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“CAPS” DO NOT LOWER INSURANCE PREMIUMS FOR DOCTORS

(AND INSURANCE INSIDERS ADMIT IT)

The hospitals and their insurers argue that “capping” compensation for injured patients will lead to reduced medical malpractice rates, or simply slower growth for doctors. Despite the enormous hardships on innocent patients caused by “caps,” or the fact that they shift compensation burdens onto others, insurers and hospitals argue that caps are therefore worth enacting.

However, history repeatedly shows that capping damages will not lead to lower rates, because what drives rate hikes has nothing to do with a state’s “tort” law. This is particularly true in New York State, as the following analysis shows.

SPECIFIC STATE EXAMPLES

HISTORICAL EXPERIENCE

Maryland and Missouri are both examples of states that enacted severe caps on damages in the mid-1980s, only to be hit with huge rate hikes later.

- **Maryland.** In the mid-2000’s, Maryland was called an American Medical Association (AMA) “problem state”¹ and a “crisis state” according to the American College of Obstetricians and Gynecologists.² Yet Maryland had had a cap on non-economic damages since 1986, originally \$350,000 but later increased somewhat.³ Despite the cap, the state experienced premiums that “rose by more than 70 percent in the last two years.”⁴ This caused lawmakers to push for, once again, even more restrictions on patients’ rights in a special session called by the Governor in 2004 ostensibly “to combat the high cost of malpractice insurance.”⁵
- **Missouri** was also identified by the AMA as a so-called “crisis state,”⁶ yet had had a cap on non-economic damages since 1986. The cap started at \$350,000 and was adjusted annually for inflation, reaching \$557,000 in 2003.⁷ “New medical malpractice claims dropped 14 percent in 2003 to what the [Missouri Department of Insurance] said was a

record low, and total payouts to medical malpractice plaintiffs fell to \$93.5 million in 2003, a drop of about 21 percent from the previous year.” And “the National Practitioner Data Bank, a federally mandated database of malpractice claims against physicians, found that the number of paid claims in Missouri fell by about 30 percent since 1991. The insurance department’s database found that paid claims against physicians fell 42.3 percent during the same time period.” *Yet doctors’ malpractice insurance premiums rose by 121 percent between 2000 and 2003.*⁸

OTHER EXPERIENCE – RATE HIKES, NOT DECREASES

Florida: “When Gov. Jeb Bush and House Speaker Johnnie Byrd pushed through a sweeping medical malpractice overhaul bill ... the two Republican leaders vowed in a joint statement that the bill would ‘reduce ever-increasing insurance premiums for Florida’s physicians . . . and increase physicians’ access to affordable insurance coverage.’” But, insurers soon followed up with requests to increase premiums by as much as 45 percent.⁹

Ohio: Almost immediately after “tort reform” passed, all five major medical malpractice insurance companies in Ohio announced they would not reduce their rates. One insurance executive predicted his company would seek a 20 percent rate increase.¹⁰

Oklahoma: After “caps” passed in 2003, the third-largest medical malpractice insurer in the state raised its premiums 20 percent, followed by an outrageous 105 percent rate hike in 2004.¹¹ The largest insurance company, which is owned by the state medical association, requested an astounding 83 percent rate hike just after “tort reform” passed (which was approved on the condition it be phased in over three years).¹²

Mississippi: Four months after “caps” passed, investigative news articles reported that surgeons still could not find affordable insurance and that many Mississippi doctors were still limiting their practice or walking off the job in protest.¹³

Nevada: Within weeks of enactment of “caps” in the summer of 2002, two major insurance companies proclaimed that they would not reduce insurance rates for at least another year to two, if ever. The Doctor’s Company, a nationwide medical malpractice insurer, then filed for a 16.9 percent rate increase. Two other companies filed for 25 percent and 93 percent rate increases.¹⁴

Texas: During the 2003 campaign for Prop. 12 – the “tort reform” referendum that passed – ads promised rate cuts if caps were passed. Right after the referendum passed, major insurers requested rate hikes as high as 35 percent for doctors and 65 percent for hospitals.¹⁵ In April 2004, after one insurer’s rate hike request was denied, it announced it was using a legal loophole to avoid state regulation and increase premiums 10 percent without approval.¹⁶ In a 2004 filing to the Texas Department of Insurance, GE Medical Protective revealed that the state’s non-economic damage cap would be responsible for no more than a 1 percent drop in losses.¹⁷

STRONG INSURANCE REGULATORY LAWS – WHICH NEW YORK DOES NOT HAVE - ARE THE ONLY WAY TO CONTROL INSURANCE RATES FOR DOCTORS AND HOSPITALS.

There are only two states in the nation where it is possible to compare the impact on insurance rates of both “caps” on non-economic damages and strong insurance rate regulation (which New York State lacks): California and Illinois. The following describes the experience of both states. It is clear – caps do not solve doctors’ insurance problems. Rather, strong insurance regulatory laws are the only effective and fair way to control insurance rates for doctors and hospitals.

CALIFORNIA

In 1975, California enacted a severe \$250,000 cap on non-economic damages, the first in the nation. This cap has severely reduced the number of genuine malpractice cases brought in California.

The impact of this “cap” on cases and payouts has been clear, because caps on non-economic damages make many legitimate cases economically impossible for attorneys to bring: those involving seniors, low wage earners (including women who work inside the home), children and the poor, who are more likely to receive a greater percentage of their compensation in the form of non-economic damages.

Insurance defense attorney Robert Baker, who had defended malpractice suits for more than 20 years, told Congress in 1994, “As a result of the caps on damages, most of the exceedingly competent plaintiff’s lawyers in California simply will not handle a malpractice case ... There are entire categories of cases that have been eliminated since malpractice reform was implemented in California.”¹⁸

Despite the reduction of legitimate cases (while deaths and injuries due to malpractice have increased), between 1975 and 1988, doctors’ premiums in California increased by 450 percent, rising faster than the national average.¹⁹

Today, as a result of the cap, California’s medical malpractice insurance industry has become so bloated that “as little as 2 or 3 percent of premiums are used to pay claims” and “the state’s biggest medical malpractice insurer, Napa-based The Doctors Company, spent only 10 percent of the \$179 million collected in premiums on claims in 2009.” Insurance Commissioner Dave Jones said that “insurers should reduce rates paid by doctors, surgeons, clinics and health providers while his staff scrutinizes the numbers.”²⁰

In 1988, California voters passed a stringent insurance regulatory law, Proposition 103, which ordered a 20% rate rollback, forced companies to open their books and get approval for any rate change before it takes effect, and allowed the public to intervene and challenge excessive rate increases.

In the twelve years after Prop. 103 (1988-2000), malpractice premiums dropped 8 percent in California, while nationally they were up 25 percent.²¹

During the period when every other state was experiencing skyrocketing medical malpractice rate hikes in the mid-2000s, California's regulatory law led to public hearings on rate requests by medical malpractice insurers in California, which resulted in rate hikes being lowered three times in two years,²² saving doctors \$66 million.

Today, if the California medical malpractice insurance industry does not lower rates on its own, as the Insurance Commissioner has requested, Prop. 103 will allow the Commissioner to take action and do so.

ILLINOIS

In 2005, Illinois enacted a non-economic damages cap on compensation for injured patients (\$500,000 for doctors and \$1,000,000 for hospitals) and a very strong insurance regulatory law. In February 2010, the Illinois Supreme Court struck down this cap as unconstitutional. Because of a non-severability clause, the insurance regulatory law was struck down, as well. In the five years these laws were in place, the following occurred:

The cap never really affected settlements or insurance rates in Illinois during the five years it existed.

This was acknowledged in a May 2010 webinar sponsored by A.M. Best, where a Chicago-based insurance attorney said:

It may be headlines in other places but here in Cook County [Illinois] I think that the Supreme Court's decision in *Lebron* was fully anticipated and discounted. None of the settlements that I've been involved in for the last couple of years paid the slightest attention to the caps anymore. There was almost a universal acceptance that it would be overturned by the Supreme Court. In fact it was overturned in Cook County two years ago. *Lebron* was a Cook County case going up, so the caps haven't been law here for quite some time.²³

The strong insurance regulatory reforms *did* take effect and had an impact.

In October 2006, the Illinois Division of Insurance announced that an Illinois malpractice insurer, Berkshire Hathaway's MedPro, would be expanding its coverage and cutting premiums for doctors by more than 30 percent. According to state officials and the company itself, this was made possible because of new insurance regulatory law enacted by Illinois lawmakers in 2005, and expressly not the cap on compensation for patients.²⁴ The new law required malpractice insurers to disclose data on how to set their rates. This, according to Michael McRaith, director of the state's Division of Insurance, allowed MedPro to "set rates that are more competitive than they could have set before."

In February 2010, the Illinois Division of Insurance released data showing that insurance regulation had greatly improved the medical malpractice insurance environment with

expanded coverage and lower premiums for doctors²⁵. Specifically, the insurance division said:

“The 2005 Reform Laws imposed changes to the Illinois Insurance Code that improved insurer reporting and transparency requirements and enhanced the Department’s rate oversight authority. Since 2005, the Department has observed improvements in the medical malpractice insurance market. In particular, the Department observed:

A decrease in medical malpractice premiums. Gross premium paid to medical malpractice insurers has declined from \$606,355,892 in 2005 to \$541,278,548 in 2008;

An increase in competition among companies offering medical malpractice insurance. In 2008, 19 companies offering coverage to physicians/surgeons each collected more than \$500,000 in premiums, an increase from 14 such companies in 2005; and

The entry into Illinois of new companies offering medical malpractice insurance. In 2008, five companies collected more than \$22,000,000 in combined physicians/surgeons premiums – and at least \$1,000,000 each in premiums – that did not offer medical malpractice insurance in 2005.”

INDUSTRY INSIDERS HAVE REPEATEDLY ADMITTED THAT CAPPING DAMAGES WILL NOT LOWER INSURANCE RATES

Representative of the Ohio Health Insurance Company testifying before the Wyoming Legislature:

Tort reform will not lower rates. (*Casper Star Tribune*, May 4, 2003)

American Insurance Association:

“[T]he insurance industry never promised that tort reform would achieve specific premium savings.” (American Insurance Association Press Release, March 13, 2002)

Sherman Joyce, President, American Tort Reform Association:

“We wouldn’t tell you or anyone that the reason to pass tort reform would be to reduce insurance rates.” (*Liability Week*, July 19, 1999)

Victor Schwartz, General Counsel, American Tort Reform Association:

“[M]any tort reform advocates do not contend that restricting litigation will lower insurance rates, and ‘I’ve never said that in 30 years.’” (*Business Insurance*, July 19, 1999)

Connecticut State Lawmaker:

“[T]he insurance industry now says [tort reform] measures will have no effect on insurance rates. We have been disappointed by the response of the insurance industry.

The reforms we passed should have led to rate reductions because we made it more difficult to recover, or set limits on recovery. But this hasn't happened." (*UPI*, March 9, 1987)

State Farm Insurance Company (Kansas):

"[W]e believe the effect of tort reform on our book of business would be small. ... [T]he loss savings resulting from the non-economic cap will not exceed 1% of our total indemnity losses...." (Letter from Robert J. Nagel, Assistant Vice President, State Filings Division, to Ray Rather, Kansas Insurance Department, Oct. 21, 1986, at 1-2.)

Aetna Casualty and Surety Co. (Florida):

After Florida enacted what Aetna Casualty and Surety Co. characterized as "full-fledged tort reform," including a \$450,000 cap on non-economic damages, Aetna did a study of cases it had recently closed and concluded that Florida's tort reforms would not effect Aetna's rates. Aetna explained that "the review of the actual data submitted on these cases indicated no reduction of cost." (Aetna Casualty & Sur. Co., Commercial Ins. Div., Bodily Injury Claim Cost Impact of Florida Tort Law Change, at 2, Aug. 8, 1986)

Allstate Insurance Company (Washington State):

In asking for a 22% rate increase following passage of tort reform in Washington State, including a cap on all damage awards, the company said, "our proposed rate would not be measurably affected by the tort reform legislation." (*The Seattle Times*, July 1, 1986)

Great American West Insurance Company (Washington State):

After the 1986 Washington tort reforms, the Great American West Insurance Company said that on the basis of its own study, "it does not appear that the 'tort reform' law will serve to decrease our losses, but instead it potentially could increase our liability. We elect at this point, however, not to make an upward adjustment in the indications to reflect the impact of the 'tort reform' law." (Letter from Kevin J. Kelley, Director of Actuarial, to Norman Figon, Rate Analyst, Washington Insurance Department, April 23, 1986, at 1)

Vanderbilt University:

A regression analysis conducted by Vanderbilt University economics professor Frank Sloan found that caps on economic damages enacted after the mid 1970's insurance crisis had no effect on insurance premiums. (Sloan, "State Responses to Malpractice Insurance Crisis of the 1970's: An Empirical Assessment," 9 *Journal of Health Politics, Policy & Law* 629-46 (1985))

NEW YORK'S PECULIAR MEDICAL MALPRACTICE EXPERIENCE: STOLEN MONEY – NOT LAWSUITS - LED TO SURPLUS PROBLEMS

In the mid-1980s, New York was one of the many states that succumbed to insurance company pressure to restrict the rights injured patients to be compensated for their injuries after being told

by insurance companies and others that this was the only way to reduce skyrocketing insurance rates for doctors.

New York State enacted three out of four of the “medical liability reform” agenda items pushed by the corporate-backed American Tort Reform Association: a sliding scale limit on attorney’s contingent fees; prohibition of lump sum compensation payments to victims; and abolition of the collateral source. These laws added to legal obstacles that New Yorkers already faced, which residents in most other states do not: a restrictive statute of limitations law that begins to run from the date of a patient’s injury as opposed to its discovery; and, an archaic “wrongful death” law dating from the 1800s that does not allow compensation for emotional loss of a child who is killed by medical malpractice.

These “tort reform” laws had such a significant impact on reducing medical malpractice payouts that the State, at the direction of Governor Pataki (and earlier Governor Cuomo) appropriated close to a billion dollars from the reserves of the Medical Malpractice Insurance Association (MMIA) - established by the State as the medical malpractice insurer of last resort – to close gaps in the State’s operating budget.

In 2001, the State finally dissolved MMIA replacing it with the Medical Malpractice Insurance Plan (MMIP), an assigned risk plan in which all medical malpractice insurers participate. Unfortunately, because the State had drained MMIA’s money, MMIP had accumulated a deficit that, by law, had to be shouldered by the few companies selling malpractice insurance in the state.

In July, 2007, Governor Spitzer established a Medical Malpractice Advisory Task Force to come up with ways to resolve this MMIP problem. While the cause of this problem had nothing to do with any lawsuit or a claims “crisis,”²⁶ the hospitals began using this process as an opportunity to argue for more limits on patients’ legal rights, using fabricated analysis and scoring by discredited insurance consulting firms like Milliman²⁷ to justify their position. While dominated by industry lobbyists, this Task Force did include members who were able to counter the information presented by hospital and industry lobbyists, and better inform the entire process. Specifically, these included three consumer and patient advocates, and three members of bar associations, including the New York State Bar Association.

In October, 2007, state insurance department representatives testified before the Task Force that the “frequency of medical malpractice insurance claims against doctors, nurses and other medical professionals are at a new low and has been stable for the third straight year. Severity is increasing at just 3 percent annually.” The Center for Health Workforce, part of the School of Public Health, University at Albany, State University of New York- an academic institution that monitors physician supply – also testified that New York is “the most richly supplied state in the nation in terms of the number of physicians in practice relative to the state population.”²⁸

The Task Force stopped meeting and never issued a report; Governor Patterson signed two different pieces of legislation to freeze medical malpractice insurance rates.

However, the MMIP problem was never fixed.

One thing is clear: none of this was the fault of patients, and it is sheer fallacy – let alone grossly unfair - to try to resolve New York’s insurance problems on the backs of brain-damaged babies and profoundly injured patients.

NOTES

¹ AMA, *American’s Medical Liability Crisis: A National View*, http://www.ama-assn.org/ama1/pub/upload/mm/450/med_liab_20stat.pdf (June 2004).

² Mary Ellen Schneider, *Maryland: A State in 'Crisis' for Ob.Gyns*, OB/GYN NEWS, Oct. 15, 2004.

³ MD. CODE ANN., CTS. & JUD. PROC. §11.108.

⁴ James Dao, “A Push in States to Curb Malpractice Costs,” *New York Times*, Jan. 14, 2005.

⁵ *Id.*

⁶ AMA, *American’s Medical Liability Crisis: A National View*, http://www.ama-assn.org/ama1/pub/upload/mm/450/med_liab_20stat.pdf (June 2004).

⁷ Missouri Dep’t of Ins., *Medical Malpractice Insurance in Missouri: The Current Difficulties in Perspective 7* (2003).

⁸ “State report says malpractice claims fell,” *Associated Press*, November 5, 2004.

⁹ Julie Kay, “Medical Malpractice; Despite Legislation that Promised to Rein in Physicians’ Insurance Premiums, Three Firms File for Big Rate Increases,” *Palm Beach Daily Business Review*, Nov. 20, 2003.

¹⁰ *E.g.* “Despite New Law, Insurance Companies Won't Lower Rates Right Away,” *Associated Press*, Jan. 9, 2003.

¹¹ “Hike Approved for Premiums,” *Daily Oklahoman*, April 8, 2004.

¹² *E.g.* “Oklahoma's Largest Medical-Liability Company Gets 83% Rate Increase Over Three Years,” *BestWire*, Dec. 2, 2003.

¹³ *E.g.* “Miss. Tort Reform Effort Falls Short,” *Commercial Appeal*, Feb. 18, 2003; Reed Branson, “Doctors In Oxford Shut, Cite Insurance,” *Commercial Appeal*, Feb. 14, 2003; Ben Bryant, “Tort Reform Has Done Little to Ease Malpractice Crisis,” *Biloxi Sun-Herald*, Feb. 2, 2003.

¹⁴ *E.g.* Joelle Babula, “Medical Liability Company Requests Premium Increase,” *Las Vegas Review-Journal*, Feb. 11, 2003; Babula, “State Insurance Program Holds Off on Lowering Rates,” *Las Vegas Review-Journal*, Aug. 14, 2002.

¹⁵ *E.g.* Darrin Schlegel, “Some Malpractice Rates to Rise Despite Prop. 12,” *Houston Chronicle*, Nov. 19, 2003; Darrin Schlegel, “Malpractice Insurer Fails in Bid for Rate Hike,” *Houston Chronicle*, Nov. 21, 2003; (Oct. 2003 rate filing from Texas Medical Liability Insurance Assoc. (JUA) to Texas Dep’t of Insurance).

¹⁶ “Insurer Switching to Unregulated Product to Raise Premiums,” *Assoc. Press*, April 10, 2004.

¹⁷ The GE Medical Protective filing can be found at: <http://www.consumerwatchdog.org/insurance/rp/rp004689.pdf>.

¹⁸ See, <http://www.multinationalmonitor.org/mm2003/032003/court.html>

¹⁹ See, Consumer Watchdog, “Insurance Rate Regulation, Not Medical Liability Limits, Lowered California Malpractice Insurance Premiums,” <http://www.consumerwatchdog.org/newsrelease/house-republicans-have-their-talking-points-california-backwards-insurance-rate-regulati>; *How Insurance Reform Lowered Doctors’ Medical Malpractice Rates in California and How Malpractice Caps Failed 1* (March 7, 2003), <http://www.consumerwatchdog.org/healthcare/rp/rp003103.pdf>.

²⁰ Shaya Tayefe Mohajer, “Calif regulator: Malpractice insurance too pricey,” *Associated Press*, February 17, 2011; http://www.mercurynews.com/news/ci_17414760?nclink_check=1

²¹ Foundation for Taxpayer and Consumer Rights, *Insurance Regulation, Not Malpractice Caps, Stabilize Doctors’ Premiums*, <http://www.ftcr.org/healthcare/fs/fs003013.php3> (last visited Feb. 16, 2005).

²² Foundation for Taxpayer and Consumer Rights, “California Group Successfully Challenges 29.2% Rate Hike Proposed by California's Ninth Largest Medical Malpractice Insurer; Proposition 103 Invoked to Slash Medical Protective Company's Requested Increase by 60%,” Sep 16, 2004, <http://consumerwatchdog.org/insurance/pr/pr004625.php3>.

²³ “State of the Medical Professional Liability Market,” *Best’s Review*, May 2010.

²⁴ Adam Jadhav, “Minor insurer is cutting malpractice rates for doctors,” *St. Louis Post-Dispatch*, October 13, 2006.

²⁵ “Illinois Department of Insurance Encourages Insurers to Comply with 2005 Medical Malpractice Reforms; Department observed increased competition, 10% decrease in premium paid since 2005 reforms,” February 20, 2010, found at http://www.insurance.illinois.gov/newsr/s/2010/02202010_a.asp

²⁶ See, e.g., Public Citizen Study, “A Self-Inflicted Crisis: New York’s Medical Malpractice Insurance Troubles Caused by Flawed State Rate Setting and Raid on Rainy Day Fund” (November 2007).

²⁷ For example, in 2007, Washington State voters passed by a huge 58-42 margin, an initiative requiring that insurance companies act in good faith or face huge damages. The leading voice in favor of R-67 was the State’s insurance commissioner, Mike Kreidler. The leading opposition, the insurance industry, based their position on a discredited Milliman analysis, which both Kreidler and the voters shunned.

²⁸ Physician Supply and Demand Indicators in New York, 2000-2005: A Summary of Trends for 35 Medical Specialties. Rensselaer, NY: Center for Health Workforce Studies, School of Public Health, SUNY Albany.