

---

**T**he most recent crisis faced by physicians in their ongoing struggle with professional liability is the double-digit yearly increase in the cost of professional liability insurance, which is occurring at a time when physician income continues to steadily decline.

### **Roots of the problem**

During the past 30 years, physicians have faced a number of crises related to the cost of professional liability coverage. The first crisis was sparked in 1975 when professional liability insurance company actuaries discovered that they had neglected to react to rising loss ratios in preceding years. Commercial insurance companies responded by either raising rates significantly or, as more often occurred, by dropping professional liability coverage entirely. This situation led to the decreased availability of professional liability insurance, and many physicians were unable to purchase professional liability insurance or were forced to pay an exorbitant price.

Physicians and state governments responded dramatically to this problem. With the stability of our health care system threatened, most states reacted by passing legislation aimed at containing the problem, and some states formed joint underwriting associations to establish an insurance market. Some states, including California, passed meaningful legislation (such as the Medical Injury Compensation Reform Act) that significantly eased the problem. Most other states approved less effective reforms that did little to protect physicians or the fragile market. Medical organizations and physicians' groups took steps toward creating their own insurance market by forming professional li-

ability insurance vehicles, such as physician mutuals, offshore captives, risk-retention groups, and insurance trusts. These efforts succeeded in creating a market for professional liability insurance but did little to improve the tort system.

In the early and mid-1980s, the professional liability insurance problem again reached crisis proportions. Driven by a significant increase in both the number of claims filed and the size of the settlements awarded by juries, professional liability premiums began rising yearly at double-digit rates. Some physicians faced rate increases of 50 percent or more per year.

To respond to this crisis of affordability, state legislatures again took action but once more enacted reforms that proved to be too narrow in scope or, in many cases, were later found to be unconstitutional by the state judicial systems.

### **Temporary relief**

For unexplained reasons, the rise in frequency of claims and severity of awards moderated during the late 1980s and early 1990s. During this period the claims inflation rate was

still increasing by approximately 4 to 5 percent annually but was deemed manageable in light of the exorbitant increases experienced in the early 1980s.

In the early 1990s, with physician mutual companies insuring some 60 percent of the physicians in the U.S., a fundamental shift occurred in the rating mechanisms used by professional liability insurance companies. The agencies responsible for rating professional liability insurance companies became concerned that physician mutuals, most of which limited their coverage to a single state, were more intrinsically risky because of their geographic concentration. As a result, these rating

## Double-digit premium hikes: The latest crisis in professional liability

by

Barry M. Manuel, MD, FACS,  
Boston, MA

---

organizations began advising physician mutual insurance companies to extend their penetration into other states in order to spread the risk and maintain their high ratings. This action resulted in many physician mutuals expanding into other states, using a technique known as “burning into a market.” Using this mechanism, expanding companies lower their premiums below actuarially sound rates so they can penetrate new markets. Local companies seeking to retain their market share were forced to match these artificially low rates, resulting in predatory price-cutting with insurance being sold at inadequate rates.

### ***Return of the high rates***

After several years of price-cutting, reserves and surpluses at many physician mutuals began to deteriorate, necessitating a return to adequate, actuarially sound pricing. This situation created a need for large rate increases, not only to cover the current actuarially defined rates but, in many cases, to help restore the financial integrity of the insurance company. Several insurance companies had so greatly discounted their pricing that they were forced into bankruptcy or receivership, causing potential harm to their physician insurers. PHICO was taken over in August by the Pennsylvania regulators; soon after Frontier Insurance Group was taken over by New York regulators. Other large commercial insurers also experienced difficulty and responded by withdrawing from troubled markets and raising their premiums significantly in others (not quite to the extent experienced in 1975). One of the largest commercial professional liability insurers has indicated that it intends to reduce its book of professional liability insurance by 50 percent.

### ***Failure or delay in diagnosis***

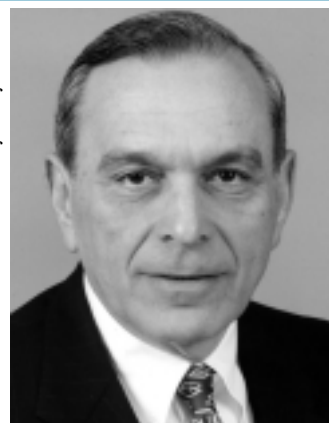
The other driving force behind the latest crisis in professional liability is the rapid rise in claims alleging failure or delay in diagnosis. Traditionally claims against physicians have fallen into two categories. Perioperative problems (surgery, anesthesia, and recovery room) have accounted for 30 to 40 percent of the claims against physicians and indemnity paid to plaintiffs; birthing injuries were the other major category, accounting for some 25 to 30 percent of all claims and indemnity payments. Failed or delayed diagnosis was not on the

radar screen 15 years ago, but now accounts for 50 percent of claims against and indemnity paid on behalf of physicians. Failure or delay in diagnosis of cancer is the leading cause of action, with breast cancer accounting for half of the cases, followed by colon and lung cancers. Delays as short as seven months have resulted in plaintiff verdicts, and there have been a number of plaintiff verdicts involving patients who were disease-free for five or more years after the alleged delay in diagnosis. Although all physicians have been affected by this trend, diagnostic radiologists and primary care physicians have been targeted most often. In addition, jury awards have skyrocketed beyond all reason. Jury Verdict Research of Horsham, PA, has reported that jury awards rose 79 percent from \$1.95 million in 1993 to \$3.49 million in 1999.

These circumstances have resulted in the latest crisis in professional liability. Some of the largest commercial insurers are raising their rates in many states by more than 30 percent. Even physician mutuals are being forced into double-digit rate increases averaging 15 percent nationally this year. Predictions are that these premium hikes will be necessary for the foreseeable future. Rate increases materially affect all physicians but are particularly devastating to individuals in high-risk specialties, such as obstetrics, neurosurgery, and orthopaedic surgery, where yearly premiums in some areas are approaching \$200,000 or more per year for \$1 million/\$3 million of coverage. Physicians in several states, such as Pennsylvania, West Virginia, Florida, and Mississippi have been especially hard hit, and physicians in other locations

*continued on page 51*

***Dr. Manual*** is associate dean and professor of surgery at the Boston University School of Medicine, Boston, MA. He also is Chair of Regents' Committee on Patient Safety and Professional Liability.



---

## DOUBLE-DIGIT PREMIUM HIKES, from page 20

will soon suffer a similar fate, unless they are able to persuade their state legislators to enact major reform.

### ***Fundamental change needed***

The current crisis will not be contained by palliative measures. We need a fundamental change in the way we deal with medical injuries. For many years, I have favored a no-fault approach (patient compensation insurance). This system has worked well in other countries, such as Denmark, Finland, New Zealand, and Sweden, for many years and has been effective in cases involving newborns with severe neurological damage in Virginia and Florida. It also has also been effective in the U.S. for many years as applied to a government-sponsored program dealing with vaccine injuries. Further, it is the same approach being advocated for those affected by the September 11 tragedy.

Physicians cannot continue to shoulder the burden of a system that:

- Compensates fewer than one in eight patients who are negligently injured.
- Is based on the determination of fault where professionals often disagree.

- Can entail five to seven years of litigation before an injured patient receives any compensation.
- Generates devastating emotional damage to the physician and his or her family even when they are later acquitted by the court.
- Impedes the development of a comprehensive patient safety program because the consequences of self-reporting injuries or near misses may result in prolonged litigation.
- Takes 60 percent of the premiums paid by physicians and puts them into the hands of lawyers.

It is time for a change!



---

This article was generated through the efforts of the Regents' Committee on Patient Safety and Professional Liability. Members of the committee believe that this and other articles published in the *Bulletin* will stimulate thought and possible action on a wider spectrum of issues related to patient safety and professional liability.