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The Medical Mal-Practice Crisis: What's Going On Here?

In parts of West Virginia, surgeons went on strike on January 1. A similar strike in Pennsylvania was narrowly averted. Last year, until new legislation was enacted, serious health care shortages occurred in Nevada and Mississippi. For 2003, the governors of several states, including Florida, Pennsylvania, West Virginia, New Jersey and Texas, have declared the medical malpractice crisis to be the most important issue for the legislators of those states.

In Florida the crisis has been upon us for some time and is getting worse. Throughout the state, malpractice insurance premiums have soared. Rates are highest in Miami-Dade County and elsewhere in South Florida - in fact it was recently documented in a national trade newsletter, Medical Malpractice Monitor that in Miami-Dade county the premium rates for interns, general surgeons and obstetricians are the highest in the United States! Similar rates in Broward and Dade Counties are almost as high. It should therefore come as no surprise that many physicians in South Florida (and some in the rest of the State) are choosing to practice without insurance - going "bare" (to the author's knowledge, the only State in the country that allows physicians to practice medicine without insurance is Florida). Many insurers have left the State or have gone bankrupt.

The medical malpractice crisis is hardly limited to physicians. Last year saw record malpractice verdicts against Florida hospitals. The nursing home industry has been financially crippled as the result of malpractice judgments and the increased cost of insurance. Fact is, there is no area of the health care industry that is not touched by the malpractice insurance problem.

The reasons that the problems exist are numerous and complicated. Clearly the increase in both the volume of suits filed and the average size of judgments obtained is a significant cause of the problem. However, there are many other reasons, including the insurance price wars of the 1990s; bad investments made by insurance companies in light of a failing stock market and reduced interest rates; the withdrawals of major insurance companies from the market, such as St Paul's and Zurich; greater needs by insurance companies for excess reinsurance, where prices have soared, particularly since September 11; the increased net worth, surplus and reserve requirements under State insurance laws that occur when premiums increase; The push to bring cases to trial more quickly, which allows insurance companies less time to earn money on its premiums; and, of course, the expectations of patients.

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One State, the nation's most populous, that has seen insurance premiums slowly rise but not nearly at the levels of Florida, is California. The reason for this is that in 1975 California enacted its Medical Insurance Compensation Reform Act (MICRA). Among other things, MICRA imposes a cap of \$250,000 on non-economic damages; limits attorney fees; provides for periodic payments of future damages; and allows collateral payment sources of the injured to be considered. Many tort reform proponents consider it to be a model for successful legislation. In 2002, Nevada and Mississippi enacted tort reform legislation patterned upon, although not the same as, that of MICRA. However, this is not a short-term solution. Serious constitutional challenges are likely, and the reductions in premiums only occur gradually. Further, there is an existing challenge to MICRA itself now happening in California, where in two cases the trial court held (both are being appealed) that MICRA only applies to individuals, and not to a group practice itself. Both Florida and the U.S. Congress will consider tort reform this year. However, there is no certainty that any legislation will be enacted or, even if it is, how significant the legislation will be.

Malpractice - the potential for it and the insurance premiums required to pay for it - has become a critical issue for physicians and other health care providers. As revenues from Medicare, Medicaid and managed care contracting continue to go down, and volume of patients are maxed, the rising costs of malpractice premiums come right out of the bottom line - causing huge reductions given that the average increase in insurance premiums over the past 3 years is approximately 25% per year (in many cases they have risen much higher). Unfortunately, there are no easy solutions, but there may be alternatives.

In some cases, basically larger medical groups where the incidents of losses (loss ratios) are found to be actuarially sound, other alternatives are possible and may be outstanding economic investments, including the formation of a captive insurance company (only for large groups), a rent-a-captive (where the group effectively "rents" a part of an existing captive), or a risk retention group (typically done with multiple persons or groups). Captives may be formed onshore (some States that encourage this kind of business are Vermont, South Carolina and Hawaii) or off-shore (major jurisdictions include Bermuda, the Cayman Islands and Barbados). Risk Retention Groups are created pursuant to U.S. Federal law and can only be formed in

the United States. In addition, in Florida there appear to be more physician-owned insurance company formations underway. It must be recognized that all of these alternatives involve the creation of insurance companies, which certainly entails considerable risk. No one should consider doing this without good consultants and actuaries to guide them through the land mines so that they can make an intelligent decision as to whether, and how, to proceed.

Broad and Cassel, founded in January 1, 1946, has more than 140 lawyers and 200 support personnel located in seven offices throughout the state of Florida. Broad and Cassel has a national and international client base with offices located in Boca Raton, Fort Lauderdale, Miami, Orlando, Tallahassee, Tampa, and West Palm Beach. The Firm has extensive experience in a wide variety of practice areas including: Corporate and Securities; Construction Law, Real Estate; Estate Planning and Trusts; Commercial Litigation; Health Law; Taxation; Bankruptcy and Creditors' Rights; Labor and Employment; Intellectual Property Law; Computer and Technology Law; Appellate Law; White Collar Criminal and Civil Fraud Defense; and Special Assets.

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