure that has been more effective than damage award caps at lowering premiums.*

***The Policy Facts:***

- Prop. 103 was passed in 1988 and took effect in 1989 – 14 years after MICRA was enacted. Medical liability premium rates were stabilized after MICRA passed and dropped significantly once the Supreme Court upheld its constitutionality in 1985 – before Prop. 103 was even on the scene. (*Californians Allied for Patient Protection*)
- Prop. 103 does nothing to prevent insurance companies from raising premiums. In fact, insurers have regularly applied for and obtained significant rate increases in all lines of insurance – except medical liability. The reason? MICRA has kept the rise in rates in check. (*Californians Allied for Patient Protection*)
- Prop. 103 has had no impact on California medical liability premiums. In fact, the California Department of Insurance has rarely denied a medical liability rate filing since Prop. 103 passed. (*San Diego Union-Tribune, October 25, 2002*)

***Political Fiction #3:***

*A 2003 Weiss Report found that in 19 states with liability caps, premiums continued to increase because insurers refused to pass on savings to physicians with lower premiums.*

***The Policy Facts:***

- The Weiss report is deeply flawed and contradicts numerous reputable studies by independent organizations, including the U.S. Department of Health and Human Services, the Congressional Budget Office, the Joint Economic Committee, Standard & Poors, and the American Academy of Actuaries, among others.
- Only 5 of the 19 states included in the report have a meaningful \$250,000 limit on non-economic damages, but Weiss lumps in states with ineffective caps to distort the results. In addition, more than half the states listed as “cap” states were included incorrectly because they did not have caps in place prior to the 1991 baseline. In other words, the Weiss report uses false methodology to reach a pre-conceived conclusion.

***Political Fiction #4:***

*According to Medical Liability Monitor, the average medical liability premium in states without caps was \$35,016 vs. \$40,381 in states with caps. The same report found that median annual premiums increased faster between 1991 and 2002 in states with caps (48.2%) compared to states with no caps (35.9%)*

***The Policy Facts:***

- This data is based on the same flawed Weiss report, and Medical Liability Monitor has objected to Weiss' misuse of its data. According to the Physician Insurers Association of America, four states (CA, CO, IN, KS) had a \$250,000 cap in place prior to the 1991 baseline used by Weiss. These four states saw total premiums increase by 28% between 1991 and 2001, while states without a \$250,000 cap experienced 47.7% growth in premiums – more than 70% higher.
- The real numbers don't lie. As the following chart demonstrates, California's caps on non-economic damages – along with other reforms – have successfully reined in medical liability premiums for California doctors. (Source: U.S. Department of Health and Human Services, July 24, 2002, Medical Liability Monitor, October 2001)

<u>State</u>	<u>OB/GYN</u>	<u>Surgeon</u>	<u>Internist</u>
Florida	\$143K-203K	\$63K-159K	\$27K-51K
Michigan	\$87K-124K	\$67K-94K	\$18K-40K
Illinois	\$89K-110K	\$50K-70K	\$16K-28K
Ohio	\$58K-95K	\$33K-60K	\$11K-16K
Nevada	\$60K-95K	\$32K-57K	\$9K-16K
New York	\$34K-115K	\$19K-63K	\$6K-22K
West Virginia	\$63K-85K	\$44K-56K	\$8K-16K
<b>California</b>	<b>\$23K-72K</b>	<b>\$14K-42K</b>	<b>\$4K-15K</b>

- Ten states have established meaningful standards for non-economic damages in medical liability lawsuits. As the following table shows, medical liability premiums are rising far faster in states that have not passed reform and instituted limits on non-economic damages. (Source: U.S. Department of Health and Human Services, July 24, 2002, Medical Liability Monitor, 2001)

<u>State</u>	<u>2000-2001 Premium Increase</u>
Nevada	35%
Pennsylvania	77%
Oregon	56%
Ohio	60%
West Virginia	30%
New Jersey	24%
Washington	55%
<b>10 states w/limits</b>	<b>12%</b>

***Political Fiction #5:***

*Caps on non-economic damages were recently implemented in Ohio, but medical liability premiums have kept rising.*

***The Policy Facts:***

- There is still a great deal of uncertainty surrounding Ohio's medical liability reform. Limits on non-economic damages in Ohio were enacted only in 2003. Several challenges have been filed to these caps, which will ultimately work their way up to the Ohio Supreme Court for review. Three times in the last three decades, the Ohio legislature has enacted tort reform measures, only to see them overturned by the Ohio Supreme Court. These factors are surely having an impact on insurers' estimates of future losses in Ohio and the corresponding rates they charge for liability coverage.

***Political Fiction #6:***

*Malpractice insurance coverage companies have increased premiums because they lost money in the stock market, not because of higher damage awards. Besides, medical liability costs are less than 2% of health care costs, so they play little role in overall health care spending.*

***The Policy Facts:***

- By law, insurers cannot raise premiums to recover investment losses. Medical premiums are determined by estimates of future losses from claims and future investment income.
- A June 2003 GAO report concluded that "losses on medical malpractice claims – which make up the largest part of insurers' costs – appear to be the primary driver of rate increases in the long run."
- Most medical liability insurers have little stock market exposure. In 2001, stock market investments comprised just 9% of the portfolios of the entire medical liability insurance industry. The percentage has stayed relatively constant regardless of market conditions. *(Brown Brothers Harriman, January 21, 2003)*

***Political Fiction #7:***

*Over the past decade, medical liability filings have fallen by 1%. There is simply no evidence of a medical liability "crisis."*

***The Policy Facts:***

- From 1996-2000, the number of claims rose 5% nationwide. Yet the real problem is not the absolute number of claims – it's the concentration of those claims in tort-friendly states and the surge in mega verdicts. Between 1996 and 1999, the average jury award in medical liability cases jumped by 76%. *(National Practitioner Data Bank, 2000 Annual Report; U.S. Department of Health and Human Services; PIAA)*

- According to the most recent figures from the National Practitioner Data Bank, the claim frequency is 15% lower in states with caps on non-economic damages.

***Political Fiction #8:***

*U.S. physician population rose 26% from 1991-2001, which proves that the so-called medical liability crisis is not influencing doctors' decision on where and whether to practice medicine.*

***The Policy Facts:***

- The medical liability crisis is forcing doctors to move their practices, to cut back on high-risk services, to retire early and to close their practices altogether. A survey conducted by the American College of Obstetricians and Gynecologists found that one in seven of their members has stopped practicing obstetrics because of the risk of liability claims. Further, 22% have decreased the amount of high-risk obstetric care they perform.
- According to a July 2003 study released by the Agency for Healthcare Research and Quality at the U.S. Department of Health and Human Services, states with medical liability reform including caps on non-economic damages experienced 12% more physicians per capita than states with no cap.
- According to the American College of Obstetricians and Gynecologists, the number of US medical students entering the specialty of ob-gyn has declined for the third year in a row. In 2004, only 65% of the ob-gyn residency slots were filled by U.S. medical school seniors, compared with 86% a decade earlier.

***Political Fiction #9:***

*Medical liability reform limits compensation for victims; only the insurance industry benefits.*

***The Policy Facts:***

- Medical liability reform measures supported by the HCLA allows for full recovery of all economic damages – including medical bills, lost wages, future earnings, custodial care and rehabilitation – while establishing fair and reasonable limits on non-economic damages such as “pain and suffering” and excessive punitive damage awards to discourage abusive lawsuits and control lottery-sized verdicts.
- Medical liability reform measures supported by the HCLA would ensure that more money actually goes to injured patients, not to trial lawyers, who typically take upwards of 33% of any settlement or award.
- All patients benefit from reform of the medical liability system. Reform will ensure that doctors are available and able to give patients the care they need when they need it. It will also help reduce “defensive medicine” and overall health care costs.

## **Diversions Masquerading As “Solutions”**

### ***Diversion #1:***

*Medical liability reform should eliminate special privileges that allow insurance companies to collude in order to fix prices and increase premiums.*

### ***The Policy Facts:***

- This proposal refers to the McCarran-Ferguson Act, which provides a very limited antitrust exemption to insurance companies to help foster a competitive marketplace and benefit consumers but does not allow insurance companies to collude or fix prices. The Act does nothing to inhibit state regulators from rejecting insurance rates that are excessive or unfairly discriminatory – in fact, they are required by law to do so. Repealing this Act will do nothing to solve the primary cause of higher insurance premiums – the explosion of meritless litigation and skyrocketing jury awards.
  
- In addition, according to the National Association of Insurance Commissioners, insurance regulators have no evidence that medical liability insurers have “engaged or are engaging in price fixing, bid rigging, or market allocation.” Further, “State Unfair Trade Practice Acts prohibit practices in restraint of trade or tending to foster monopoly such as unfairly discriminatory underwriting practices, much as the federal antitrust law applies to other industries.”

### ***Diversion #2:***

*Requiring claimants to have a qualified medical specialist sign off on a case would prevent meritless cases from reaching the courts.*

### ***The Policy Facts:***

- This proposal sounds good on the surface, but it is already in effect in about 15 states and alone has done little to address the medical liability crisis. In fact, 14 of the 15 states with a certificate of merit law in place are listed as states in or approaching “crisis” conditions by the American Medical Association. Colorado, which also has a \$250,000 limit on non-economic damages, is the only exception.

### ***Diversion #3:***

*Congress can limit huge jury awards by ruling out punitive damages absent intentional misconduct, gross negligence or reckless indifference.*

### ***The Policy Facts:***

- This is nice rhetoric, but doctors rarely get sued for punitive damages and this proposal adds little to the protections most states already provide doctors in medical liability cases.

### ***Diversion #4***

*Implementing a “Three Strikes And You’re Out” law for attorneys who file frivolous claims would force trial lawyers to think twice before filing meritless claims.*

***The Policy Facts:***

- This is merely a symbolic gesture with no substantive relevance. As legal reform expert Walter Olson of the Manhattan Institute has written, the current definition of “frivolous” is so narrow that the threat of any lawyer being sanctioned is very remote.

***Reform That Includes Reasonable Limits on Non-Economic Damages Is The Only Effective Solution to Our Nation’s Medical Liability Crisis.***