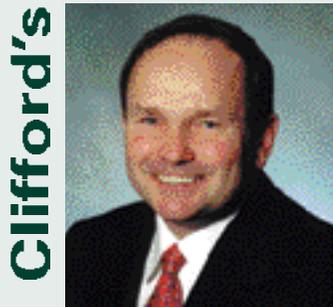




SPECIAL ISSUE: CIVIL JUSTICE REFORM ALERT

Clifford's Corner



Robert A. Clifford

Robert A. Clifford testified on March 17 before the Illinois Senate Health and Human Services Subcommittee. The topic was Medical Malpractice Insurance. The day-long testimony, chaired by Sen. Susan Garrett (D-Lake Forest), considered the pros and cons from a number of informed legal experts on changing the civil justice system in this state.

Medical Association, doctors' malpractice premiums make up less than 4 percent of their total operation revenue.

Second, the largest insurer of doctors in this state, the Illinois State Medical Insurance Exchange, whines that it needs to have a 35 percent premium increase because of a "lawsuit crisis." Insurance company executives claim they don't have sufficient funds.

But data from the sworn statement of ISMIE filed with the state shows that the number of paid claims is actually down more than 20 percent in the last four years, and the average paid claim has increased only slightly more than the rate of medical inflation.

Yet, to the public, the insurance groups and physicians claim that these figures are on the rise. It makes for misleading headlines and unsubstantiated editorials.

The truth is ISMIE took in almost 10 percent less in premiums last year, its net capital (investment) losses jumped over 700 percent last year, and its investment income plummeted 36 percent in the last four years. These figures parallel what is happening to everyone across the country because of the drop in the stock and bond markets.

Yet, according to its sworn statements, ISMIE has sufficient funds to

Chicago Sun-Times

May 22, 2003

Don't Swallow Hype on Malpractice Caps

At first glance, the May 15 editorial espousing caps on damages in medical malpractice cases might have knee-jerk logical appeal. But a closer look at the facts leads to the opposite conclusion.

First, the claim that there is a lawsuit crisis is unfounded because lawsuits against doctors are not on the rise in Illinois. The number of medical malpractice payouts fell by almost 4 percent in the last eight years. Medical malpractice payouts rose slower than medical inflation since 1990, and according to the American

carry over \$1million in loans to its own directors and officers on its 2002 books.

As doctors at the Daley Center Plaza rally shouted from the dais, Illinois already has lawsuit reform in place—from requiring a medical affidavit in order to file a case to prevent frivolous lawsuits to controlling lawyers' fees. All that's left is caps, according to the doctors.

But let's face it, caps already exist in Illinois. The limit of a physician's insurance policy generally sets the ceiling on what a victim of malpractice can recover. No patient, no matter how badly hurt, is in a position to put a doctor out of business.

It boils down to insurance companies that don't want to pay what doctors have contracted for to protect them when they make a mistake. A cap of \$250,000 (or any other amount) would affect those hurt the worst by the negligence of medical professionals while protecting the very people who caused the harm.

The Coalition for Consumer Rights in Illinois released a report this month that shows that this state is near the bottom of the list in taking serious disciplinary action against physicians. The Department of Professional Regulation, which polices the medical profession, revoked only half the number of licenses in 2002 as it did the year before. However, the agency continues to overlook or oppose public policy proposals to crack down on dangerous practitioners such as Patient Right to Know.

Taking a step in the direction of caps, as the Sun-Times puts it, appears to advocate an experimental approach to see if caps will work. But we don't need such an experiment at the expense of consumers' fundamental rights.

Before jumping on the caps bandwagon, the Sun-Times, physicians and consumers need to see the cargo its carrying. Or else they may find that the trail is set on a course for disaster.

ROBERT A. CLIFFORD
PARTNER, CLIFFORD LAW OFFICES

Frank and Ernest



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Bill of Particulars

Doctors Rally in Chicago Over Insurance Premium Hikes

Hundreds of doctors gathered on the Daley Center Plaza May 13 to protest their rising medical malpractice premiums. Although much of the rhetoric was aimed at lawsuits and the civil justice system, many of the speakers both on the dais and in the crowd referred to the uncontrolled insurance industry that has hiked their rates tens of thousands of dollars in the last few years to make up for losses in the stock and bond markets.



Insurance Companies' Figures Don't Figure

ISMIE is the largest insurer of doctors in Illinois. It has recently run advertisements arguing for caps on damages in medical malpractice cases. Their arguments are not supported by the facts.

According to ISMIE, the number of malpractice cases is increasing. But, U.S. government data and court records show that since 1997 there has been a steady decline in the number of medical malpractice settlements and verdicts. And, ISMIE has paid on 20% less cases since 1999. ISMIE also argues that in the last two years, its average payout per claim rose over 50% to over \$600,000. In fact, the average payout rose only 15%, from \$480,000 to about \$560,000.

ISMIE argues that caps on damages will reduce malpractice premiums. But, caps didn't have that effect in California. After caps were passed, insurers continued to raise their rates. It took voter-enacted Proposition 103 and numerous consent decrees

to force insurers to give back \$135 million that they had extorted from physician policyholders over the years.

ISMIE argues that doctors are leaving their practices in Illinois because there are no caps on damages. But, a 2001 study of California physicians found that, despite caps on malpractice awards, 43% of all doctors planned to close their practices within

three years. These doctors cited low reimbursement rates, hassles with managed care plans, and government regulation as their main sources of dissatisfaction.

ISMIE argues that it bears no responsibility for its recent plan to increase malpractice premiums. But, ISMIE's own sworn filings with the Illinois Department of Insurance state "Net income in 2002 for ISMIE was a loss of \$61.7 million, compared to last year's income of \$5.0 million. ... [I]nvestment income was down in 2002 because of the drop in interest rates. Additionally, ISMIE realized significant losses from the sale of WorldCom, Tyco, and Qwest securities." (Management's Discussion and Analysis, 2002 ISMIE Annual Statement).

And, according to the Wall Street Journal (June 24, 2002), "[A] price war that began in the early 1990s led insurers to sell malpractice coverage to obstetrician-gynecologists at rates that proved inadequate to cover claims... Some of these carriers had rushed into malpractice coverage because an accounting practice widely used in the industry made the area seem more profitable in the early 1990s than it really was. A decade of short-sighted price slashing led to industry losses of nearly \$3 billion last year." Moreover, "[i]n at least one case, aggressive pricing allegedly crossed the line into fraud."



Illinois Consumer Group Releases Study

The Illinois Coalition for Consumer Rights released a study this year that revealed that the high costs of physicians' malpractice premiums are due to insurance companies' practices. The group has criticized the Illinois Department of Professional Regulation for not cracking down on bad doctors, also a possible solution to lowering premiums. That agency disciplined fewer than 2 percent of the negligent physicians in Illinois, and is ranked near the bottom of all the states in disciplining doctors.

The Illinois State Medical Insurance Exchange (ISMIE), the state's largest insurer of doctors, says that malpractice premiums will go up roughly 35 percent this year over last. Yet, the number of malpractice claims paid by ISMIE declined from 356 in 1999 to 281 in 2002. In that same period, total damages paid remained stable.

Senator Dick Durbin (D-Ill.) has announced a proposal whereby doctors and hospitals can claim a tax credit in 2003 and 2004 for a percentage of the malpractice premiums paid, with a higher credit for those in higher risk specialties such as obstetrics and surgery.

Number of Illinois Medical Malpractice Claims Paid by ISMIE

Number	356	340	296	281
Year	1999	2000	2001	2002

Medical Malpractice Victims Targeted by Congress

President Bush has called for a national \$250,000 cap on non-economic damages such as pain and suffering, disability and loss of society in medical malpractice lawsuits. Such caps, which have been found unconstitutional three times in Illinois, would pre-empt state law and harm those who have been victims of malpractice.

Ignoring the fact that judges routinely exercise their powers to reduce or reverse jury awards that are excessive, Bush is asking congress to take away the determination of these damages from the state.



Some comments from the medical malpractice attorneys at Clifford Law Offices...

KEITH HEBEISEN:

“The Illinois Supreme Court has held three times that caps on damages are unconstitutional. Damage cap



legislation invariably favors special interests and cannot be allowed if we are to protect each person's right to come to the courthouse to file a legitimate claim. The Annual Statements filed with the state Department of Insurance by ISMIE, the largest insurer of doctors in this state, make it clear that the insurance companies are merely “crying wolf” again. Last year, ISMIE had enough money to carry \$1 million in loans to its top executives. Its chief operating officer and top lobbyist pled guilty in 2002 to taking kickbacks on state contracts. He also resigned but was also given a golden parachute worth almost \$5 million. ISMIE's top 10 officers were paid a total of nearly \$8.4 million last year. Yet, this company has the audacity to demand as much as a 35 percent hike from doctors in premiums to pay it? Doctors should be picketing the insurance companies' offices, not the Daley Center courthouse.”

ROBERT STRELECKY:

“Having practiced for 20 years defending doctors and hospitals



before I came to Clifford Law Offices, I have seen the issue from the other side close-up. I have witnessed insurance companies forcing medical professionals into compromising positions where a person's health is at stake. I have seen doctors strapped by an insurance company that is determining how much a physician can charge for a specialized procedure through its stingy reimbursement policies. These set rates often are what are making it impossible for medical professionals to run a business. The crux of the problem lies with insurance companies which must be controlled so doctors can do their jobs and do them well.”

JEFFREY KROLL:

“Caps on damages are not the answer when you are looking at a lifetime of care for a patient injured at the hands of a negligent medical professional. To allow a figure arbitrarily set by a legislature for an individual's pain and suffering, disfigurement, or disability is to victimize that person again when all that person is trying to do is cope with a compromised lifestyle.”



ROBERT A. CLIFFORD:

“Reforms already are in place in Illinois that protect medical professionals from so-called frivolous lawsuits. No punitive damages are allowed in medical malpractice cases. A doctor must certify a complaint as meritorious before it can be filed. Plaintiffs' attorneys' legal fees are restricted according to a statutorily set sliding scale based on the recovery. The physician's malpractice policy limit is the cap that is most real because no victim of negligence has the ability to run a doctor out of business. Instead of more lawsuit reform, we must look at the insurance industry, which is largely unregulated. We must examine their books before hefty rate increases are allowed by greedy executives. We must closely monitor their investments and expenditures if these companies are to have such wide-ranging impact on the public.”

KATHERINE DZIK:

“Lobbyists are trying to point to California for proof that caps on non-economic damages lower doctors' malpractice premiums. In reality, the 1975 legislation imposing caps that was passed in California had no impact on doctors' malpractice premiums in that state. In fact, premiums continued to rise. Premiums did not start to decline until insurance reform was passed 14 years later, which regulated the amount that insurance companies could raise premiums in that state. Insurance company executives, though, leave out that important point and try to pin the blame on lawsuits and trial lawyers. Consumers have to know the whole story before taking sides in this heated debate.”



SUSAN CAPRA:



“Caps on non-economic damages are unfair, particularly for women because they devalue the worth of housewives and homemakers. The stay-at-home moms who suffer negligence at the hands of a medical professional find that a court of law limits their non-economic damages while their economic damages, or what they earned, also is worth little to nothing. Is that the message we want to send to the families across the state and across the country? Moms who want to give their children a foundation at home are as valuable as those who choose to earn a living in the working world.”

TIMOTHY TOMASIK:

“Arbitrarily limiting a catastrophically injured patient's ability to recover compensation

for their permanent disabilities through a cap on damages is not only unjust, but it will not reduce the cost of medical malpractice premiums. This has been proven by the many states, like California, that already have a limitation on monetary awards but yet have doctors paying premiums that are substantially the same as states without caps. The hard numbers show that insurance companies, like the majority of Americans, have suffered huge financial losses due to their own underwriting practices and the depressed stock and bond markets. Insurance companies are now trying to close the gap thru rate increases. This has occurred despite the number of medical malpractice filings declining nationwide and doctors winning more than 75% of all trials that go to verdict.”



RICHARD BURKE:

“Arbitrary and discriminatory caps on non-economic damages hurt the patients with the most serious injuries. The patient who loses a leg, her eyesight, or suffers paralysis will

lose, not only a lifetime of income, but will have to pay exorbitant medical bills, nursing home care, or future surgeries. Where is the fairness in capping that person's damages instead of allowing a jury to decide what those injuries are worth? The framers of our Constitution granted Americans that right hundreds of years ago, and it is not up to legislators today, goaded by greedy lobbyists, to change this established right. Personal legal rights are under attack by corporate America, and it is up to consumers and patients to protect themselves.”



SHERI TARR:

“I am a former corporate executive in the healthcare and

medical products industry, and I lobbied against 'tort reform' and product liability 'reform' in Washington, DC, before becoming an attorney. The benefits to all of us from recent advancements in medicine are undeniable. Nevertheless, in this competitive global marketplace, where corporations have every financial incentive to get products to market as quickly as possible, product defects do occur and corporate managers do make errors in judgment, including those related to product design, testing, marketing, or distribution. The personal injury inflicted by these defects and by corporate malfeasance can be catastrophic. Corporate wrongdoers should not be permitted to reap huge financial gains from sales of medical devices and pharmaceuticals, while at the same time be shielded from lawsuits or damage awards when consumers are injured or killed by these defects. It is, therefore, vital that we continue to honor the fundamental principle in our society, that every citizen is responsible for the consequences of his or her own conduct. The wisdom of this truth should not be diminished simply because the citizen whose conduct has created the harm is a corporation.”



Don't Hurt the Injured by Capping Damage Awards

Dozens of families traveled to Washington, D.C. in mid-February to tell legislators how negligent doctors or hospitals ruined their lives. There were dozens of stories, each a tragedy of how a family tries to get through a day after negligent doctors left someone injured for life: brain-damaged babies, now teenagers, who can't dress themselves or eat; a man in a wheelchair on round-the-clock oxygen because his good lung was removed instead of the cancerous one; a healthy teenage boy who goes into the hospital for simple hernia surgery and is left unable to walk or talk because of improperly administered anaesthesia.

These people talked of how they had put their trust in professionals, in doctors who took an oath to do them no harm. Instead they recounted how doctors committed negligent acts or omissions and then continued to neglect them or attempted to cover up their mistakes by evading or lying or even altering medical records.

The Tribune suggested a \$500,000 cap in "Solving the malpractice mess," (Editorial, Feb. 7). What does that mean for, say, a 20-year-old medical malpractice survivor in a wheelchair for the rest of a normal life expectancy? That's \$24 a day for the rest of his

life. What can you do on \$24 a day, much less if you have special needs and are confined to a wheelchair?

Are the families mad? Sure. But they made the trek to our nation's capital to try to help others, so that it wouldn't happen to anyone else. They were there to plead with those who pass legislation asking them to focus on the real problem: a crippled health care industry coupled with an insurance lobby that tries to blame trial lawyers for the entire problem.

As insurance companies try to be competitive, they lower premium rates to attract customers when the bond market is good. When the bond market is soft, as in recent years, their investments, as does everyone else's, suffer. But that doesn't justify passing those losses on to physicians in the way of higher premiums. Why are they exempt from antitrust regulation and, instead, allowed to charge whatever they see fit?

Many congressmen indicated they would not discuss the issue of capping damages, when it is expected to come before Congress this session as a Bush priority, unless insurance industry practices were scrutinized and regulated as well.

The time has come to focus on this multi-

faceted problem, but let's look at the entire picture and the real culprits behind the skyrocketing insurance rates. The number of lawsuits in Illinois filed actually has decreased per capita since 1993 because the number of lawsuits has remained steady while the population has increased, according to the Illinois Department of Insurance.

Illinois already has in place a number of controls over medical malpractice cases: Punitive damages are banned, a doctor's certificate of merit is required in order to file a lawsuit and contingency fees by lawyers are controlled by statute with a graduated scale that decreases the higher the damage award.

Capping compensatory damages is not the answer. Those who suffered only minor injury won't reach the \$500,000 cap anyway. On the other hand, those severely injured, who need a jury to determine fair and just compensation over a lifetime, would see their damages arbitrarily capped at a figure set by someone who never even heard their story, understood their pain or walked in their shoes for even a minute, much less a lifetime. Why target those deserving victims with a cap?

ROBERT A. CLIFFORD
CLIFFORD LAW OFFICES
CHICAGO



• THE PRESSROOM •

In February, **Keith Hebeisen** traveled to Washington, D.C., with a former client who testified at a House Judiciary Committee hearing in opposition to caps on damages in medical malpractice cases. While in Washington, he also attended a joint hearing of the U.S. Senate Health and Judiciary Committees which held hearings on capping damages in medical malpractice cases. He also wrote a guest essay published in the Northbrook Star in March, responding to a previous guest essay by a doctor who had called for caps on damages on medical malpractice cases. In April, he was an invited guest speaker at a symposium regarding medical malpractice reforms at Northwestern along with the presidents of the American Medical Association, Illinois State Medical Society, and Chicago Medical Association. Recently, in Springfield, he assisted in drafting legislation which will extend the right of privacy for patients who are admitted to hospitals.

Kevin Durkin spoke in our nation's capital with senators and representatives from Illinois on February 26 about the unfairness and discriminatory nature of caps on damages on behalf of his clients.

Susan Capra recently authored an article on the impact of tort reform on women and children in a special issue of the Chicago Daily Law Bulletin that recognized women in law in Chicago.



Kevin Durkin



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