MEDICAL LIABILITY AND MALPRACTICE INSURANCE IN NEW YORK STATE

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SUMMARY/KEY FINDINGS

Americans for Insurance Reform (AIR) is a coalition of nearly 100 consumer and public interest groups around the country, including New York State. Under the direction of actuary J. Robert Hunter, [1] AIR has produced the most comprehensive review of medical malpractice premiums and claims, to date. Based on its analysis, AIR finds:

- Inflation-adjusted payouts per doctor in New York State have been stable, have failed to increase in recent years, and are comparable to what they were in the early 1980s.

- Inflation-adjusted premiums per doctor premiums in New York State are among the lowest they have been in over 30 years, comparable to what they were in the mid-1970s.

- Loss ratios are not unusal; they clearly display no "crisis," but rather that medical malpractice insurers have been performing well in New York State.

AIR concludes that there is absolutely no reason to further limit the liability of doctors and hospitals, who already benefit from numerous liability protections in New York State for their negligence.[2]

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[1] Hunter is Director of Insurance for the Consumer Federation of America, a federation of some 300 pro-consumer groups with over 50 million Americans as members of whom over 5 million are New York members. He was formerly the Commissioner of Insurance for the State of Texas, the Federal Insurance Administrator under both Presidents Carter and Ford, and President and Founder of the National Insurance Consumer Organization. As a consultant on public policy and actuarial issues for various government agencies, his clients have included the U.S. Department of Housing and Urban Development, the General Accounting Office, and the Environmental Protection Agency, as well as state governments including California, Florida, Georgia, Massachusetts, Maine, North Carolina, New Jersey, New York, Oklahoma, South Carolina and Texas. Other experience includes work in the private sector, including as Associate Actuary for the Mutual Insurance Advisory Association and Mutual Insurance Rating Bureau (now AIPSO), Actuarial Supervisor for the National Bureau of Casualty Underwriters (now ISO), and Underwriter, Atlantic Mutual and Centennial Insurance Companies. His awards include the Award for Excellent Service for the Secretary of the Department of Housing and Urban Development (HUD), for work performed from 1971 to 1977, the Esther Peterson Award for lifetime service to consumers in 2002, and twice, the Schraeder-Nelson Publications Award for article of the year: in 2002 for "Enron's Impact on State Insurance Regulation" and in 2007, for "How Regulators Can Return P/C Profits to Reasonable Levels," *Regulator Magazine*, Insurance Regulatory Examiner's Society. He is the author of numerous publications on insurance and related topics and has served as an Executive Committee member and advisor to the National Association of Insurance Commissioners (NAIC). Over the past decades, Mr. Hunter has testified in every state in the Union on the medical malpractice insurance cycle and related premium spikes.

[2] In the mid-1980s, New York 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 runs 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

THE CONTEXT: HISTORIC CYCLES AND UNIQUE NEW YORK ISSUES

Medical liability insurance is part of the property/casualty sector of the insurance industry. This industry's profit levels are cyclical, with insurance premium growth fluctuating during hard and soft market conditions. This is because insurance companies make most of their profits, or return on net worth, from investment income. During years of high interest rates and/or excellent insurer profits, insurance companies engage in fierce competition for premium dollars to invest for maximum return, particularly in "long-tail" lines – where the insurers hold premiums for years before paying claims – like medical malpractice. Due to this intense competition, insurers may actually underprice their policies (with premiums growing below inflation) in order to get premium dollars to invest. This period of intense competition and stable or dropping insurance rates is known as the "soft" insurance market.

When interest rates drop or the economy turns causing investment decreases, or the cumulative price cuts during the soft market years make profits unbearably low, the industry responds by sharply increasing premiums and reducing coverage, creating a "hard" insurance market. This usually degenerates into a "liability insurance crisis" often with sudden high rate hikes that may last for a few years. Hard markets are followed by soft markets, when rates stabilize once again.

The country – and New York State - experienced a hard insurance market in the mid-1970s, particularly in the medical malpractice and product liability lines of insurance. A more severe crisis took place in the mid-1980s, when most liability insurance was impacted. Again, in 2001 a "hard market" took hold.

In addition, New York State's medical malpractice insurance market has had a unique problem in recent years. This was described in December 17, 2007 "Report of J. Robert Hunter on New York State Medical Malpractice Insurance Situation,"[3] specifically that in the 1990s, the State 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. Governor Spitzer established a Medical Malpractice Advisory Task Force to come up with ways to resolve this MMIP problem.

The amount of this deficit was never clear. In his report, Hunter found at the time that the state medical malpractice insurance deficit was based on figures that the insurance department admitted might not be accurate yet is asserted without caveat. Hunter strongly cautioned against any precipitous action and urged the department to evaluate this situation on a year-by-year cash flow basis. Notably, in 2008, the Task Force stopped meeting and never issued a report. Governor Patterson later signed two different pieces of legislation to freeze medical malpractice

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killed by medical malpractice.

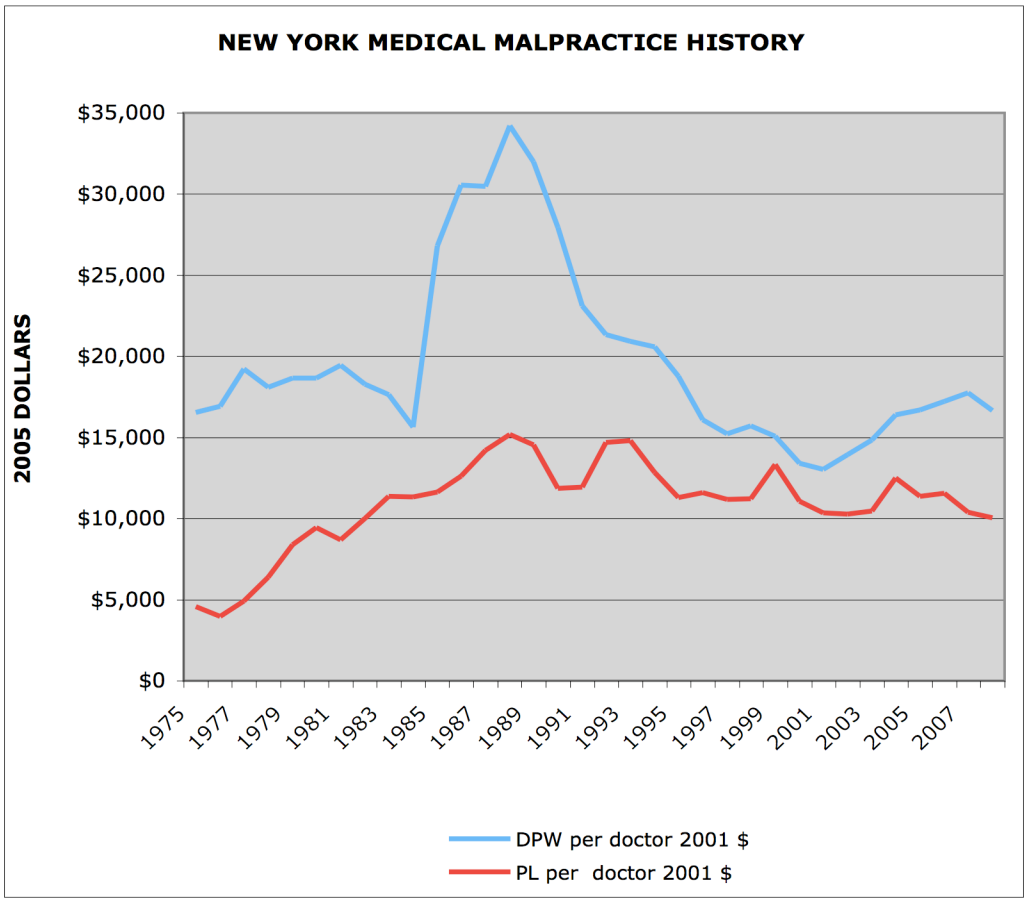
[3] See, http://centerjd.org/archives/states/newyork/CJDHunterAnalysispdf.pdf.

insurance rates. During this period, there was never any "spike" in insurance claims, and in fact, claims remained quite stable.

This new study is an extensive review of medical malpractice insurance rate activity in New York from 1975 through 2008 – over three decades of data prepared by A.M. Best that includes all that medical malpractice insurers paid in jury awards, settlements and other costs, and compared these actual costs with the premiums that insurers charged doctors, as well as with the economic cycle of the insurance industry. The data shows (see data in Appendix A):

- Inflation-adjusted payouts per doctor have been stable, have failed to increase in recent years, and is comparable to what they were in the early 1980s.

- Inflation-adjusted premiums per doctor premiums are among the lowest they have been in over 30 years, comparable to what they were in the mid-1970s.



DPW is "direct premiums written." PL is "paid losses."

As this chart shows, at no time in these 30 years were increases in premiums connected to any increases in claims or payouts. Rather, they reflected the well-known cyclical insurance cycle.

Loss Ratio

Loss ratios compares the premiums that insurers take in and the money expected to be paid in claims. The lower the loss ratio, the less the insurer expects to pay for claims and the more profitable the insurer likely is (assuming all other things are equal.) A low loss ratio also indicates a very inefficient delivery system for benefits.

According to our analysis, the loss ratio for medical malpractice insurers was 60.5% in 2008. Put another way, medical malpractice insurers believe they will pay out in claims only 60.5 cents for each premium dollar they take in. The rest goes towards overhead and profit. This profit is in addition to the profit the insurer also makes by investing premiums during the "float" period. (The "float" occurs between the time when premiums are taken in by the insurer and losses paid out—*e.g.,* while there is about a 15 month lag for auto insurance, there is a much longer 5 to 10 year lag for medical malpractice, allowing for more investment income.)

Given all these factors, a 60.1 percent loss ratio is low and helps demonstrate how well medical malpractice insurers have been performing in New York State.

APPENDIX A

YEAR	Direct Premiums Written (DPW)	Direct Losses Paid (PL)	Loss Ratio	Number of Doctors In New York	Med. Inflation (cpi-u)	DPW Per Doctor	PL Per Doctor	YR	DPW Per Doctor 2001 $	PL Per Doctor 2001 $
1975	$112,651,522	$31,039,310	27.6%	46393	47.5	$2,428	$669	1975	$16,522	$4,552
1976	127,679,765	30,018,024	23.5%	46935	52.0	$2,720	$640	1976	$16,908	$3,975
1977	160,860,475	41,003,255	25.5%	47478	57.0	$3,388	$864	1977	$19,211	$4,897
1978	166,062,891	58,520,232	35.2%	48020	61.8	$3,458	$1,219	1978	$18,086	$6,373
1979	189,000,515	85,184,416	45.1%	48563	67.5	$3,892	$1,754	1979	$18,635	$8,399
1980	212,169,479	107,385,433	50.6%	49105	74.9	$4,321	$2,187	1980	$18,644	$9,436
1981	252,103,328	112,760,851	44.7%	50562	82.9	$4,986	$2,230	1981	$19,439	$8,695
1982	271,923,193	148,956,326	54.8%	52020	92.5	$5,227	$2,863	1982	$18,264	$10,005
1983	293,240,995	188,977,759	64.4%	53477	100.6	$5,483	$3,534	1983	$17,617	$11,353
1984	283,861,417	205,377,839	72.4%	54935	106.8	$5,167	$3,739	1984	$15,637	$11,314
1985	530,787,017	230,263,811	43.4%	56392	113.5	$9,412	$4,083	1985	$26,803	$11,627
1986	660,307,449	272,951,926	41.3%	57262	122.0	$11,531	$4,767	1986	$30,549	$12,628
1987	712,816,848	332,134,833	46.6%	58133	130.1	$12,262	$5,713	1987	$30,461	$14,193
1988	865,125,258	383,778,736	44.4%	59003	138.6	$14,662	$6,504	1988	$34,191	$15,168
1989	884,623,310	402,302,269	45.5%	59874	149.3	$14,775	$6,719	1989	$31,984	$14,545
1990	854,403,798	362,843,038	42.5%	60744	162.8	$14,066	$5,973	1990	$27,924	$11,859
1991	793,879,724	409,388,834	51.6%	62745	177.0	$12,652	$6,525	1991	$23,103	$11,914
1992	811,974,970	559,175,764	68.9%	64746	190.1	$12,541	$8,636	1992	$21,322	$14,683
1993	870,300,422	615,013,468	70.7%	66748	201.4	$13,039	$9,214	1993	$20,924	$14,786
1994	923,163,546	576,724,483	62.5%	68750	211.0	$13,428	$8,389	1994	$20,568	$12,849
1995	905,070,538	544,403,418	60.2%	70751	220.5	$12,792	$7,695	1995	$18,750	$11,278
1996	822,075,016	591,710,868	72.0%	72314	228.2	$11,368	$8,183	1996	$16,101	$11,589
1997	816,663,055	598,744,431	73.3%	73877	234.6	$11,054	$8,105	1997	$15,229	$11,165
1998	886,935,822	634,166,913	71.5%	75440	242.1	$11,757	$8,406	1998	$15,695	$11,222
1999	900,034,082	795,112,336	88.3%	77003	250.6	$11,688	$10,326	1999	$15,074	$13,317
2000	849,687,717	700,772,374	82.5%	78566	260.8	$10,815	$8,920	2000	$13,403	$11,054
2001	881,194,813	698,555,720	79.3%	80129	272.8	$10,997	$8,718	2001	$13,029	$10,329
2002	992,924,544	732,555,312	73.8%	80667	285.6	$12,309	$9,081	2002	$13,929	$10,277
2003	1,107,374,159	781,788,782	70.6%	81199	297.1	$13,638	$9,628	2003	$14,836	$10,474
2004	1,284,228,574	980,901,472	76.4%	81716	310.1	$15,716	$12,004	2004	$16,380	$12,511
2005	1,372,467,390	935,093,278	68.1%	82301	323.2	$16,676	$11,362	2005	$16,676	$11,362
2006	1,500,463,000	1,008,063,000	67.2%	83826	336.2	$17,900	$12,026	2006	$17,208	$11,561
2007	1,645,731,025	962,933,297	58.5%	85304	351.054	$19,293	$11,288	2007	$17,762	$10,393
2008	1,622,405,520	980,255,362	60.4%	85142	364.065	$18, 755	$11,332	2008	$16,650	$10,060

Sources:
Premiums Written (Net), A.M. Best and Co., special data compilation for AIR, reporting data for as many years as separately available;
Number of Total NonFed Doctors: U.S. Bureau of the Census
Inflation Index: Bureau of Labor Statistics