Because of rising malpractice premiums, some physicians are moving to areas with lower rates, retiring early, not performing certain procedures, practicing without malpractice insurance, or going on strike to capture the attention of the public and policy makers. And some malpractice insurers have elected not to renew existing policies in certain locations or for practitioners in certain specialties. To address the issue of rising malpractice insurance premiums, it is important to understand the root causes.1

Two theories have emerged to explain the recent malpractice “crisis.” One theory proposes that high payments for “pain and suffering” are the cause of rising premiums; a second theory is that low and even negative returns in the stock market are responsible. According to the second theory, when insurance companies can earn a historical rate of return on their investments (perhaps 9%), the cost of insurance premiums will begin to stabilize. What does the evidence show?

COST TRENDS

A 2002 survey conducted by Medical Liability Monitor contained the following highlights: in 2002, malpractice premiums for internists and general surgeons increased by an average of 25%, and rates for obstetricians and gynecologists increased 20%.2 Recent reports in the New York Times and other newspapers and periodicals suggest even more rapid increases in 2003.

PAIN AND SUFFERING

The pain-and-suffering theory attributes these recent increases primarily to multimillion dollar jury awards. The data available to justify this assertion are old.3 The only government data are from 1996, when the median malpractice award in state courts was $285 000.

The most persuasive argument for this position comes from studies comparing premiums in states with and without caps on awards for pain and suffering. The simple comparisons show that premiums are higher in states without caps.4 The problem with this simple comparison, however, is that many other factors in addition to caps may explain the differences. One obvious factor is that the tendency of people to sue differs from state to state. Another is the variability in the quality of care provided. Multivariate analyses of state-to-state variations in malpractice premiums have not been conducted.5

Proponents of the pain-and-suffering theory offer 2 different policy solutions. The most common solution is to cap jury awards for pain and suffering. This approach is being studied in multiple state legislatures and the US Congress. A summary of state actions is available on the Kaiser Family Foundation Web site or in a recent report by the National Academy for State Health Policy.7 Recent hearings in the US Senate have focused on passing a bill similar to the one passed by the House of Representatives last year, which proposed a $250 000 cap on awards for pain and suffering.

A second approach, which has been proposed by numerous experts and adopted in other countries, is “no-fault” malpractice insurance.8 Although a limited number of states have considered this approach, obstetricians in Florida and Virginia may elect to participate in a no-fault plan for newborns with severe birth-related neurological impairments.9 The major advantage of the no-fault approach is that it does not require proof of culpability; thus, physicians may be more willing to disclose errors. A recent evaluation of the malpractice insurance system in New Zealand concluded the no-fault system “does not generate a strikingly higher level of claims making and receipt than do tort jurisdictions.”10 The study did not report on whether no-fault policies improved disclosure rates.

STOCK MARKET

The second theory is that the recent increase in malpractice insurance can be attributed to the 3-year decline in the stock market.11 Insurance companies invest their reserves in the stock market, and when the stock market declines, so do the companies’ reserves.12

The most compelling evidence for this theory is history. Previous malpractice crises have occurred at the same time.
as declines in the stock market. Is this causation or association? Premiums are invested, and the return on investment is part of a company's profits and losses. During periods of high interest rates or increasing equity values, insurance companies are able to keep premiums low to attract customers and thereby increase market share. When the interest rates and the stock market decline, the insurers must raise premiums to maintain profits. Currently, insurers are raising premiums for all types of business. Unfortunately, the research community does not have sufficient data to resolve whether low returns in the stock market actually cause higher insurance premiums. Insurance companies would need to open their books and disclose actual payments, forecasts of future trends in malpractice awards based on actuarial projections, and other confidential data. This is unlikely to happen.

CONCLUSION
There is no conclusive evidence that either theory is correct. The lack of evidence will not stop policy makers. The theory that most of the increase is attributable to the stock market does not allow for any public policy action. This is not a very acceptable scenario for most politicians faced with unhappy physicians paying much higher malpractice premiums. There is some evidence that states with caps on awards for pain and suffering have lower malpractice premiums. This seems to be the approach that state legislators and the US Congress are taking. Most states and the federal government are considering a cap in the $250,000 to $500,000 range. The approach that may have the greatest potential for improving quality of care is the “no-fault” approach. Policy makers and physicians should consider this approach because it is most likely to improve the quality of care.

References

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