

## An Ounce of Prevention is Worth a Pound of Cure: Distribution of Medical Malpractice Claims - Implications for Healthcare Organizations

In today's emphasis on reducing healthcare costs and spending, many commentators have noted that reforms to the U.S. system of medical malpractice, such as noneconomic damages caps, could reduce overall healthcare spending.<sup>1</sup> While the effectiveness of "tort reform" measures on reducing healthcare spending has been challenged,<sup>2</sup> new data regarding the concentration of paid medical malpractice claims among physicians may offer new insight into future medical malpractice reform efforts. Specifically, a January 2016 study published in the *New England Journal of Medicine* (NEJM) found that "approximately 1% of all physicians accounted for 32% of paid claims"<sup>3</sup> and positively correlated the risk level of a physician for a malpractice claim with the number of previous paid malpractice claims against the physician.<sup>4</sup> Identifying physicians with increased risk levels for a malpractice claim, as well as designing protocols and training regimens to decrease this risk, prior to the onset of legal implications could serve as a proactive means by which health systems can reduce the burden of medical malpractice while also reducing unnecessary healthcare expenditures.<sup>5</sup> This Health Capital Topics article will discuss the results of the NEJM study on medical malpractice claim distribution, as well as detail how health systems can utilize claims data to take proactive measures that may reduce the burden of medical malpractice and the costs associated with this quality control measure.

There is much debate concerning whether the U.S. tort system governing medical malpractice adequately protects patients, through the reduction of medical errors, while reducing healthcare costs. As stated in Chapter 11 of *Risk Management, Liability Insurance, and Asset Protection Strategies for Doctors and Advisors*:

*"The goal of medical malpractice is to function as a quality control measure, creating an incentive to prevent medical errors and reduce accident producing behavior by awarding damages, i.e., "money claimed by or ordered to be paid to a person as compensation for loss or injury,"<sup>6</sup> to plaintiffs who have been found to have been harmed by the physician's error."<sup>7</sup>*

While the payment of damages provides some form of recourse to the injured party after the medical malpractice, economists and physicians have questioned the efficacy of the U.S. tort system to reduce medical errors and healthcare costs. In response to the threat of medical malpractice claims, many physicians resort to *defensive medicine*, defined as the instance "when doctors order tests, procedures, or visits, or avoid certain high-risk patients or procedures, primarily (but not solely) because of concern about malpractice liability."<sup>8</sup> Defensive medicine practices been widely noted as a driver of unnecessary care and increased healthcare costs.<sup>9</sup> Further, many "tort reform" efforts to reduce the scope of liability for physicians, such as non-economic damages caps, may not adequately reduce defensive medicine practices, as physician overestimation of their risk of facing a malpractice claim was driven more by subjective fears of a lawsuit instead of the presence or absence of specific tort reform laws.<sup>10</sup> This attitude toward malpractice risk and the use of defensive medicine calls into question the efficacy of various "tort reform" laws in reducing healthcare costs.

In addition to defensive medicine concerns, concerns about litigation costs also impact discussions regarding improvements to the U.S. tort system governing medical malpractice. According to the *Physician Insurers Association of America* (PIAA) Data Sharing Project, national indemnity payments for 2013 amounted to \$704 million (in 2013 dollars).<sup>11</sup> Additionally, defense and cost containment expenses, not including indemnities, were \$228 million (in 2013 dollars).<sup>12</sup> Over a 10 year period (2004-2013), total indemnity paid in claims amounted to nearly \$9 billion (in 2013 dollars), with 26% of all claims resulting in indemnity payment. Among the \$9 billion spent on total indemnity payments, defense and cost containment expenses not including indemnities were \$2.4 billion (in 2013 dollars), accounting for nearly 1/4<sup>th</sup> of all indemnity spending.<sup>13</sup>

Medical malpractice claim concentration data may provide insight into identifying specific forces underlying the overall efficacy of the U.S. tort system in preventing medical errors. According to the NEJM study, 1% of the approximately 915,000 active U.S. physicians in 2014 had two or more paid malpractice

claims levied against him/her; this subset of the active physician population accounted for 32% of the approximately 66,000 paid medical malpractice claims between 2005 and 2014.<sup>14</sup> In addition, physicians with three or more paid malpractice claims levied against him/her (approximately 0.2% of the 2014 active physician population) accounted for 12% of all paid malpractice claims.<sup>15</sup> The incidence of levied claims against a particular physician has a positive correlation with the risk level of facing a future claim for medical malpractice. According to the NEJM study, physicians with two paid malpractice claims levied against him/her possessed nearly double the risk of facing a malpractice claim in the future, in comparison to physicians who previously faced one paid malpractice claim.<sup>16</sup> For physicians with three paid malpractice claims levied, the risk of facing a malpractice claim in the future tripled against physicians with only one levied paid claim, and had a 24% probability of occurring within 2 years of being levied with their third paid claim.<sup>17</sup> In consideration of this data, the authors noted that “*the instantaneous risk of further paid [malpractice] claims was highest soon after a payment was made.*”<sup>18</sup> The February 2016 NEJM study reflects what previous studies have also noted: a small minority of physicians are associated with a grossly disproportionate share of paid medical malpractice claims.<sup>19</sup>

Claims distribution data provides hospitals, integrated delivery systems, and other healthcare providers with an opportunity to impact the U.S. tort system governing medical malpractice claims by proactively seeking to reduce medical errors *before* a patient and physician enter litigation. Notably, healthcare organizations can access claims data through the *National Practitioner Data Bank* (NPDB) and run queries to track the status of each affiliated physician in regards to paid malpractice claims.<sup>20</sup> Healthcare organizations have the potential to utilize data on paid medical malpractice claims to identify at-risk physicians and develop protocols to reduce the potential of further medical errors.<sup>21</sup> With the heightened risk of future malpractice suits after being levied with a second paid claim,<sup>22</sup> preventing the occurrence of a second paid claim may eliminate a large portion of the claims filed against physicians for medical malpractice.

In the future, it is worth tracking the actual impact of targeted institutional efforts, using NPDB data, in reducing medical errors, healthcare costs, and defensive medicine practices. However, in the present, healthcare organizations can view both the existence and their access to NPDB data on medical malpractice claim distribution not simply as a risk to manage, but as an “*exciting opportunity*” to improve the quality of care provided by its member physicians with the potential of reducing costs in the long run.<sup>23</sup>

1 “The Impact of Tort Reform on Employer-Sponsored Health Insurance Premiums” By Ronen Avraham, Leemore S. Dafny, and Max M. Schanzbach, National Bureau of Economic

Research, NBER Working Paper No. 15371 (September 2009) p. 2; “Medical Malpractice Reform” National Conference of State Legislatures, October 2011, <http://www.ncsl.org/portals/1/documents/health/MedicalMalReform-2011.pdf> (Accessed 3/22/16) p. 1.

2 “Would Tort Reform Lower Costs?” By Anne Underwood, The New York Times, August 31, 2009, [http://prescriptions.blogs.nytimes.com/2009/08/31/would-tort-reform-lower-health-care-costs/?\\_r=0](http://prescriptions.blogs.nytimes.com/2009/08/31/would-tort-reform-lower-health-care-costs/?_r=0) (Accessed 3/23/16); “Defensive Medicine, Cost Containment, and Reform” By Laura D. Hermer, JD, LLM, and Howard Brody, MD, Ph.D., *Journal of General Internal Medicine*, Vol. 25, No. 5 (2010) p. 471.

3 “Prevalence and Characteristics of Physicians Prone to Malpractice Claims” By David M. Studdert et al., *The New England Journal of Medicine*, Vol. 374, No. 4, January 28, 2016, p. 354.

4 *Ibid*, p. 357.

5 *Ibid*, p. 355.

6 “Black’s Law Dictionary” 9th ed., Eagan, MN: West Publishing Company, 2009, p. 445.

7 “Health Law: Cases, Materials, and Problems, 7th Edition,” By Barry R. Furrow et al., St. Paul, MN: West Publishing Company, 2013, p. 508; “Risk Management, Liability Insurance, and Asset Protection Strategies for Doctors and Advisors” Edited by David E. Marcinko and Hope R. Hetico, Boca Raton, FL: Taylor & Francis Group, 2016, Ch. 11, “Medical Malpractice and Tort Reform: Urgent Crisis or Red Herring?” By Robert James Cimasi, MHA, ASA, FRICS, MCBA, CVA, CM&AA, and Todd A. Zigrang, MBA, MHA, FACHE, ASA, p. 271.

8 “Defensive Medicine and Medical Malpractice” By U.S. Congress, Office of Technology Assessment, Washington, DC: U.S. Government Printing Office, July 1994, p. 1.

9 “Defensive Medicine in Neurosurgery: Does State-Level Liability Risk Matter?” By Timothy R. Smith, et al., *Neurosurgery*, Vol. 76, No. 2, February 2015, p. 113; “Overuse of Testing in Preoperative Evaluation and Syncope: A Survey of Hospitalists” By Allen Kachalia, MD, JD, et al., *Annals of Internal Medicine*, Vol. 162, No. 2 (January 20, 2015) p. 105.

10 “Physicians’ Fears Of Malpractice Lawsuits Are Not Assuaged By Tort Reforms” By Emily R. Carrier, et al., *Health Affairs*, Vol. 29, No. 9 (2010) p. 1588-89.

11 “Closed Claim Comparative: A Comprehensive analysis of medical professional liability data reported to the PIAA Data Sharing Project” Physician Insurers Association of America, 2014, [https://www.piaa.us/wcm/Data\\_Sharing\\_Project/Publications/wcm/\\_Data\\_Sharing\\_Project/Publication.aspx?hkey=5f338ca6-3269-414e-87e0-a2528d7d8eb5](https://www.piaa.us/wcm/Data_Sharing_Project/Publications/wcm/_Data_Sharing_Project/Publication.aspx?hkey=5f338ca6-3269-414e-87e0-a2528d7d8eb5) (Accessed 11/21/2014).

12 *Ibid*.

13 *Ibid*.

14 Studdert et al., January 28, 2016, p. 356.

15 *Ibid*.

16 *Ibid*, p. 357.

17 *Ibid*.

18 *Ibid*, p. 360.

19 By Barry R. Furrow et al., 2013, p. 509; “Medical Malpractice Experience of Physicians: Predictable or Haphazard?” By Frank A. Sloan, Ph.D., et al., *Journal of the American Medical Association*, Vol. 262, No. 23 (December 15, 1989) p. 3293; “National Practitioner Data Bank: 2006 Annual Report” Health Resources and Services Administration, U.S. Department of Health and Human Services, 2006, <http://www.npdb.hrsa.gov/resources/reports/2006NPDBAnnualReport.pdf> (Accessed 3/23/16) p. 39.

20 “Medical Peer Review and Risk Management” By S. Jay Jayasankar, MD, *American Academy of Orthopedic Surgeons*, October 2008, <http://www.aaos.org/news/aaosnow/oct08/managing9.asp> (Accessed 12/22/14).

21 By David M. Studdert et al., January 28, 2016, p. 361.

22 *Ibid*, p. 357.

23 *Ibid*, p. 356.



(800) FYI - VALU

*Providing Solutions  
in the Era of  
Healthcare Reform*

Founded in 1993, HCC is a nationally recognized healthcare economic financial consulting firm

- [HCC Home](#)
- [Firm Profile](#)
- [HCC Services](#)
- [HCC Experts](#)
- [Clients & Projects](#)
- [HCC News](#)
- [Upcoming Events](#)
- [Contact Us](#)
- [Email Us](#)

#### HEALTH CAPITAL

CONSULTANTS (HCC) is an established, nationally recognized healthcare financial and economic consulting firm headquartered in St. Louis, Missouri, with regional personnel nationwide. Founded in 1993, HCC has served clients in over 45 states, in providing services including: valuation in all healthcare sectors; financial analysis, including the development of forecasts, budgets and income distribution plans; healthcare provider related intermediary services, including integration, affiliation, acquisition and divestiture; Certificate of Need (CON) and regulatory consulting; litigation support and expert witness services; and, industry research services for healthcare providers and their advisors. HCC's accredited professionals are supported by an experienced research and library support staff to maintain a thorough and extensive knowledge of the healthcare reimbursement, regulatory, technological and competitive environment.



**Robert James Cimasi**, MHA, ASA, FRICS, MCBA, CVA, CM&AA, serves as Chief Executive Officer of **HEALTH CAPITAL CONSULTANTS (HCC)**, a nationally recognized healthcare financial and economic consulting firm headquartered in St. Louis, MO, serving clients in 49 states since 1993. Mr. Cimasi has over thirty years of experience in serving clients, with a professional focus on the financial and economic aspects of healthcare service sector entities including: valuation consulting and capital formation services; healthcare industry transactions including joint ventures, mergers, acquisitions, and divestitures; litigation support & expert testimony; and, certificate-of-need and other regulatory and policy planning consulting.

Mr. Cimasi holds a Master in Health Administration from the University of Maryland, as well as several professional designations: Accredited Senior Appraiser (ASA – American Society of Appraisers); Fellow Royal Institution of Chartered Surveyors (FRICS – Royal Institution of Chartered Surveyors); Master Certified Business Appraiser (MCBA – Institute of Business Appraisers); Accredited Valuation Analyst (AVA – National Association of Certified Valuators and Analysts); and, Certified Merger & Acquisition Advisor (CM&AA – Alliance of Merger & Acquisition Advisors). He has served as an expert witness on cases in numerous courts, and has provided testimony before federal and state legislative committees. He is a nationally known speaker on healthcare industry topics, and is the author of several books, the latest of which include: “*Adviser’s Guide to Healthcare – 2nd Edition*” [2015 – AICPA]; “*Healthcare Valuation: The Financial Appraisal of Enterprises, Assets, and Services*” [2014 – John Wiley & Sons]; “*Accountable Care Organizations: Value Metrics and Capital Formation*” [2013 - Taylor & Francis, a division of CRC Press]; and, “*The U.S. Healthcare Certificate of Need Sourcebook*” [2005 - Beard Books].

Mr. Cimasi is the author of numerous additional chapters in anthologies; books, and legal treatises; published articles in peer reviewed and industry trade journals; research papers and case studies; and, is often quoted by healthcare industry press. In 2006, Mr. Cimasi was honored with the prestigious “*Shannon Pratt Award in Business Valuation*” conferred by the Institute of Business Appraisers. Mr. Cimasi serves on the Editorial Board of the Business Appraisals Practice of the Institute of Business Appraisers, of which he is a member of the College of Fellows. In 2011, he was named a Fellow of the Royal Institution of Chartered Surveyors (RICS).



**Todd A. Zigrang**, MBA, MHA, ASA, FACHE, is the President of **HEALTH CAPITAL CONSULTANTS (HCC)**, where he focuses on the areas of valuation and financial analysis for hospitals, physician practices, and other healthcare enterprises. Mr. Zigrang has over 20 years of experience providing valuation, financial, transaction and strategic advisory services nationwide in over 1,000 transactions and joint ventures. Mr. Zigrang is also considered an expert in the field of healthcare compensation for physicians, executives and other professionals.

Mr. Zigrang is the co-author of the “*Adviser’s Guide to Healthcare – 2nd Edition*” [2015 – AICPA], numerous chapters in legal treatises and anthologies, and peer-reviewed and industry articles such as: *The Accountant’s Business Manual* (AICPA); *Valuing Professional Practices and Licenses* (Aspen Publishers); *Valuation Strategies; Business Appraisal Practice*; and, *NACVA QuickRead*. In addition to his contributions as an author, Mr. Zigrang has served as faculty before professional and trade associations such as the American Society of Appraisers (ASA); the National Association of Certified Valuators and Analysts (NACVA); Physician Hospitals of America (PHA); the Institute of Business Appraisers (IBA); the Healthcare Financial Management Association (HFMA); and, the CPA Leadership Institute.

Mr. Zigrang holds a Master of Science in Health Administration (MHA) and a Master of Business Administration (MBA) from the University of Missouri at Columbia. He is a Fellow of the American College of Healthcare Executives (FACHE) and holds the Accredited Senior Appraiser (ASA) designation from the American Society of Appraisers, where he has served as President of the St. Louis Chapter, and is current Chair of the ASA Healthcare Special Interest Group (HSIG).



**John R. Chwarzinski**, MSF, MAE, is Senior Vice President of **HEALTH CAPITAL CONSULTANTS (HCC)**. Mr. Chwarzinski’s areas of expertise include advanced statistical analysis, econometric modeling, as well as, economic and financial analysis. Mr. Chwarzinski is the co-author of peer-reviewed and industry articles published in *Business Valuation Review* and *NACVA QuickRead*, and he has spoken before the Virginia Medical Group Management Association (VMGMA) and the Midwest Accountable Care Organization Expo.

Mr. Chwarzinski holds a Master’s Degree in Economics from the University of Missouri – St. Louis, as well as, a Master’s Degree in Finance from the John M. Olin School of Business at Washington University in St. Louis. He is a member of the St. Louis Chapter of the American Society of Appraisers, as well as a candidate for the Accredited Senior Appraiser designation from the American Society of Appraisers.



**Jessica L. Bailey-Wheaton**, Esq., is Senior Counsel of **HEALTH CAPITAL CONSULTANTS (HCC)**, where she conducts project management and consulting services related to the impact of both federal and state regulations on healthcare exempt organization transactions and provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services. Ms. Bailey is a member of the Missouri and Illinois Bars and holds a J.D., with a concentration in Health Law, from Saint Louis University School of Law, where she served as Fall Managing Editor for the *Journal of Health Law & Policy*.



**Kenneth J. Farris**, Esq., is a Research Associate at **HEALTH CAPITAL CONSULTANTS (HCC)**, where he provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services, and tracks impact of federal and state regulations on healthcare exempt organization transactions. Mr. Farris is a member of the Missouri Bar and holds a J.D. from Saint Louis University School of Law, where he served as the 2014-2015 Footnotes Managing Editor for the *Journal of Health Law & Policy*.



# HEALTHCARE VALUATION

## THE FINANCIAL APPRAISAL OF ENTERPRISES, ASSETS, AND SERVICES

Robert James Cimas, MHA, ASA, FRICS, MCBA, AVA, CM&AA – CEO, HEALTH CAPITAL CONSULTANTS  
Foreword by Shannon P. Pratt

“...the definitive treatise for the complexities of valuation in the healthcare industry.”

- Chris M. Mellen, President - Delphi Valuation Advisors, Inc.

## The Adviser's Guide to Health Care

Robert James Cimas, MHA, ASA, FRICS, MCBA, CVA, CM&AA – CEO, HEALTH CAPITAL CONSULTANTS  
Todd A. Zigrang, MBA, MHA, FACHE, ASA – President, HEALTH CAPITAL CONSULTANTS

Keep Up With the Changes in Health Care Services and Consulting Practices

Includes Foreword by Leading National Health Care Attorney

David W. Grauer, Esq.  
Partner, Jones Day

**TWO-VOLUME SET** ➤

- Consulting Services
- An Era of Reform - The Four Pillars



To purchase, visit [AICPAStore.com/AGHC](http://AICPAStore.com/AGHC)

## ACOs: Balancing Quality and Costs in Healthcare

Robert James Cimas, MHA, ASA, FRICS, MCBA, AVA, CM&AA – CEO, HEALTH CAPITAL CONSULTANTS  
Foreword by Peter A. Pavarini, Esq. – Squire Sanders LLP

“A must read and resource for any healthcare industry executive”

—Roger W. Logan, MS, CPA/ABV, ASA, Senior Vice President of Phoenix Children's Hospital



Learn more at  [CRCPress.com](http://CRCPress.com) ➤