

## Chapter VI

### Why the Insurers and the AMA Want to Take Your Rights Away

Many doctors have been recruited into the war against victims' rights because of the high cost of malpractice liability insurance premiums — the insurance coverage that physicians purchase to cover a claim in the event they commit malpractice.

Unfortunately, the medical profession and its trade associations have paid little attention to how the insurance industry's Byzantine practices inflate liability premiums to unjust levels. Instead, physicians have robotically joined with insurance companies in the campaign to limit the rights of malpractice victims.

Here's what this sordid alliance offers: when consumer rights are limited, insurance companies have to pay fewer malpractice claims, so they get to keep the premiums they receive and increase their profits. Physicians get insulated from legal liability and are promised they will pay less for malpractice coverage.

However, history shows that physicians, like other policyholders, have not received what they were promised by the insurance industry. Before joining in the attack on its patients, the medical community should have carefully examined the insurance industry's claims. Here is what they would have found, if they had looked:

#### **A “Crisis of Greed,” Not a “Litigation Crisis.”**

The “malpractice litigation crisis” that insurers say has forced them to raise malpractice liability premiums is one of the great hoaxes of the twentieth century. It is a scapegoat which has enabled the insurance industry to mislead its policyholders and transfer responsibility for the internal difficulties within the insurance business that lead, on a cyclical

basis, to dramatic increases in premiums. What better way to deal with underwriting and investment mistakes than to shift the blame onto malpractice victims, a less politically organized and more exploitable class of people?

Witting or not, the medical profession has been duped, but it is not alone. The news media and elected officials do not generally understand how the peculiar dynamics of the insurance business drive the industry's assault on consumers' rights.

To understand the origins of the insurance crisis, it is critical to recognize that modern-day insurance companies make most of their often phenomenal profits from the *investment* of insurance premiums. The sale of insurance policies (known in the insurance industry as "underwriting") used to be the industry's single purpose, and while underwriting can still be a big money-maker, insurance companies today are by and large much like banks and other financial institutions driven by investment profits.

In the early 1980s, insurance companies were aggressively trying to out-sell each other by offering many types of insurance policies at lower prices despite, in many instances, clear indications that the risk of a sizable loss warranted higher rates. Insurers were avariciously trying to increase their overall revenue from underwriting to take advantage of the higher interest rates of the time in order to reap massive increases in their investment profits.

But when interest rates dropped in the early 1980s, after a period of super-inflation, so did the insurance industry's profit from investments. Moreover, many insurers found themselves paying costly claims on policies that were extremely risky in the first place, but were under-priced to attract investment capital. To make matters even worse, some of the insurers' hasty investments — in real estate and projects financed by savings and loans — had turned into major debacles.

In 1984, faced with significant financial losses almost entirely of its own making, the industry had only one choice in order to maintain the profits to which it had become accustomed: increase premiums sharply. No one was spared. Premiums began to skyrocket for businesses, municipal governments and motorists. The industry also reduced the availability of coverage, which further boosted prices. Certain medical specialists couldn't find an insurance company willing to sell a policy — at any price.<sup>158</sup>

For industry observers, this “crisis” was simply a repeat of a similar mismanaged performance of the mid-1970s, in which rates for general liability policies, which includes medical malpractice premiums, increased by an average of 72 percent.<sup>159</sup> It was hardly unexpected. A leading stock analyst described this process as the “boom and bust nature of the industry . . . as predictable as the tide in a three-year swing from flood to ebb.”<sup>160</sup> Dennis Jay, a spokesperson for the Professional Insurance Agents trade association, said, “They [insurance companies] did not underwrite [assess risks and set appropriate premiums] the business as well as they should have. But it’s very tempting to get the money in today to earn 21 percent interest and worry about the losses later.”<sup>161</sup> A Washington State task force concluded that the “insurance crisis” was “mostly a result of poor management practices by the [insurance] companies.”<sup>162</sup>

When millions of insurance policyholders demanded an explanation for massive rate increases, policy cancellations and nonrenewals, they got a different explanation.

The insurance industry needed a scapegoat to distract attention from its own excesses and mistakes. And, along with foreign reinsurance companies (international conglomerates that back up the ability of insurance firms to pay claims), the industry saw a great opportunity to limit its own future payout obligations by exploiting the business community’s natural eagerness for limited liability from lawsuits.

So the insurers told their policyholders and the public that the tort system was responsible. Excessive jury verdicts, omnipresent lawyers and misguided judges were to blame. Unless “tort reform” was enacted by politicians, the entire insurance system would collapse, the industry warned.

Maintaining their short term profits was the first goal of the insurers’ strategy; increasing their profits over the long term by limiting how much money they would have to pay for policyholder claims was another. Insurance companies dislike the civil jury system because it forces them to pay claims. That means lower investment income. Restrictions on victims’ compensation means higher profits for insurers, particularly when the state insurance regulators responsible for preventing abusive practices often have close ties to the insurance industry.

Further, the people employed by the insurance industry to calculate the price of insurance policies — actuaries — dislike risks that they cannot precisely quantify. Of course, insurance is necessary because no

one can predict the future. But placing arbitrary, flat limits on compensation to victims of negligence was very appealing to insurance actuaries. Such limits would regulate the unique circumstances of individual cases that lead juries to make their decisions on how much compensation a victim requires.

The insurance industry's scapegoat was instantly and warmly embraced by many in the corporate community, including those in the health care business. The very industries being abused by insurance companies joined with them to form a new anti-consumer lobby. Their common cause was to limit their liability for the injuries and damage they wrongfully inflict upon innocent people — victims of defective products, dangerous drugs, cancer causing pesticides, drunk drivers or even incompetent doctors. Attacking civil liability standards, plaintiffs, juries and lawyers in one unified campaign became a deliberate “merchandising strategy” for higher premium prices and lower legal responsibility. The contrived “litigation crisis” of our time achieved its purposes. Some 41 states adopted one or more significant changes in their tort laws to limit the rights of injured Americans or, in the case of wrongful deaths, their next of kin.

### **The insurance industry targets the medical profession.**

Nationally, the medical profession was hit as hard or harder than the business community by the “crisis” of the mid-1980s. Insurance companies boosted malpractice premiums dramatically for medical specialties such as gynecology and midwifery, sometimes even canceling policies outright. Health clinics treating low income patients suffered particular hardship. The industry's actions rapidly enlisted the medical profession's support for restrictions on victims' rights.

The impact of the premium increases upon the medical profession was magnified by the insurers' callous and arbitrary underwriting system. It unfairly penalizes many doctors, particularly those who practiced high quality medicine and have good claims records. Insurers categorize physicians state-by-state and in specialty groups so small that one incompetent doctor's negligence can result in enormous increases for every member of the group.

While the insurers claimed premium increases were necessary because of the “litigation explosion,” the medical lobby should have known

that the data did not support that assertion. The previous “malpractice insurance crisis” of the mid-1970s had led to restrictions on the rights of malpractice victims in many states, but those laws did not lower the cost of malpractice liability insurance for physicians, as the insurance industry had promised.

California offers an excellent example of how the insurance industry easily convinced the medical profession to lead an attack on its patients. In 1975, the California legislature was confronted with a “malpractice liability insurance crisis” of skyrocketing premiums and policy cancellations. In response, it enacted anti-consumer legislation demanded by the physician and insurance lobbies.

The Medical Injury Compensation Reform Act, known as MICRA, mandated a series of arbitrary limitations on the right of consumers injured by medical negligence to seek legal redress. Two of its most onerous and punitive provisions cap the compensation paid to malpractice victims for pain and suffering to \$250,000 (the amount is not indexed to inflation) and establish a sliding scale of fees received by attorneys for representing victims of malpractice (no limits are placed on how much the defendants can pay their attorneys).

The insurance industry promised physicians and hospitals that if MICRA became law, malpractice insurance premiums would drop. The medical lobby then became a powerful proponent of the legislation. However, physicians and hospitals in California never got the promised premium reductions,<sup>163</sup> and some physician groups successfully sued their insurers for the excess profits that resulted.<sup>164</sup> In the late 1970’s, many physicians were forced to establish their own nonprofit insurance companies — known as “bed pan mutuals” — to get the coverage they needed. As one physician recalled, “The commercial insurers said if we changed the laws they would stand by us. Instead, once we did, we saw them hacking a path across the Sierra,” to leave the marketplace.<sup>165</sup> Today, doctor-owned companies control virtually the entire market in California, in contrast to the dominance of private for-profit insurers before 1975.<sup>166</sup>

MICRA did not fix the problems it was enacted to address because it was based on a phony premise: that the legal system, rather than the insurance industry, was responsible for gyrations in the cost and availability of insurance policies.

MICRA’s failure in California did not deter either the AMA or the insurance industry, however, because it served their financial purposes.

When insurance companies began boosting the price of all types of liability insurance in 1985, they told their angry customers that a “litigation explosion” had made the massive increases necessary. MICRA became the model for the industry’s “tort reform” campaign, the goal of which was to limit the legal rights of *all* Americans, not just those injured or killed by medical incompetence.

### **Research disproved the existence of a “litigation explosion.”**

Between 1985 and 1987, at the height of the “insurance crisis,” few policy-makers either looked back at the experience of the 1970s or took the time to demand empirical support for the insurance industry’s anecdote-based propaganda.<sup>167</sup> Insurers refused to provide the data in any case, and there is typically a two-year lag time to obtain the limited statistical information state regulators require insurance companies to report. The insurance industry’s campaign — aided by the medical industry — had already succeeded by the time independent researchers had the opportunity to analyze what had really happened in the mid-1980s.

Research has confirmed that the higher malpractice premiums of the period were not necessitated by litigation; there were no significant increases in the frequency of malpractice claims or the size of jury awards during this period. Objective investigations have shown that there was no “litigation crisis” in any of the economic sectors that had experienced destabilizing premium increases or withdrawal of insurance companies from the market.<sup>168</sup> The RAND Corporation’s Institute for Civil Justice (ICJ), whose work is partly funded by insurance companies and businesses that are often defendants in liability cases, conducted in 1983 a comprehensive evaluation of all lawsuits filed in Cook County, Illinois and San Francisco, California. The ICJ’s verdict: the number of malpractice lawsuits had remained stable since 1959.<sup>169</sup>

When the Minnesota Department of Commerce investigated a tripling of malpractice premiums between 1982 and 1987 in Minnesota, North Dakota and South Dakota — looking at each of the 4,747 malpractice claims filed — it found that the increases had nothing to do with jury awards, insurer costs or the number or size of malpractice claims, which had “not materially changed” over the six year period.<sup>170</sup>

Nor were the exaggerated and often-repeated horror stories of closed clinics and hospitals the result of the legal system gone awry. While the medical lobby and the insurance industry had argued that lawsuits and high malpractice liability insurance premiums were driving physicians and clinics out of business, subsequent studies showed otherwise.

Out of the 15 states that have the highest number of doctors per 100,000 people, only five have enacted tort law restrictions similar to those advocated by the insurance industry and the AMA: Maryland, California, Hawaii, Florida and Minnesota. Between 1980 and 1990, three out of these five *fell* in their ranking for the number of doctors per 100,000 people as compared to the rest of the country — Maryland and Minnesota and Minnesota did not go down, but stayed at the same rank. If the proponents of limitations on tort law are correct, doctors should have flocked to these states; instead, in a majority of the states, more doctors left.

Similarly, among the ten states with no liability restrictions, four went up in their ranking — there was an influx of physicians to these states — two remained the same, two fell, and another non-restrictive state, Washington, entered the top fifteen states.<sup>171</sup>

A close look at two jurisdictions with very different medical malpractice rules — California and the District of Columbia — further illustrates this point. In 1990, Washington, D.C., which has never limited medical malpractice lawsuits, had the highest per capita doctor/patient ratio in the nation, with 658 doctors for every 100,000 people. In 1980, the District also ranked first, with 576 doctors per 100,000 people. California, which had adopted the AMA's wish list of anti-consumer liability rules in 1975, ranked only sixth in the country, with 248 doctors per 100,000 people in 1980. By 1990, California had *fallen* to eighth place in the nation.<sup>172</sup>

A similar examination of the numbers of practicing obstetrician/gynecologists — specialists who often complain of unjust lawsuits and high malpractice premiums — produces similar results. In the state of New York, which has not adopted the restrictions on the rights of malpractice victims, the number of ob/gyns increased 19.9 percent between 1980 and 1990, while the population increased by 2.1 percent. During that same period, the number of ob/gyns in California increased 34.9 percent, while the population increased by 22.4 percent. If California had experienced the same rate of increase as New York per population, its number of ob/gyns would have increased 212 percent.<sup>173</sup>

These data show that placing draconian restrictions on lawsuits seeking compensation for malpractice does not result in more physicians practicing in those states. Nor does the absence of such laws drive physicians away.

Indeed, other factors explain why physicians leave their practice. Obstetrical practices in Florida and New York may have closed down in the 1980s, for example, not because of high insurance premiums, but because both states had an oversupply of ob/gyns at the time. One would expect a decline in physician activity in such circumstances.

The New York State Education Department conducted a 10-year study of obstetricians practicing in New York. It found that only 5 percent, or one out of 20, obstetricians in the state discontinued their practice or changed their practice specialty between 1980 and 1988. This drop-out rate was no different than for other practice specialties.<sup>174</sup> The reasons obstetricians cited for changing their practice were long, unpredictable hours, burn-out, and dissatisfaction with working conditions.

### **Liability premiums did not drop.**

After the fusillade of restrictions on the rights of malpractice victims took effect, of course, the “insurance crisis” of the 1980s rapidly dissipated. Recent analyses, based on data reported to state agencies by insurance companies, show that, as would be expected under laws limiting the legal rights of malpractice victims, the amounts insurance companies reported they would pay out to malpractice victims dropped by 45 percent between 1985 and 1991.<sup>175</sup>

Insurance companies did not cut their malpractice premiums accordingly, however. Numerous studies have since verified the predictions of those who warned that the restrictions on the legal rights of malpractice victims would not reduce the price of malpractice liability insurance purchased by doctors and hospitals.

Ironically, it was a law sponsored by the insurance industry itself which first exposed the deceit of its promise to lower rates in exchange for changes in the civil justice system.

Legislation enacted in Florida in the spring of 1986 at the behest of a coalition of insurance companies, medical lobbies and corporations contained dramatic restrictions on victims’ rights. But it also required insurers to reduce their insurance rates concomitantly, unless they could



demonstrate to state insurance regulators that the limitations on consumers' rights would not reduce their costs.

Six months after the law was enacted, two of the nation's largest insurance companies told the Florida Insurance Department that limiting compensation to injury victims would not reduce insurance rates.<sup>176</sup> St. Paul Fire and Marine Insurance Company, the nation's largest medical malpractice insurer, and Aetna Casualty & Surety Co., provided an extensive "actuarial analysis" of five specific limitations on victim's rights that the insurance industry had promised would reduce premiums. Overall, the Aetna report concluded that one provision of the law would reduce rates by a maximum of 4/10 of 1 percent, while all the other tort restrictions would have "no impact" on rates. In fact, Aetna asked for a 17 percent rate *increase* based on its analysis of the impact of the law.<sup>177</sup> The St. Paul study concluded that the restrictions "will produce little or no savings to the tort system as it pertains to medical malpractice."<sup>178</sup>

Another damaging indictment of the industry's campaign to limit consumer rights came a few months later. In April, 1987, the insurance industry's rate-making agency, the Insurance Services Office (ISO), released the results of a study intended to respond to repeated demands from policymakers and legislators across the country that the industry provide empirical data to support its claims that changes in the tort law system would alleviate the nation's insurance crisis.<sup>179</sup>

The study examined the responses of 1262 insurance adjusters from nine property-casualty insurance companies and two independent adjusting firms located in 24 states. The adjusters were asked to determine the impact of actual restrictions in the tort laws of 15 of the states on six hypothetical injury cases. In addition, they were asked to judge the impact of similar proposals which did not become law in the remaining nine states.

Much to the chagrin of the insurance industry, the study failed to support years of insurance industry propaganda. Instead, it disclaimed any impact upon rates. One insurance industry official was quoted as saying, "Some state legislators are going to be shaking their heads after hearing us tell them for months how important tort reform is, and now we come out with a study that says the legislation they passed was meaningless."<sup>180</sup>

In light of California's experience with MICRA, the insurance industry's confession, cynical as it was, should have come as no surprise. Indeed, in the midst of the "crisis," the federal government's watchdog

agency, the U.S. General Accounting Office, published a study of six states that had enacted many different forms of tort law restrictions during the “crisis” of the mid-1970s, including caps on compensation. The GAO report showed that the price of medical malpractice liability insurance in California had increased dramatically since the passage of MICRA. In fact, “premiums for physicians increased from 16 to 337 percent in southern California . . . between 1980 and 1986.”<sup>181</sup> The GAO study concluded:

While it is not possible to assess the extent to which the act [MICRA] has had an impact on the state’s malpractice situation, our analysis of key indicators indicated that the problem is continuing to worsen in California.<sup>182</sup>

According to the GAO, four states (Arkansas, Florida, New York and North Carolina) reported that the restrictions had had “little effect” on insurance premiums.<sup>183</sup>

A more recent, comprehensive review of insurance industry data spanning the period from 1976, when MICRA took effect, through 1991, demonstrates that its restrictions have done nothing to ease the cost of malpractice insurance premiums. The average malpractice premium per California physician has been higher than the national average in most years since MICRA’s passage. The total cost of malpractice liability insurance premiums paid as a percentage of total health care costs is higher in California than in the nation. Moreover, the price of malpractice coverage increased in California after the passage of the law. Premiums grew 191 percent through 1988, when they began to fall, dropping 20 percent by 1991. The same pattern emerged in the nation: premiums grew 331 percent through 1989, then fell 5 percent by 1991.<sup>184</sup>

This study concludes that MICRA is not responsible for the reversal in premium growth; tougher regulation imposed in California in 1988 probably accounts for the greater reduction in premiums witnessed in recent years.<sup>185</sup> But insurers still charge too much for malpractice liability insurance in California, according to the report; MICRA’s chief effect has been to enrich the insurance industry.<sup>186</sup>

## **Higher profits for insurers, fewer rights for malpractice victims.**

Investigations of the insurance industry's financial operations confirm that insurers took advantage of the crises they concocted to engage in profiteering. According to the National Insurance Consumer Organization (NICO), medical malpractice insurers earned a 12.6 percent return on net worth in 1987, when their complaints about the litigation explosion were at a fever pitch.<sup>187</sup> This rate of return is twice that of most other industries. Moreover, between 1975 and 1984, the entire property/casualty insurance industry made a record-breaking profit of \$75 billion, yet, due to preferential treatment under federal tax laws, paid no federal income tax, according to the U.S. General Accounting Office.<sup>188</sup>

In 1991, insurers writing medical malpractice insurance in the United States earned a return of \$1.4 billion, or 15.9 percent of net worth. But this immodest figure still underestimates the insurers' profitability. It reflects the industry's decision to retain much more capital than is necessary or reasonable to cover the risks they underwrite, according to NICO. Had insurers not retained so much previous profit, the return on net worth for America's medical malpractice insurers would have been even higher — 29.2 percent. This is an excessively high rate of return, one that is more than double the profit required to reward the risk of underwriting this insurance.<sup>189</sup>

The study of medical malpractice insurance in California shows that MICRA, the law restricting malpractice suits in that state, has done little more than enrich California malpractice insurers with excessive profits, at the expense of malpractice victims. One measure of the insurers' greed is revealed by their "loss ratio," which is the amount estimated to be paid for malpractice claims, shown as a percentage of premiums sold. Carriers which sell medical malpractice policies in California had an average loss ratio of 36 percent in 1990 — an astounding figure for an industry which usually relies on investment income, rather than underwriting, for most of its profits.<sup>190</sup>

Put another way, malpractice insurance companies operating in California paid out only 36 cents for every one dollar in premiums they took in from physicians, hospitals and other health facilities.<sup>191</sup> The industry's legendary inefficiency and bloated bureaucracy, along with excessive profits, soak up 64 percent of premiums.<sup>192</sup>

Given the insurance industry's role in the "insurance crisis" of the 1970s, its behavior in the mid-1980s was predictable, and should have elicited a stringent response from law enforcement, insurance regulators and elected officials. But few paid attention to the conclusions of those investigators who took the time to sift through the evidence of the chaos that swept the insurance marketplace in the mid-1980s. A 1986 report prepared by six state attorneys general concluded:

The facts do not bear out the allegations of an "explosion" in litigation or in claim size, nor do they bear out the allegations of a financial disaster suffered by property/casualty insurers today. They finally do not support any correlation between the current crisis in availability and affordability of insurance and such a litigation "explosion." Instead, the available data indicate that the causes of, and therefore the solutions to, the current crisis lie with the insurance industry itself.<sup>193</sup>

By early 1987, much of the public understood that the "insurance crisis" was a cruel hoax. But by that time, most of the states in the nation had enacted laws limiting the rights of injured consumers, premiums had stabilized at sharply higher levels, and the insurers' profits were skyrocketing. The "crisis" was over — for everyone except the victims.

Struck by high liability insurance premiums in 1986, many of the 400 health clinics that had catered to the poor in California were forced to raise prices or restrict services; some closed. Yet, as a Modesto, California newspaper angrily noted in February, 1987, "a survey conducted by the clinics indicates that for every dollar they paid in premiums, their insurers paid just a nickel in claims . . ." <sup>194</sup> As in the 1970s, insurance companies gained the most from the "crisis" of the 1980s, and consumers lost the most.

### **California's 1970s' experiment leads to a citizen backlash in the 1980s.**

While the medical community was oblivious to or uninterested in the lessons of history, consumers in California had learned their lesson the hard way and were ready when the industry announced the "crisis" of

the mid-1980s. Instead of accepting the industry's across-the-board demands for higher premiums and restrictions on victims' rights, Californians fought back, demanding reform of the insurance industry. In 1988, California voters approved a ballot measure, known as Proposition 103, which mandated a 20 percent rate rollback in all forms of property-casualty insurance, including medical malpractice, and prohibited increases in such insurance unless approved by the insurance commissioner after hearings and public justification. The insurance commissioner was made an elected official by the statewide initiative and given broad investigative powers.

As a result of Proposition 103, the average malpractice premium per physician in California fell below national levels in 1989. And malpractice insurance premiums in the state have been reduced by more than twice the amount that rates have fallen throughout the nation.<sup>195</sup> The initiative has saved California consumers an estimated \$4 to \$6 billion overall, according to a study by the National Insurance Consumer Organization.<sup>196</sup> Still, research data show that insurers have not passed through to policyholders (i.e., doctors and hospitals) the "savings" that resulted from the 1975 law that allows them to pay fewer malpractice claims.<sup>197</sup> Proposition 103's most important achievement may be the regulatory protection it affords Californians against future attempts by insurance companies to generate insurance "crises."

### **Malpractice insurance is irrelevant to the health care crisis.**

One "crisis" cannot be disputed, however: the nation's health care system is near collapse. Health care costs are skyrocketing and the ranks of the uninsured exceed 37 million.

The medical and insurance lobbies, facing widespread demands for reform of the health care system, say that limits on malpractice suits (rather than upon skyrocketing insurance premiums or exorbitant doctors' fees) would lower costs and help resolve the nation's health care crisis. Data provided by the medical-insurance industry itself prove these contentions false.

The price of malpractice liability insurance coverage (policies purchased by doctors and hospitals to cover them if they commit malpractice and settle or lose a subsequent court case), are a minute fraction of the nation's health care costs. In 1991, both doctors and hospitals paid

\$4.86 billion in malpractice insurance premiums nationwide.<sup>198</sup> This represents 0.6 percent of America's total health care costs of \$750 billion in 1991.<sup>199</sup> And the percentage is unchanged from 1985. The premiums paid by every physician and hospital to liability insurers are simply immaterial when it comes to solving the crisis.

Similarly, the amount of compensation paid by insurance companies on behalf of negligent physicians and hospitals to victims of medical malpractice is insignificant compared to the total costs of health care in the United States, and the amount is decreasing. In 1985, the total amount of malpractice claims paid and funds reserved for future claims in the United States amounted to 0.8 percent of total health care costs.<sup>200</sup> Malpractice payments *decreased by 50 percent* to 0.4 percent total health care costs, by 1991.<sup>201</sup> The payments made to malpractice victims by insurance companies are irrelevant to the overall cost of the health system in the nation.

Indeed, even if the Congress completely capitulated to the propaganda of the medical and insurance lobbies and prohibited *any compensation* for malpractice victims, the nation's health care crisis would not be significantly affected, much less alleviated.

On the contrary, as shown previously in Chapters IV and V, repealing the protections of the tort system will lead to *more* malpractice and higher costs. If the goal is to curb health care costs, stronger, not weaker, malpractice law enforcement is needed.

Americans need not learn the hard way that draconian restrictions on legal rights will not lower health care costs. As noted, the people of California have served as guinea pigs in such an experiment, and the results are clear. Despite the draconian limits imposed by MICRA in 1975, per capita health care expenditures in California exceeded the national average each year between 1975 and 1991 by an average of 13 percent per year.<sup>202</sup>

In fact, the amount that insurance companies estimated they would have to pay out for medical malpractice claims in California averaged about *one-half of one percent* of the state's total health expenditures each year between 1985 and 1990.<sup>203</sup>

Many states passed similar anti-consumer legislation in the 1970s and 1980s. In virtually every one of these states, the insurance industry promised that if limits on victims' rights were instituted, malpractice insurance premiums and health care costs would decline. Historical ex-

perience shows that these promises have not been kept, as noted previously, because the insurance industry has consistently refused to restrain its profiteering, adopt more reasonable policies in determining reserves, or set premiums by applying experience-loss ratings that surcharge malpracticing physicians and hospitals. Even if the insurance industry were to suddenly reform itself, however, it is important to recognize that the total cost of health care in this country would not be significantly affected.

In any case, debating the “cost” of victims’ rights is a fundamental mistake. Health care consumers must reject a dollar-driven analysis that would require them to sacrifice the limited protection of the rights afforded by the legal system in exchange for the broken promise of reduced health care costs.

Stripped of its glossy patina, such a *quid pro quo* is no more than an across-the-board diminishment of the quality of care consumers will receive, against a minuscule, and wholly illusory, promise of financial savings.

There is, moreover, the question of who would claim the right to abrogate 200 years of jury decisions and judicial development of principles which protect consumers against negligence, carelessness and criminal behavior. Can Congress claim the legitimate authority to summarily exclude these victims from the courts so that insurance companies, doctors and hospitals obtain a financial gain?

It is a sad reflection on the medical trade that it has permitted itself to be the standard-bearer in this dollars vs. lives campaign. This is especially so because the physicians’ grievance — the cost of malpractice liability coverage — is virtually irrelevant to the finances of most doctors. In the midst of the 1980s “crisis,” malpractice premiums — which are tax deductible for physicians — averaged a paltry 2.9 percent of physicians’ gross income.<sup>204</sup> Even after physicians pay their liability insurance premiums and other expenses, they are financially well-to-do. The average net income for a doctor in 1990 was \$164,300.<sup>205</sup>

Advocating that patients be deprived of their legal rights merely so that doctors can obtain unspecified savings for an item which is a minor expense is a profound betrayal indeed.

A genuine solution to the health care crisis will require laws to control the cost of hospital stays and drug prices, limit physicians’ fees, and end the waste, inefficiency and fraud that characterizes the insurance

process, and then using the savings to provide universal health care coverage.<sup>206</sup> Because real reform means an end to the gravy train that has enriched the insurance industry, physicians and pharmaceutical companies, these special interests are working hard to scapegoat those most incapable of defending themselves: the innocent victims — children, women and men — of medical malpractice.