Medical Misdiagnosis in West Virginia:

Challenging the Medical Malpractice Claims of the Doctors' Lobby

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Acknowledgments

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Table of Contents

Executive Summary

The West Virginia State Medical Association and its allies have made a number of sensational allegations about what they call a malpractice "crisis." We agree that there is a *temporary* "crisis" and malpractice insurance costs have spiked over the last two years. But claims that it has been caused by "many frivolous lawsuits," an "out-of-control legal system," "an irrational lottery," or "astronomic jury verdicts" have no basis in fact.

This Public Citizen study, which examined statistics from numerous government agencies and other reputable sources, has two principal findings:

1) The medical malpractice "crisis" in West Virginia, as in the rest of the country, is not a long-term problem nor has it been caused by the legal system. It is a short-term problem triggered by a brief spike in medical malpractice insurance rates for some physicians. This spike in rates is a result of the cyclical economics of the insurance industry and investment losses caused by the country's economic slowdown.

2) A more significant, longer-term malpractice "crisis" faced by West Virginians is the unreliable quality of medical care being delivered – a problem that health care providers have not adequately addressed. Taking away people's legal rights, as is proposed under a cap on non-economic damages, would only decrease deterrence and reduce the quality of care.

Highlights of this report include:

- **The cost of medical negligence to West Virginia's patients and consumers is considerable, especially when measured against the cost of malpractice insurance to West Virginia's doctors.** Extrapolating from Institute of Medicine findings, we estimate that medical errors cause 283 to 630 preventable deaths in West Virginia each year. The cost resulting from preventable medical errors to West Virginia's residents, families, and communities is estimated at $109 million to $186 million each year. But the cost of medical malpractice insurance to West Virginia's doctors is less than $77 million a year.

- **Government data show that the median amount of medical malpractice awards in West Virginia has decreased, even as the cost of health insurance has increased.** Statistics from the federal government's National Practitioner Data Bank (NPDB) show the median medical malpractice payment in West Virginia through the first nine months of 2002 was $145,000. This is the same amount that it was in 1997. During that same time period, the national average premium for single health insurance coverage increased 39 percent (9.5 percent a year). Payments for health care costs, which directly affect health insurance premiums, make up the lion's share of most medical malpractice awards. In spite of this, payments to malpractice claimants in West Virginia have remained steady.

- **Large malpractice verdicts in West Virginia are decreasing.** The number of large jury verdicts in West Virginia medical malpractice cases is steadily decreasing. There were only two verdicts for more than $1 million in 2000 and 2001 – and none reported for 2002.

- **At the height of the purported malpractice "crisis," the number of licensed physicians in West Virginia actually *increased* slightly.** The claim that skyrocketing malpractice insurance premiums are driving doctors from the state is contradicted by the facts. According to the West Virginia State Medical Board and the Board of Osteopathy, 4,069 physicians/osteopaths were practicing in West Virginia during 2001, and the number increased to 4,077 in 2002. Over the past five years, the number of doctors licensed and residing in West Virginia increased by 9.6 percent, a trend mirrored nationwide.

- **"Repeat offender" physicians are responsible for the bulk of malpractice costs.** The NPDB shows that 9.3 percent of doctors who have paid multiple (two or more) malpractice claims are responsible for 62.2 percent of all payments. Even more surprising, only 3.5 percent of West Virginia's doctors – those who have made three or more payments – are responsible for 36.5 percent of all payments. West Virginia ranks third worst among all 50 states and the District of Columbia in terms of its percentage of repeat offender doctors – those with three or more malpractice payments.

- **Repeat offender doctors suffer few consequences in West Virginia.** Public Citizen's analysis of NPDB data found that only 25.5 percent of those doctors who made five or more malpractice payments were disciplined by West Virginia's State Board of Medicine. And only 14.3 percent of doctors – one out of seven – who made 10 or more malpractice payments were disciplined.

- **Where's the doctor watchdog?** West Virginia's State Board of Medicine is lenient with doctors, as are most state medical boards, regularly letting serious and sometimes repeat offenders off the hook. Nationally in 2001, there were 3.36 serious actions taken for every 1,000 physicians. West Virginia took 4.89 serious actions per 1,000 doctors – slightly greater than the national average, but still half as good as the best performing states and not nearly high enough to prevent bad doctors from practicing.

- **Insurance costs are increasing overall, not just for malpractice.** The same cyclical economic forces that pushed up malpractice premiums in West Virginia also influenced the costs of other categories of insurance. In 2001-2002, increases for medical malpractice insurers ranged from 17.9 percent to 26.4 percent in West Virginia. Rate increases for health insurance in the state varied between 20.7 and 23 percent in 2002. And increases in homeowners insurance premiums ranged from 5.8 percent to 27.5 percent.

- **The spike in medical liability premiums was caused by the insurance cycle, not by "skyrocketing" malpractice awards.** J. Robert Hunter, one of the country's most knowledgeable insurance actuaries and director of insurance for the Consumer Federation of America, recently analyzed the growth in medical liability premiums. He found that amounts charged for premiums do not track losses paid, but instead rise and fall in concert with the state of the economy. When the economy booms and investment returns are high, companies maintain premiums at modest levels; however, when the economy falters and interest rates fall, companies increase premiums.

- **Insurer mismanagement compounded the problems.** Underpriced premiums, reckless cash-flow policies, and ill-fated involvement with Enron and asbestos subsidiaries forced one major carrier, the St. Paul Companies, to stop offering malpractice insurance. The company had covered nearly 29 percent of West Virginia's doctors. According to a *Wall Street Journal* analysis, St. Paul had generated large cash reserves by raising rates during the 1980s, and then released $1.1 billion from reserves between 1992 and 1997 – dramatically boosting its bottom line. This artificial profitability attracted numerous, smaller competitors into the malpractice insurance market and led to widespread price-cutting. By the end of the 1990s, revenue from premiums no longer could cover malpractice claims, causing some companies to collapse and others, like St. Paul, to drop coverage.

Introduction:
Misleading the Public to Escape Responsibility for Negligence

There is no dispute that medical malpractice rates are rising in West Virginia and across the country, in some cases to a considerable degree. No one wants to see doctors forced to pay more to insure themselves against liability, even if they are surgeons earning $500,000 a year.

For two years, physicians and their allies have lobbied overtly in West Virginia to restrict the rights of patients to seek compensation when they have suffered from medical malpractice. The campaign has included "White Coat Day," when large numbers of doctors descended on the state capitol, a litany of distorted public statements, and distribution of literature that consistently exaggerated the frequency and severity of jury awards in medical liability cases.[1]

At the same time, medical leaders chided a victims' support organization for daring to run advertisements reminding political leaders that the real victims of the malpractice "crisis" are the patients who face lifelong suffering as a result of medical errors and neglect. "I thought it was just appalling," Doug McKinney, president of the State Medical Association said about the ads. "They would stoop so low that they would use that kind of tragedy to promote their cause."[2]

Ironically, some of the most outspoken and active doctors involved in West Virginia's malpractice controversy have a history of paying multiple liability claims. These include four doctors participating in strikes at a Wheeling hospital and a former president of the West Virginia Medical Association.[3]

This report shows that the spike in some medical malpractice premiums is an insurance industry pricing and profitability problem – not a litigation problem. This report also exposes the real long-term threats to quality health care in West Virginia: the frequency of medical mistakes, and the lack of practitioner oversight and discipline. And it provides suggestions for averting these problems in the future.

Rather than reducing the real threats that medical care poses to their patients, the doctor's lobby would prefer to shift the costs of injuries onto individuals, their families, voluntary organizations, and taxpayers. This is unfortunate because doctors and patients and consumers should be allies on this issue – not be pitted against each other. Doctors should join with patients and consumers in working to reform the business practices of the insurance industry, rather than blaming the victims and their lawyers; and to better police the very small number of their profession who commit most of the state's malpractice.

Medical Liability Premium Spike Is Caused by the Insurance Cycle and Mismanagement, Not the Legal System

For much of the 1990s, doctors benefited from artificially lower insurance premiums. According to the International Risk Management Institute (IRMI), one of the leading analysts of commercial insurance issues, "What is happening to the market for medical malpractice insurance in 2001 is a direct result of trends and events present since the mid to late 1990s. Throughout the 1990s, and reaching a peak around 1997 and 1998, insurers were on a quest for market share, that is, they were driven more by the amount of premium they could book rather than the adequacy of premiums to pay losses. In large part this emphasis on market share was driven by a desire to accumulate large amounts of capital with which to turn into investment income." IRMI also noted: "Clearly a business cannot continue operating in that fashion indefinitely."[4]

IRMI's findings were buttressed in a recent report by the West Virginia Insurance Commissioner. According to the Insurance Commission, "[T]he insurance industry is cyclical and necessarily competitive. We have witnessed these cycles in the Medical Malpractice line in the mid-'70s, the mid-80s and the present situation. This particular cycle is, perhaps, worse than previous cycles as it was delayed by a booming economy in the '90s and is now experiencing not just a shortfall in rates due to competition, but a subdued economy, lower interest rates and investment yields, the withdrawal of a major medical malpractice writer and a strong hardening of the reinsurance market. Rates will, at some point, reach an acceptable level to insurers and capital will once again flow into the Medical Malpractice market."[5]

Other authoritative insurance analysts and studies indicate that this is a temporary "crisis" unrelated to the legal system:

- **Medical liability premiums track investment results.** J. Robert Hunter, one of the country's most knowledgeable insurance actuaries and director of insurance for the Consumer Federation of America, recently analyzed the growth in medical liability premiums. He found that premiums charged do not track losses paid, but instead rise and fall in concert with the state of the economy. When the economy booms and investment returns are high, companies maintain premiums at modest levels; however, when the economy falters and interest rates fall, companies increase premiums in response.[6]

- **Corporate mismanagement fueled malpractice problems.** Pressure on physician premiums intensified after December 2001, when a major carrier, the St. Paul Insurance Companies, quit the medical liability business. The company had covered 28.6 percent of all the doctors in West Virginia.[7] St. Paul's departure had much less to do with jury awards than with the company's cash flow policies, its disastrous involvement with Enron, and its ill-fated acquisition of two companies that manufactured asbestos products.

Only days before St. Paul discontinued its malpractice business, it reported to the Securities and Exchange Commission (SEC) that it had $84 million of exposure from the Enron collapse and held another $23 million in unsecured Enron debt. In that disclosure to the SEC, St. Paul also listed "a series of actions intended to improve profitability" – foremost of which was the insurance company's plan to "exit its medical malpractice business."[8] In August 2001, St. Paul's quarterly earnings report also warned that it faced liability for incalculable asbestos claims resulting from its ownership of two subsidiaries, Western MacArthur and USF&G.[9] Within the year, St. Paul had agreed to pay $988 million to settle those claims.[10]

Even without these large setbacks, St. Paul had contributed to a catastrophic cycle of low prices and artificially high profits in the malpractice insurance industry. Only a few months before St. Paul withdrew from the market, one industry expert warned that these business practices would inflict "chaos" on the market. "The end result is that premiums must increase, losses must decrease, or the insurer will eventually cease operating," predicted Charles Kolodkin of Gallagher Healthcare Insurance Services.[11]

And a *Wall Street Journal* investigation into the decline in the medical liability insurance market made these points about The St. Paul Companies:[12]

> "[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."

- **The same trends are present in other lines of insurance.** Property/casualty refers to a large group of liability lines of insurance (a total of 30) including medical malpractice, homeowners, commercial, and automobile. The property/casualty insurance industry has exhibited cyclical behavior for many years, as far back as the 1920s. These cycles are characterized by periods of rising rates leading to increased profitability. Following a period of solid but not spectacular rates of return, the industry enters a down phase where prices soften, supply of the insurance product becomes plentiful, and, eventually, profitability diminishes or vanishes completely. In the down phase of the cycle, as results deteriorate, the basic ability of insurance companies to underwrite new business or, for some companies, even to renew some existing policies can be impaired. This is because the capital needed to support the underwriting of risk has been depleted through losses. The current market began to harden in 2001, following an unusually prolonged period of soft market conditions in the property-casualty section in the 1990s. The current hard market is unusual in that many lines of insurance are affected at the same time, including medical malpractice. As a result, premiums are rising for most types of insurance. The increases have taken policyholders by surprise given that they came after several years of relatively flat to decreasing prices.[13]

Insurance Rates Increase Across the Board in West Virginia

Doctors insist that lawsuits and verdicts have spurred increases in malpractice insurance. In reality, malpractice premiums have increased for the same reasons that the costs of all insurance products have increased. After years in which the stock market was booming and rates were lowered to attract customers and cash flow, the insurance industry now is suffering from poor investment returns.

West Virginia's Insurance Commissioner, Jane Cline, approved 2001-2002 rate increases for medical malpractice insurers ranging from 17.9 percent to 26.4 percent.[14] As these rates increased due to economic and management factors, so did rates for other categories of insurance – such as health, homeowner, and automobile. Cline acknowledged this industry wide phenomenon, saying "[the agency] is seeing increases in all lines of insurance…health care and other property/casualty expenses keep going up."[15]

The following increases approved by the Insurance Commissioner [see Figure 1] provide an overall perspective on rising insurance rates in West Virginia:[16]

- **Health insurance.** Healthcare insurance rate increases in West Virginia varied between 20.7 and 23.1 percent in 2002. Two of West Virginia's top five companies received rate increases in 2002: Mid Atlantic Medical Services, Inc. (MAMSI) received a 20.7 percent increase, after receiving an increase of 17.9 percent just the year before; and Health Plan of Upper Ohio Valley received approval for a rate increase of 23.1 percent.

- **Homeowners insurance.** As one newspaper reported, "State Farm, the nation's and West Virginia's largest writer of homeowners insurance, has put the brakes on new business in 17 states – including West Virginia – to control rapid growth and losses that has the profitability of the insurance line at stake."[17] State Farm took this action despite winning the largest rate increase of all homeowners insurance companies from the Insurance Commissioner's office in 2002, nearly 38 percent. On the whole, homeowners insurance premiums in West Virginia during 2002 saw increases that ranged from 5.8 percent all the way up to 37.5 percent.

- **Automobile insurance.** In 2002, large auto insurers in West Virginia received approval for rate increases. State Farm Mutual Auto Insurance Company received approval to increase premiums by 11.3 percent, while Allstate Insurance Co. received approval to raise rates by 13.5 percent. "West Virginian's pay the fourth highest automobile rates in the country, and there are clear indications that things are getting worse," according to news reports.[18]

Figure 1

Rate Increases Granted by West Virginia Insurance Commissioner in 2002

Medical Malpractice Insurance	
Medical Assurance	17.9%
Commonwealth	19.7%
Doctors Company	26.4%
Health Insurance	
Health Plan of Upper Ohio Valley	23.1%
MAMSI	20.7%
Homeowners Insurance	
State Farm	37.5%
Nationwide	19.9%
Erie	5.8%
Allstate	21.8%
Automobile Insurance	
State Farm Mutual Auto	11.3%
Nationwide Mutual	8.0%
Allstate	13.5%

Source: "Ninety-Third Annual Report of The Insurance Commissioner of the State Of West Virginia Year Ending December 31, 2001," October 2002. Companies are listed according to their share of the market.

The Costs of Medical Malpractice to West Virginia's Patients & Consumers vs. West Virginia's Doctors

In 1999, the Institute of Medicine (IOM) estimated that from 44,000 to 98,000 Americans die in hospitals every year from *preventable* medical errors.[19] The IOM also estimated the costs to individuals, their families, and society at large for these medical errors at $17 billion to $29 billion a year. These costs include disability and health-care costs, lost income, lost household production, and the personal costs of care.

The true impact of medical malpractice in West Virginia should be measured by the cost to patients and consumers, not by the premiums paid by doctors to their insurance companies. Extrapolating from the IOM findings, we estimate that there are 283 to 630 preventable deaths in West Virginia each year that are due to medical errors. The costs resulting from preventable medical errors to West Virginia's residents, families and communities is estimated at $109 million to $186 million each year. But the cost of medical malpractice insurance to West Virginia's doctors is $76.8 million a year.[20] [See Figure 2]

Figure 2

283 – 630

Preventable Deaths Due to Medical Errors Each Year

$109 million – $186 million

Costs Resulting from Preventable Medical Errors Each Year

$76.8 million

Cost of West Virginia Doctors' Annual Medical Malpractice Premiums

Sources: Preventable deaths and costs are prorated based on population and based on estimates in To Err is Human, Institute of Medicine, November 1999. Malpractice premiums are based on "Medical Malpractice Net Premium and Incurred Loss Summary," National Association of Insurance Commissioners, July 18, 2001.

No Growth in Median Malpractice Awards

- **Government data show that medical malpractice awards have remained steady, despite claims of the medical lobby.** Statistics from the federal government's National Practitioner Data Bank show the median medical malpractice payment by a West Virginia physician through the first nine months of 2002 was $145,000. This is the same amount that it was in 1997, it actually represents a significant decrease if you account for medical inflation.[21]

- **Government data reveals that medical malpractice awards in West Virginia have not kept pace with national increases in health insurance premiums.** While NPDB data show no change in the median malpractice payments in West Virginia between 1997 and 2002, the national average premium for single health insurance coverage increased 39 percent over that time period (9.5 percent a year).[22] Payments for health care costs, which directly affect health insurance premiums, make up the lion's share of most medical malpractice awards. In spite of this, payments to malpractice claimants in West Virginia have remained steady.

Large Verdicts in West Virginia Have Dramatically Declined

Physicians have used anecdotal evidence to convince politicians and the media that they are being victimized by an explosion of large jury verdicts – knowing that occasional mega-awards grab headlines, even if they do not reflect broader trends.

These anecdotes are misleading. In fact, the number of large verdicts by West Virginia juries and the amount paid in medical malpractice cases has consistently decreased, not increased, during the past five years. [See Figure 3]

Figure 3

Number of Medical Malpractice Large Jury Verdict Payouts by Payment Size in West Virginia, 1998 to 2002

Year	Number of Verdicts Between $1 – $10,000	Number of Verdicts Between $10,001 – $300,000	Number of Verdicts Between $300,001 – $1,000,000	Number of Verdicts More Than $1,000,000
1998	2	3	0	3
1999	0	3	6	3
2000	2	1	4	2
2001	0	4	2	2
2002	0	5	3	0

Source: West Virginia Department of Tax and Revenue, Insurance Division, "Medical Malpractice Claim Forms Received as of 1/13/2003."

Physician Exodus from West Virginia Is Fabricated

The medical community has insisted that the quality of West Virginia's health care has been jeopardized by the steam of doctors fleeing to other states that have weakened patients' legal rights and are perceived to be more "doctor friendly." A closer examination of these assertions reveals that this "exodus" is a myth..

- The West Virginia State Board of Medicine and the Board of Osteopathy regulate the practice of medicine through the licensure, registration and certification of members of the medical profession. In 2000, these boards issued 4,018 medical licenses to physicians and osteopaths practicing in West Virginia. In 2002, the number of licensed doctors living in-state climbed to 4,077.[23] [See Figure 4]

- During the height of the purported medical malpractice "crisis" (2000-2002), the number of doctors in the state increased by 59, including an increase last year – a time when the West Virginia State Medical Society claimed doctors were fleeing the state due to high insurance costs.

Figure 4

Licensed Physicians and Osteopaths with West Virginia Addresses

Year	Number of Licensed Doctors
1997	**3,721**
1998	3,773
1999	3,884
2000	4,018
2001	4,069
2002	**4,077**

Source: The West Virginia State Medical Board, West Virginia Board of Osteopathy

Two other points were made in "The Price of Practice," a *Charleston Gazette* series that examined the supposed exodus of physicians from West Virginia:[24]

- According to Dr. Robert D. Alessandri, dean of the West Virginia School of Medicine, "40 percent of our graduates remain in the state today, compared to 32 percent a few years ago."

- Part of the reason West Virginia retains and recruits doctors could be that West Virginia has the seventh highest average physician income nationwide, and it is higher than any neighboring states.

Repeat Offender Doctors Are Responsible for the Bulk of Medical Malpractice

The insurance and medical community has argued that medical liability litigation constitutes a giant "lottery," in which lawsuits are random events bearing no relationship to the care given by physicians. If the tort system is a lottery, it is clearly a rigged one, because some numbers come up more often than others. A small percentage of doctors have attracted multiple claims, and it is these doctors who are responsible for the bulk of malpractice in West Virginia.

- According to the federal government's National Practitioner Data Bank, which covers malpractice judgments and settlements since September 1990, 9.3 percent of the state's doctors have paid two or more malpractice awards to patients.[25] [See Figure 5] These repeat offender doctors are responsible for 62.2 percent of all payments. Overall, they have paid out $222.5 million in damages. Even more surprising, only 3.5 percent of West Virginia's doctors (150), each of whom has paid three or more malpractice claims, are responsible for 36.5 percent of all payments. This ranks West Virginia as third worst among all fifty states and the District of Columbia in terms of the number of repeat offender doctors (three or more malpractice payments) as a percent of all doctors.[26]

Figure 5

Number of Medical Malpractice Payments and Amounts Paid by West Virginia Doctors

Number of Payment Reports	Number of Doctors that Made Payments	Percent/Total Doctors (4,296)	Total Number of Payments	Total Amount of Payments	Percent of Total Number of Payments
All	1,137	26.5%	1,948	$366,444,150	100.0%
1	736	17.1%	736	$143,952,500	37.8%
2 or More	401	9.3%	1,212	$222,491,650	62.2%
3 or More	150	3.5%	710	$109,338,850	36.5%
4 or More	71	1.7%	473	$63,714,250	24.3%
5 or More	43	1.0%	361	$48,093,500	18.5%

Source: Public Citizen analysis of National Practitioner Data Bank data, Sept. 1990 to Sept. 30, 2002.

Repeat Offenders Suffer Few Consequences

The West Virginia state government and the state's health care providers have done little to rein in doctors who repeatedly commit negligence. According to the National Practitioner Data Bank and Public Citizen's analysis of NPDB data, disciplinary actions have been few and far between for West Virginia physicians.

- Only 25.5 percent of those doctors who made five or more malpractice payments since 1990 were disciplined by the West Virginia State Board of Medicine. Only 14.3 percent of those doctors who made 10 or more malpractice payments were disciplined.[27]

- Doctors in West Virginia account for 0.57 percent of U.S. physicians but make up 1.69 percent of physicians who have had five or more malpractice payouts, a three-fold over-representation.[28]

The West Virginia Medical Practice Act created the West Virginia Board of Medicine, and gave it power to independently initiate disciplinary proceedings based on information received from medical peer review committees, physicians, podiatrists, hospital administrators, professional societies, and others.[29] The statute also states that the Board may take action if there are five judgments or settlements within the most recent five-year period in excess of $50,000 each. However, the Board is under no duty to do so in either situation. The statute appears to address the malpractice problem, but is permissive.

The extent to which doctors can commit negligence in West Virginia and not be disciplined is illustrated by the following NPDB descriptions of the worst 10 offenders who practice in West Virginia, *none* of whom have been disciplined by the state:

- **Physician Number 40689** settled six malpractice lawsuits and lost one judgment for malpractice between 1992 and 2002 involving three incidents of surgery, delay in treatment, improper treatment, and two retained foreign bodies, and improper management of surgical patient. The damages add up to $855,000.

- **Physician Number 40735** settled five malpractice lawsuits and lost one judgment for malpractice between 1993 and 2001 involving improper performance of surgery, two incidents of improper diagnosis, and three incidents of surgery. The damages add up to $1,056,250.

- **Physician Number 40778** settled six malpractice lawsuits, including one in Ohio, between 1992 and 2001 involving three incidents of failure to diagnose, improper practice of obstetrics, failure to obtain consent/lack of informed consent for surgery, improper diagnosis, and delay in diagnosis. The damages add up to $2,397,500.

- **Physician Number 40849** settled six malpractice lawsuits between 1991 and 2000 involving two incidents of failure to perform surgery, two incidents of improper performance of surgery, surgery, and improper positioning of surgery. The damages add up to $1,125,000.

- **Physician Number 40905** settled five malpractice lawsuits between 1993 and 2002 involving two incidents of medication administration related, obstetrics, diagnosis, improper management of course of treatment, and delay in treatment. Damages add up to $627,500.

- **Physician Number 40919** settled at least four malpractice lawsuits between 1991 and 2000 involving surgery, failure to diagnose, wrong diagnosis, delay in diagnosis, and two incidents of obstetrics. Damages add up to $1,322,500.

- **Physician Number 40968** settled seven malpractice lawsuits between 1991 and 2002 involving six incidents of surgery, retained foreign body, improper management of course of treatment, and failure to refer or seek consultation. Damages add up to $1,422,500.

- **Physician Number 40977** settled four malpractice lawsuits and lost one malpractice judgment between 1992 and 2002 involving two incidents of failure to perform surgery, failure to diagnose, wrong treatment/procedure performed, and unnecessary surgery. Damages add up to $605,000.

- **Physician Number 41016** settled six malpractice lawsuits between 1991 and 1995 involving diagnosis, improper choice of delivery method, two incidents of obstetrics, failure to obtain consent/lack of informed consent for surgery, and delay in diagnosis. Damages add up to $1,950,000.

- **Physician Number 41050** settled at least five malpractice lawsuits between 1990 and 2001 involving two incidents of surgery, two incidents of delay in diagnosis, two incidents of failure to perform surgery, unnecessary surgery, failure to obtain consent/lack of informed consent for surgery, improper performance of surgery, improper management of surgical patient, and failure to refer or seek consultation. Damages add up to $626,250.

- **Physician Number 41086** settled four malpractice lawsuits and lost one malpractice judgment between 1990 and 2002 involving two incidents of surgery, failure to diagnose, improper performance of surgery, and failure to medicate. Damages add up to $2,105,000.

- **Physician Number 41103** settled five malpractice lawsuits between 1992 and 2001 involving two incidents of surgery, two incidents of delay in treatment, treatment, and retained foreign body. Damages add up to $1,217,500.

- **Physician Number 57533** settled eleven malpractice lawsuits between 1994 and 2001 involving treatment, unnecessary surgery, four incidents of improper management of surgical patient, five incidents of surgery, medication administration related, and two incidents of improper performance of surgery. Damages add up to $3,241,250.

- **Physician Number 58478** settled seventeen malpractice lawsuits between 1994 and 1998 involving fourteen incidents of equipment/product related, fourteen incidents of failure to obtain consent/lack of informed consent for treatment, surgery, improper performance of surgery, improper positioning of surgery, and one miscellaneous incident. Damages add up to $320,250.

- **Physician Number 58737** settled five malpractice lawsuits between 1994 and 1999 involving two incidents of use of equipment/product, two incidents of failure to obtain consent/lack of informed consent, two incidents of improper performance of surgery, and one miscellaneous incident. The damages add up to $235,000.

- **Physician Number 78552** settled 40 medical malpractice lawsuits between 1998 and 2002 involving two cases of improper surgery and 38 involving the improper use of equipment/product (type not specified) and the failure to obtain the patients' informed consent. The damages add up to $471,250.

- **Physician Number 80822** settled 5 medical malpractice lawsuits (including one in Arizona) between 1994 and 1999 involving the failure to diagnose, improper surgery and improper management of course of treatment. The damages add up to $960,000.

- **Physician Number 87903** settled 6 medical malpractice lawsuits (including four in Virginia) between 1996 and 1998 involving improper diagnosis and improper use of equipment/product (not otherwise coded). The damages add up to $68,250.

- **Physician Number 119317** settled 36 medical malpractice lawsuits between 1998 and 1999 each involving improper use of equipment/product (not otherwise coded) and failure to obtain patient's informed consent. The damages add up to $300,750.

- **Physician Number 119387** settled 21 medical malpractice lawsuits (including 19 in South Carolina) involving the failure to obtain informed consent, and improper use of equipment/product (not otherwise coded). The damages in the two West Virginia cases added up to $482,500. The total damages add up to $533,000.

Protesting Doctors Had Multiple Malpractice Claims

As president of the West Virginia Medical Association, Dr. John Holloway vocally directed the 2001 assault on patients' legal rights in malpractice cases. Only when a journalist confronted him with his own record did Holloway admit he had paid $525,000 to settle negligence claims. One case resulted in death, after Holloway failed to realize a diabetic patient was suffering from pneumonia. The other case resulted in long-term disability, after he failed to detect a blood clot in the leg of an elderly woman who had fractured a hip. Holloway conceded blame in both cases.[30]

And among the 18 doctors who protested their malpractice rates by staging a recent walk-out in Wheeling, W. Va., nine had cost their previous insurers at least $6.3 million in malpractice claims. These repeat offenders included:[31]

- **Dr. Howard L. Shackleford,** who agreed to pay $2 million to a patient who needed a liver transplant after a surgical clip was left on an artery in a 1997 operation. Shackleford has settled three other malpractice cases for a total of $500,000.

- **Dr. Robert J. Zaleski,** who settled four claims for a total of $950,000 between 1993 and 1998. One alleged he operated on the wrong knee. Three other claims against Zaleski were dismissed during that time.

- **Dr. Robert L. Cross,** who has had at least five claims against him since 1990. A jury ordered him to pay $250,000 in a 1997 case, and he settled a second case for $250,000 in 1998.

Where's the Doctor Watchdog?

In 2001, only 21 doctors in West Virginia had serious sanctions levied against them by the State Medical Board for incompetence, misprescribing drugs, sexual misconduct, criminal convictions, ethical lapses and other offenses, according to an ongoing Public Citizen project that tracks "Questionable Doctors" in West Virginia and other states.[32] Most of these doctors were not required to stop practicing, even temporarily.

The West Virginia State Board of Medicine is dangerously lenient with doctors, repeatedly letting serious and sometimes repeat offenders off the hook.

Nationally in 2001, there were 3.36 serious actions taken for every 1,000 physicians. Although West Virginia ranks among the top third of states when its diligence in taking disciplinary actions is measured – 4.89 serious actions per 1,000 doctors – it is important to emphasize that West Virginia still has a great deal of room for improvement.[33] The top states listed in the report discipline doctors twice as often as West Virginia does. Further, West Virginia's current protocol for initiating disciplinary action against negligent doctors is surprisingly indolent. As it stands, the Medical Board may initiate an investigation when it receives notification that a physician has five or more judgements or settlements in excess of $50,000 each arising from medical professional liability over a five-year period.[34] Under this system, a doctor in West Virginia could commit a negligent act a year and yet still evade formal review from the Board.

Capping Damages Misses the Mark

The proposals now under consideration in West Virginia's state senate do not emphasize improving medical care or reducing the instances of malpractice. They focus on creating financial protections for physicians. As in many states, the centerpiece of this legislation is the imposition of "caps" on the damages that can be awarded for patients' pain-and-suffering. There is convincing evidence that this is a misguided approach:

- **"Non-economic" damages are not as easy to quantify as lost wages or medical bills, but they compensate real injuries.** So-called "non-economic" damages are awarded for the pain and suffering that accompany any loss of normal functions (e.g. blindness, paralysis, sexual dysfunction, lost bowel and bladder control) and inability to engage in daily activities or to pursue hobbies, such as hunting and fishing. This category also encompasses damages for disfigurement and loss of fertility. According to Physicians Insurance Association of America (PIAA), the average payment between 1985 and 2001 for a "grave injury," which encompasses paralysis, was only $454,454.

- **No evidence supports the claim that jury verdicts are random "jackpots."** Studies conducted in California, Florida, North Carolina, New York, and Ohio have found that jury verdicts bear a reasonable relationship to the severity of the harm suffered.[35] In total, the studies examined more than 3,500 medical malpractice jury verdicts and found a consistent relationship between the severity of the injury and the size of the verdict. Uniformly the authors concluded that their findings did not support the criticism that jury verdicts are frequently unpredictable and irrational.

- **The insurance industry's own statistics demonstrate that awards are proportionate to injuries.** PIAA's Data Sharing Report also demonstrates the relationship between the severity of an injury and the size of the settlement or verdict.[36] PIAA, as do most researchers, measures severity of injury according to the National Association of Insurance Commissioners' classifications.[37] The average indemnity paid per file was $49,947 for the least severe category of injury and increased with severity, to $454,454 for grave injuries. All researchers found that the amount of jury verdicts fell off in cases of death, for which the average indemnity was $195,723. This is not surprising, as the costs of medical treatment for a grave injury are likely to be greater, and pain and suffering would be experienced over a longer time period than in the case of death.[38]

- **Capping awards hurts women the most.** Limiting medical malpractice awards for non-economic injury has a disproportionate impact on women – especially as it relates to a woman's ability to have children, according to a study by the director of the Insurance Law Center at the University of Connecticut School of Law. "This is so for two main reasons," reported Tom Baker, Connecticut Mutual Professor of Law. "First, the largest part of the economic damages in many tort claims is lost wages, and women earn on average less money than men. Second, the most significant effect of many medical and other injuries inflicted on women is harm to reproductive capacity. Although this may be hard to believe, harm to reproductive capacity does not entitle women to receive significant economic damages … [and] lowering the price of making a women infertile cannot be sound policy."[39]

Solutions to Reduce Medical Errors and Long-term Insurance Rates

Reducing compensation to victims of medical malpractice does not, as doctors contend, "reduce costs;" it merely shifts the costs of injuries away from dangerous doctors and unsafe hospitals and onto the injured patients, their families, and taxpayers. This, in turn, reduces the incentive to practice medicine with due regard to patient safety. The only way to reduce the cost of medical injuries is to reduce negligence; the best way to accomplish this is by reforming the regulatory oversight of the medical profession. Public Citizen's recommendations for addressing the real medical malpractice problems are:

Implement Patient Safety Measures Proposed by the Institute of Medicine

Public Citizen believes in personal responsibility and accountability for negligence as one of the principal methods for deterring medical errors. Nevertheless, we acknowledge that the "systems approach" to patient safety advocated by the Institute of Medicine shows considerable promise. We are disappointed that some three years after the release of its report, almost nothing has been done to establish mandatory nationwide error reporting systems, identify unsafe practices, or raise performance standards.

- **Medication errors are among the most common preventable mistakes, but safety systems have been put in place in ver few hospitals.** Although experts using the systems approach have identified a number of promising strategies to reduce malpractice, few have been implemented. Experts have estimated that more than 950,000 serious drug errors occur annually in hospitals alone.[40] Recent studies show that computer physician order entry (CPOE) systems can reduce error rates by 55 percent,[41] CPOE is an electronic prescribing system that intercepts errors where they most commonly occur – at the time medications are ordered. Physicians enter orders into a computer, rather than on paper. Orders are automatically checked for potential problems, such as drug interactions or allergies. CPOE also resolves problems associated with deciphering doctors' notoriously bad handwriting. But in spite of these benefits, fewer than three percent of hospitals have fully implemented CPOE.[42]

- **Evidence-based hospital referral could save 4,000 lives every year, but has not been implemented.** Evidence-based hospital referral means directing patients with high-risk conditions to hospitals with characteristics shown to be associated with better outcomes. Dr. Adams Dudley, a researcher at the University of San Francisco at California, identified 10 surgical procedures for which outcomes were strongly related to hospital volume. Using data from California hospitals, he estimated that using evidence-based hospital referral for those 10 procedures would prevent over 4,000 deaths across the U.S. each year.[43]

- **Surgery performed on the wrong part of the body, to the wrong patient, and performing the wrong procedure on a patient are all completely preventable, yet continue to occur.** Such mistakes should *never* happen, according to a special alert reissued December 5, 2001 by the Joint Commission on Accreditation of Healthcare Organizations.[44] To prevent these accidents, the JCAHO recommends the surgical site be marked with a permanent marker. Sometimes referred to as "signing your site," doctors place their initials on the surgical site with a permanent marking pen in a way that cannot be overlooked and then actually operate through or next to the initials. JCAHO also recommends orally verifying the surgery in the operating room just before starting the operation.[45]

Open the National Practitioner Data Bank to Empower Consumers with Information About Their Doctors

Information about doctor discipline, including state sanctions, hospital disciplinary actions and medical malpractice awards is now contained in the National Practitioner Data Bank. HMOs, hospitals and medical boards can look at the National Practitioner Data Bank. Unfortunately, consumers cannot because the names of physicians in the database are kept secret from the public. Congress should lift the veil of secrecy and allow the people who have the most to lose from questionable doctors to get the information they need to protect themselves and their families.

Limit Physicians' Workweek to Reduce Hazards Created by Fatigue

American medical residents work among the highest—if not the highest—number of hours in the professional world. They work up to 120 hours a week, including 36-hour shifts for several weeks at a time.[46] After 24 hours of wakefulness, cognitive function deteriorates to a level equivalent to having a 0.10 percent blood alcohol level.[47] In other words, doctors who would be considered too unsafe to drive may still treat patients for 12 more hours. 41 percent of resident-physicians attribute their most serious mistake in the previous year to fatigue.[48] 45 percent of residents who sleep less than four hours per night report committing medical errors.[49] Working these extreme hours for years at a time also has ill-effects on doctors' own personal health and safety. Multiple studies in the medical literature demonstrate that sleep-deprived and overworked residents are at increased risk of being involved in motor vehicle collisions, suffering from depressed mood and depression, and giving birth to growth-retarded and/or premature infants.[50] If the maximum workweek for residents was limited to 80 hours, it could considerably reduce mistakes due to fatigue and lack of supervision.

Refine the Malpractice Insurance System

The number of classifications of doctor specialties for insurance rating purposes should be reduced to more broadly spread the risk. Risk pools for some are too small and thus overly influenced by a few losses and the concentration in a few specialties of doctors handling the highest risk patients. Often the high-risk patients are "referred up" from general practitioners who do not bear any of the risk.

Improve Oversight of Physicians

Public Citizen has long sought greater consumer access to information about doctors, and there have been recent improvements in making that information available. Most state medical boards now provide some physician information on the Internet, but the information about disciplinary actions varies greatly, is often inadequate and can be difficult for people to access.[51]

For more than a decade, Public Citizen's Health Research Group has been carefully scrutinizing the performance of state medical boards. As reported in our *Questionable Doctors* publication,[52] too little discipline is being done. Too many state medical boards, despite their duty to protect the public, still believe their first responsibility is to rehabilitate "impaired physicians" and shield them from the public's prying eyes. Fewer than one-half of one percent of the nation's doctors face any serious state sanctions each year. 2,708 total serious disciplinary actions a year, the number state medical boards took in 2001, are a pittance given estimates that between 44,000 and 98,000 deaths of hospitalized patients are caused by medical errors annually.

State discipline rates ranged from 10.52 serious actions per 1,000 doctors (Arizona) to 0.73 actions per 1,000 physicians (District of Columbia), a 14.4-fold difference between the best and worst states. If all the boards did as good a job as the lowest of the top five boards, Kentucky's rate of 6.32 serious disciplinary actions per 1,000 physicians, it would amount to a total of 5,089 serious actions a year. That would be 2,381 more serious actions than the 2,708 that actually occurred in 2001. It is likely that patients are being injured or killed more often in states with poor doctor disciplinary records than in states with consistent top performances.

Negligent doctors are rarely disciplined with loss or suspension of their license for inferior care. Instead, state medical boards focus on more easily documentable offenses such as prescription drug violations and fraud convictions or disciplinary action in another state as potential indicators of substandard care. Congress could encourage better oversight through grants to state medical boards, tied to the boards' agreements to meet performance standards. The following state reforms would help protect patients:

- **Reform medical board governance.** States should sever any remaining formal, debilitating links between state licensing boards and state medical societies. Members of medical boards (and separate disciplinary boards, where present) should be appointed by the governor, and the governor's choice of appointees should not be limited to a medical society's nominees. At least 50 percent of the members of each state medical board and disciplinary board should be well-informed and well-trained public members who have no ties to health care providers and who, preferably, have a history of advocacy on behalf of patients. The governor should appoint members to the Medical Board whose top priority is protecting the public's health, not providing assistance to physicians who are trying to evade disciplinary actions.

- **Beef up medical board funding and staffing.** State legislatures should permit medical boards to spend all the revenue from medical licensing fees, rather than being forced to give part to the state treasury. The medical boards should raise their fees to $500 a year. All boards could benefit from hiring new investigators and legal staff. Boards should employ adequate staff to process and investigate all complaints within 30 days, to review all malpractice claims filed with the board, to monitor and regularly visit doctors who have been disciplined to ensure their compliance with the sanctions imposed, and to ensure compliance with reporting requirements. They should hire investigators to seek out errant doctors, through review of pharmacy records, consultation with medical examiners, and targeted office audits of those doctors practicing alone and suspected of poor care.

- **Require risk prevention.** States should adopt a law, similar to one in Massachusetts, that requires all hospitals and other health care providers to have a meaningful, functioning risk prevention program designed to prevent injury to patients. Massachusetts also requires all adverse incidents occurring in hospitals or in doctors' offices to be reported to the medical board.

- **Require periodic recertification of doctors based on a written exam and audit of their patients' medical care records.**

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Emotional damage only (fright; no physical injury);
Temporary insignificant (lacerations, contusions, minor scars);
Temporary minor (infections, fall in hospital, recovery delayed);
Temporary major (burns, surgical material left, drug side-effects);
Permanent minor (loss of fingers, loss or damage to organs);
Permanent significant (deafness, loss of limb, loss of eye, kidney or lung);
Permanent major (paraplegia, blindness, loss of two limbs, brain damage);
Permanent grave (quadriplegia, severe brain damage, lifelong care or fatal prognosis);
Death
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[49] Id.
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[51] See http://www.citizen.org/publications/release.cfm?ID=7168
[52] www.questionabledoctors.org