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A New Era
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Medical
Malpractice
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Reform Trends

MACRA:
Implications
for Physician
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Medical Malpractice and Tort Reform Environment

The Protecting Access to Care Act of 2017 seeks a non-economic damages cap of \$250,000 and signals the intent of the Republican-controlled Congress to push for federal tort reform **By Robert James Cimasi, MHA, and Todd A. Zigrang, MBA, MHA**

SINCE THE inauguration of President Donald Trump in January 2017, and with Republicans controlling Congress and the White House, the issue of tort reform has received heightened attention at the federal level. Industry commentators have noted that federal bills related to tort reform may have an increased probability of passage. A consideration of the current medical malpractice environment may serve to frame this highly political issue within context. This article presents a brief review of the significant elements of the tort reform debate, including the comparatively slower than expected growth in medical errors, the concentration of medical malpractice lawsuits and litigation within a subset of physicians, and the nature and extent of tort reform efforts at both the state and federal levels.

Significant increases in the volume of procedures performed by physicians over the past half century have contributed, in part, to the increase in both the risk of harm to patients and the liability exposure for physicians through medical errors, or deviations from the norms of clinical care. Since the 1999 Institute of Medicine (IOM) report that estimated that 44,000-98,000 patients died each year due to an adverse event, of which 58% were preventable (directly tied to medical error), numerous studies have concluded that the prevalence of fatal medical errors may be far greater than previously estimated. A 2011 study published in *Health Affairs* found that deaths stemming from adverse medical events could range as high as 400,000 per year. Additionally, a 2016 study published in *BMJ* by researchers from Johns Hopkins University estimated that 251,000 U.S. deaths occur annually due to medical errors, making medical errors the third-leading cause of death in the U.S.

Payout Trends

Despite increased risk exposure, the total amount and rate of indemnity payouts (damages awarded to injured parties from defendants) for instances of medical malpractice have decreased over the past 20 years. According to National Practitioner Data Bank (NPDB) data analyzed by professional liability insurer Diederich Healthcare, the total amount of damages payouts in instances of medical malpractice in the U.S. fell nearly \$1 billion over the past decade, from approximately \$4.8 billion

in 2003 to \$3.84 billion in 2016. The 2016 data reflect a decrease of 2.54% from 2015 levels, and serve as the first decline in medical malpractice payouts since 2012, which, at approximately \$3.6 billion, marked the figure's lowest level since 2003. Similarly, a separate analysis of NPDB data published by *JAMA Internal Medicine* found that "the rate of claims paid on behalf of all physicians declined by 55.7% from 1992 to 2014."

The decline in the both total amount and rate of medical malpractice damages payouts may be attributable to depressed claims frequency, the rate at which insureds request protection from their insurer for actions covered under their insurance policy. According to the 2016 Annual Rate Survey Issue published by *Medical Liability Monitor*, claim frequency levels are at "historic lows [with] little-to-no evidence of a significant upward trend in the near future." Although physicians infrequently pay damages awards themselves, it remains unclear whether the depressed claims frequency actually reflects decreased numbers of medical malpractice lawsuits. However, this decreased claim frequency may be attributable to the efforts by states over the past 40 years to limit noneconomic damages for this type of litigation, which may, in part, disincentivize plaintiff attorneys, who work on a contingency fee basis, from assuming the risk of representing a client in a case that will only result in a certain (capped) amount of damages.

Premium Decreases

Additionally, average professional liability insurance premiums for physicians have decreased over a similar timeframe. Data compiled from *Medical Liability Monitor's* Annual Rate Survey Issue indicates that average professional liability insurance premiums for the general surgery, internal medicine, and obstetrics and gynecology specialties have decreased each year from 2005 to 2014, and have remained relatively flat from 2015 to 2016, as illustrated in Exhibit 1.

Exhibit 2 on page 12 shows that the average medical malpractice payout amounts for internal medicine and obstetrics and gynecology have decreased during the 2003 to 2008 period while payout amounts for general surgery has increased slightly during the same period. Payouts for obstetrics and gynecology showed a dramatically sharp decline during the period. 

Exhibit 1: Average Cost of Professional Liability Insurance Premiums, U.S., 1991-2016

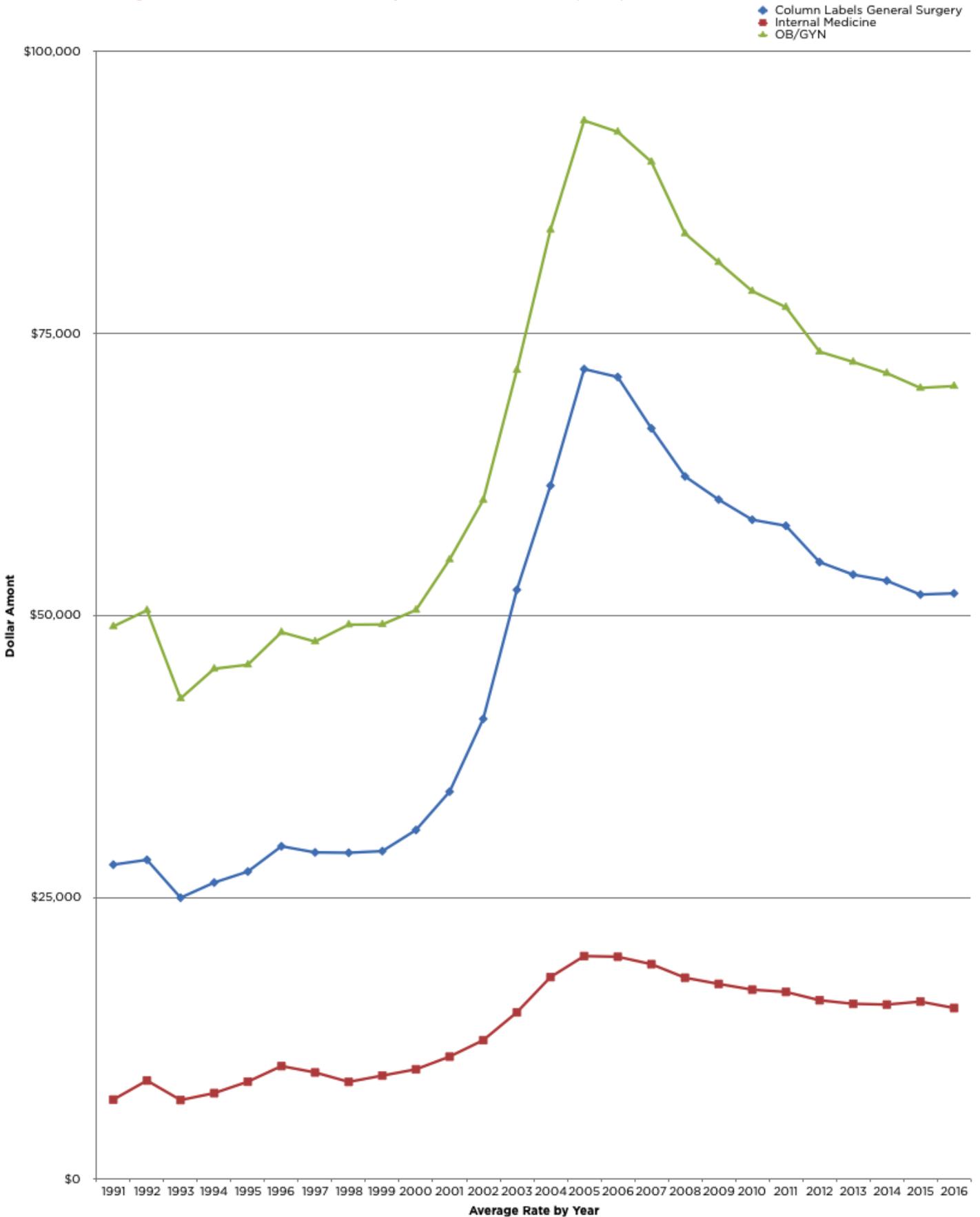


Exhibit 2: Average Medical Malpractice Payout Amounts, U.S., 1992-2014

