OBG MANAGEMENT

Here's how *we* can solve the malpractice dilemma

Past malpractice crises have taught us much. But the ultimate fix? That requires each of us to step up.

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Who do you think is to blame for the latest malpractice crisis?

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The lessons we've learned from past malpractice insurance crises are worth reviewing so we can avoid the next one. In the mid-1970s, it was sky-rocketing malpractice insurance rates—100% to 150% increases year after year. In the 2000–2003 crisis, the number of actual claims fell but the payout per claim soared.

Through these crises, we've learned the value of physician-owned malpractice insurance companies, the importance of tort reform (most notably in California), the roles that inflation and technology play, and the need for policing our own ranks to root out incompetent physicians. In this article, I analyze those past crises and the solutions that led us out of them.

That '70s show

Nobody knew whom to blame for what happened in the 1970s. Attorneys reproached bad physicians and greedy insurance companies. Insurance companies criticized inept physicians and unscrupulous attorneys. We physicians didn't suddenly become incredibly stupid between 1976 and 1977, but we were at a disadvantage because we didn't have access to unbiased data to assess the problem.

So state medical societies responded by organizing malpractice liability insurance companies, which became quite successful. This led to the creation of the Physicians Insurance Association of America (PIAA), organized to share solutions and data. These unbiased data have been invaluable in helping us analyze the numerous crises of the past 30 years.

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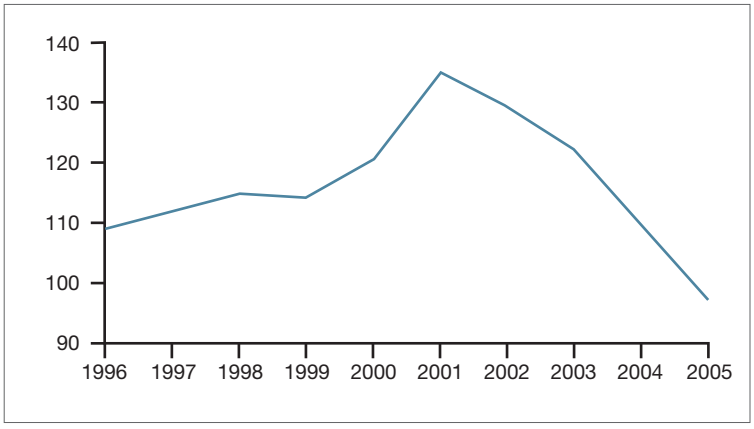
The perfect storm

We analyzed the cause of the late 1970s crisis as the perfect storm: increased severity and increased frequency (see "A glossary of insurance-speak," page 28). In the 2000–2003 crisis, the severity of claims increased while the frequency of claims actually fell.

Tracking the combined ratios (losses to premiums) of PIAA companies demonstrates the devastating effects of the crisis years (**FIGURE 1**).[1] Combined ratios around 110, indicating a 10% loss, are tolerable. When the combined ratio inched up to 114 and then skyrocketed, as it did in 2000–2001, crisis ensued.

What this means in real dollars is quite telling. If an insurance company has $100 million income and combined ratios of 120, 134, 129, and 122 over 4 years, the company has lost $105 million (20 + 34 + 29 + 22 = 105)!

FIGURE 1 10 years' combined ratio of all PIAA companies[1]



The spike marks the 2000–2003 crisis.

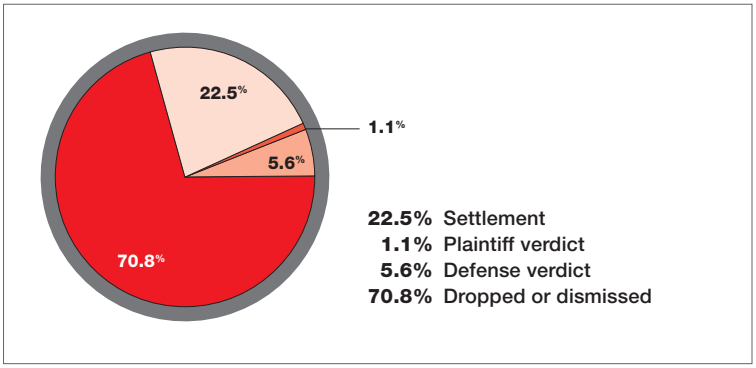
The fix, but not for you

As **FIGURE 1** shows, the combined ratios came back into line as the crisis abated—for insurance companies, not physicians.

Insurance companies rectified their combined ratios by raising premiums. If losses rise (numerator), insurance companies can increase premiums (denominator) to bring their combined ratios back into line.

This is healthy for the insurance companies—and you, as an insured, want and need a healthy company—but it is very bad for your pocketbook. Rates increased 105% over 4 years and are likely to stay there until the next crisis, when they will rise even further.

FIGURE 2 Outcome of malpractice cases closed in 2004[2]



A large majority of liability cases are closed without payment.

Who's to blame?

That depends on who controls frequency and severity. I will eliminate the "greedy" insurance companies from this discussion. Most physician-owned companies simply return any excess profit to their insured members. Two parties control frequency of claims:

The attorneys. They attempt to develop new theories of litigation and exploit weaknesses in our scientific knowledge. When it's a bad baby, it must be the doctor's fault. Lawsuits with no medical foundation remain an expensive problem; 70% of cases nationwide are closed without payment (**FIGURE 2**).[2]

The physicians. We are also culpable. In the 1970s, we believed all physicians were going to be sued (mostly true), and that we would all be sued equally (not true). In some jurisdictions, almost one half of all paid malpractice claims come from a fairly small number of habitual offenders.[3]

The peer-policing problem

Physician peer policing has become restrained and time consuming. You have to give the bad ones time to reform.

Juries, however, have no patience with

A glossary of insurance-speak

Severity Payout per claim

Frequency Overall number of claims made (for every 100 physicians)

Combined ratio Cumulative effect of expenses, calculated as:

$$\frac{\text{(claims paid + costs)}}{\text{income from premiums}}$$

An insurance company's goal, of course, is to have income = expenses.

peer policing. They extract impressive damages for allowing an inept physician to see even one patient, let alone practice for 6 months and hurt a number of people while under his or her peers' watchful eyes.

Effects of growing severity

Frequency pales in comparison with the damage wrought by increasing severity. Two dynamics mainly control severity: **1)** a combination of inflation and improved technology and **2)** juries.

Inflation and improved technology

Compare how we have improved our care for injured parties versus the above-inflation cost of that care. Babies with cerebral palsy live longer and we are ever improving their care. This is good, but very expensive.

We should expect increases in severity to mimic increases in inflation and technology, to parallel the increase in health-care costs in general. However, the only place where this has happened is California.[4]

Most juries are reasonable…

Few states restrict the pain and suffering awards juries may grant. None restrict damage awards. Juries can award $100,000 or several million dollars for the same injury. They may disregard scientific data and expert testimony. Juries carry our wallets (and retirement plans, houses, cars, and kids' educations) in their hip pocket.

FAST TRACK

Few states restrict the dollar amount awarded for "pain and suffering," and none restrict damage awards

Almost all jurors want to do the right thing, exhibiting an organic restraint. When interviewed after a case, jurors are typically sincere and responsible and want assurance that they made the right choice. The jury system usually works.[5]

…but there are outliers

The killers, however, are the outliers. Look what happens to our fairly strong insurance company's combined ratio if a case that we thought was winnable results in a $15 million jury verdict. Our company shoots for a combined ratio of 105% to 110% (we plan to lose $5 million to $10 million a year, which our return on investments covers). All of a sudden, besides our planned losses, we're assessed an extra $15 million. Then we are looking at a combined ratio in the crisis range: 125%. One case, one runaway jury. A volatile game.*

Jury awards have been increasing faster than inflation and technology together can support. Perhaps it is because the value of the "mega dollar" has risen far greater than inflation. Perhaps it's the fault of the lottery, the exceptional millionaire of the 1960s being replaced by the billionaire of the 1990s (a thousandfold increase) and the multibillionaire of the 21st Century (another hundredfold increase). I speculate that jury awards more closely follow this trend.

What have we learned?

Sad to say, the modern function is too similar to that of the 1970s. We have ruled out the "greedy" insurance companies and developed solid unbiased data—good steps—but we have not been able to avoid crises nor have we stabilized premiums to match medical inflation.

Where physicians "healed thyselves"

Under these circumstances, well-run physician-owned and -governed companies with

* This example is a bit disingenuous. In real life, the insurance industry has several mechanisms available to cushion a solitary large outlier like this in any given year (reinsurance, etc). However, the net effect as portrayed here is quite real.

TABLE California's MICRA reforms[2]

• $250,000 cap on noneconomic damages
• Collateral source offsets
• Periodic payment of future damages
• One-third-year statute of limitations/repose
• Joint and several liability
• Limit on contingency fees

a nonprofit but sound financial goal should continue to offer the best long-term rates and security. Based on reasonable combined ratio goals (105 to 110), income from the company's invested assets can reduce physician premiums.

Physician owners and physician input throughout the corporate structure sustain the business model. Professional medical expertise in reviewing claims, peer review of physicians' performance, and support for physicians through the onerous lawsuit experience augment a medical malpractice insurance company. Claims committees of multispecialty physicians ensure that we fight when right and settle expeditiously when wrong, saving time and money.

A positive side effect

Physician-owned companies have created a cadre of physicians schooled in the medical malpractice insurance business. This makes us much less vulnerable in the political arena. Our pooled data enable us to negotiate from truly informed positions.

Four things we can do to fix it

If malpractice costs do hinge on inflation and technology, repeat offender doctors, aggressive attorneys, and runaway juries, then another crisis is imminent unless we can rein in attorneys and juries.

As physicians, if we hurt someone we expect them to be given reasonable restitution, and we strive to ensure the return of as much function as possible. We are making strides to find and limit incompetent physicians. Although frequency, which reflects frivolous lawsuits, has been stable recently, aggressive attorneys remain a threat.

Here are four ways to fix the problem:

Do your part. Remodeling juries is a political solution—with a capital "P." In spite of our 30-year effort to hire lobbyists and, at times, an 85% approval rating by the general public for tort reform, most states have yet to enact truly effective limits on juries. To avoid the next crisis, we will need a grassroots, every-physician, hands-on movement to pass tort reform.

Copy California. The Medical Insurance Compensation Reform Act (MICRA) of 1975 has been quite successful in California (see the **TABLE**).[2] A cap on noneconomic damages is the most important aspect of the MICRA reforms—it limits the runaway jury's ability to award excessive verdicts.[4] It is also the most difficult reform to get passed because it is perceived to limit a plaintiff's right to fair and reasonable compensation.

Get ready for the next crisis. The most recent crisis has passed. Regrettably, we lost our best opportunity to have federally mandated reform in 2003 and 2004 when President Bush actively campaigned for caps and most of the MICRA reforms. When the next opportunity comes, we need to be ready.

Organize. Our malpractice premiums are up 925% since the 1970s. Our paid lobbyists and PACs have not gotten the job done. Obviously, throwing money at the problem doesn't work. Next time, we must organize every physician nationwide to attain our political goal: to pass caps and MICRA reforms.

Your state medical society, your specialty society, and the PIAA (www.piaa.us) have the contact numbers and e-mail addresses of your legislators. The next time this is an issue, call your legislators. They seem to listen to constituents more than they listen to lobbyists.

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Malpractice premiums have risen 925% since the 1970s

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