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## **Setting the Record Straight on Medical Liability Limits: Tort “Reform” Hurts Patients, Costs Billions, and Shields Those Who Cause Harm**

Commentators have suggested that Democrats could make concessions on medical liability to win Republican support for health care legislation. But liability limits are extremely bad policy—too bad to bargain over. They would hurt patients and increase the cost of health care.

Here are the facts.

### **The Nation Faces an Epidemic of Medical Errors**

**Hundreds of Thousands of Lives, Billions of Dollars Lost.** In 1999, the Institute of Medicine estimated that up to 98,000 Americans die from medical errors.

A 2009 examination of medical mistakes by Hearst newspapers concluded that **approximately 200,000 Americans die every year from preventable medical errors and health care-associated infections.**

The Institution of Medicine estimated in 1999 that medical errors cost an estimated \$17 billion to \$29 billion annually for lost income, lost household production, disability, and health care costs. Adjusted for inflation, these numbers are \$22.1 billion to \$37.7 billion today.

### **Liability Limits Provides None of the Advertised Benefits, Particularly Not Cost Savings**

Nationwide, medical malpractice litigation is at the lowest level on record and has been falling steadily for years. But health care costs have continued rising.

**Evidence from Texas.** We examined Texas’ experience with strict liability limits, enacted in 2003. Since Texas passed those laws, medical malpractice payments to injured patients has dropped by 67 percent. But none of this has translated into benefits for Texas patients or taxpayers. Since 2003:

- the cost of diagnostic testing in Texas (measured by per patient Medicare reimbursements) has grown 50 percent faster than the national average;
- spending increases for diagnostic testing (measured by per patient Medicare reimbursements) have far exceeded the national average;
- the state’s uninsured rate has increased, remaining the highest in the country;
- the cost of health insurance in the state has more than doubled;
- growth in the number of doctors per capita has slowed; and

- the number of doctors per capita in underserved rural areas has declined.<sup>1</sup>

In response to this analysis, the president of the Texas Medical Association, William Fleming, MD, stated: “**The goal of tort reform was never cost containment.**”<sup>2</sup>

**CBO’s erroneous 2009 report.** In October 2009, the Congressional Budget Office (CBO) stated that a package of medical liability limits would reduce federal budget deficits by roughly \$5.4 billion a year. But the CBO’s report lacks evidentiary support. First, CBO fails to explain how each tort reform proposal will reduce costs. In fact, the agency admits that the “estimated effect of any specific legislative proposal would depend on the details of that proposal.”<sup>3</sup> The CBO also fails to discuss the impact of shifting the costs of preventable medical errors from those responsible, negligent medical providers to federal government programs such as Social Security and Supplemental Security Income disability programs, Medicaid, and Medicare. **Finally, even if the CBO estimate is correct, it amounts to less than one-fourth of one-percent of U.S. health care spending.**

“We did tort reform in 1988 before it was cool,” Colorado Gov. Bill Ritter Jr. recently explained at the National Governors Association convention. But despite the legal change, the state has some of the country’s highest health-care costs.<sup>4</sup>

### **Overutilization Is Probably Driven by Financial Incentives, Not Fear of Lawsuits**

Proponents of liability limits often claim that overutilization of tests and procedures are caused by fear of lawsuits – so-called “defensive medicine.” But when Texas enacted harsh liability limits that dropped lawsuits “practically to zero,” according to one Texas cardiologist,<sup>5</sup> the cost of diagnostic testing in Texas still grew 50 percent faster than the national average. The evidence from Texas puts lie to the “defensive medicine” myth.

The more likely cause of skyrocketing health costs is the fee-for-service system in which medical providers are paid for each service they perform rather than for providing quality care. Indeed, the CBO in 2004 found that “so-called defensive medicine may be motivated less by liability concerns” than by the income it generates for physicians and by medical benefits to patients.<sup>6</sup>

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<sup>1</sup> Public Citizen, *Liability Limits in Texas Fail to Curb Medical Costs*, Dec. 2009.

[http://www.citizen.org/documents/Texas\\_Liability\\_Limits.pdf](http://www.citizen.org/documents/Texas_Liability_Limits.pdf).

<sup>2</sup> Cheryl Clark, *Don’t Use Texas as Model for Tort Reform*, *Advocacy Group Warns*, HealthLeaders Media, Dec. 18, 2009, available at, <http://www.healthleadersmedia.com/content/PHY-243762/Dont-Use-Texas-as-Model-for-Tort-Reform-Advocacy-Group-Warns>.

<sup>3</sup> Letter from Congressional Budget Office to Sen. Orrin Hatch, Oct. 9, 2009, at page 5.

[http://www.cbo.gov/ftpdocs/106xx/doc10641/10-09-Tort\\_Reform.pdf](http://www.cbo.gov/ftpdocs/106xx/doc10641/10-09-Tort_Reform.pdf).

<sup>4</sup> Meena Thiruvengadam, *States Look Beyond Washington on Health As Federal Health-Care Legislation*, *Wall Street Journal*, Feb. 22, 2010.

<sup>5</sup> Atul Gawande, *The Cost Conundrum: What a Texas Town Can Teach us About Health Care*, *New Yorker*, June 1, 2009, available at

[http://www.newyorker.com/reporting/2009/06/01/090601fa\\_fact\\_gawande?currentPage=all#ixzz0gIzsb4Nd](http://www.newyorker.com/reporting/2009/06/01/090601fa_fact_gawande?currentPage=all#ixzz0gIzsb4Nd).

<sup>6</sup> Congressional Budget Office, *Limiting Tort Liability for Medical Malpractice*, Jan. 8, 2004.

In 2009, the CBO purported to find that tort reform proposals would save \$6.6 billion a year by reducing so-called defensive medicine. CBO did not explain why it abandoned its previous conclusion on defensive medicine. Nor did it account for evidence from states like Texas—or examine medical providers' financial incentive to order excess tests and procedures. The agency noted, however, that managed care health plans that limit and control utilization of services spend less than Medicare, which pays on a fee-for-service basis.

### **Medical Malpractice Lawsuits Are Rare**

The year 2008 saw the fewest number of medical malpractice payments since the creation of the federal government's National Practitioner Data Bank (NPDB), which began collecting data on these payments in 1990.

The cost of medical malpractice liability, measured generously, fell in 2008 to less than 0.6 percent of the \$2.1 trillion in total nation health care costs as measured in 2006.

There are nearly 10 times as many injuries caused by medical negligence as there are malpractice claims.<sup>7</sup> In fact three to seven people die from medical errors for every payment made to compensate any type of malpractice.<sup>8</sup>

### **Malpractice Lawsuits Are Serious**

Most malpractice payments compensate patients who suffer significant, permanent injuries such as quadriplegia, brain damage, or death. In 2008, more than 80 percent of malpractice payments went to victims with these serious injuries or the families of patients who died.<sup>9</sup>

Proponents of liability limits believe frivolous lawsuits are rare. Well-known tort "reform" advocate and lawyer Victor Schwartz said in 2004, "There is no question that it is rare that frivolous suits are brought against doctors. They are too expensive to bring."<sup>10</sup>

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<sup>7</sup> David A. Hyman and Charles Silver. *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 Vand. L. Rev. 1085, 1089 (2006).

<sup>8</sup> Public Citizen, *The 0.6 Percent Bogeyman, Medical Malpractice Payments Fall to All-Time Low as Health Care Costs Continue to Rise*, July 2009.

<sup>9</sup> National Practitioner Data Bank.

<sup>10</sup> Nick Anderson & Edwin Chen, *Bush Pushes Stance Against Junk Lawsuits*, Los Angeles Times, Oct. 22, 2004.