

## **REPORTER ALERT**

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### **As Obama Health Care Summit Looms, Know This: Medical Malpractice Payments Are at an All-Time Low**

#### ***The Crisis Lies in Patient Safety, Not Litigation; the Texas Experiment Is a Flop***

With President Barack Obama's health care summit pending, a lot of misinformation about medical liability reform is being peddled. This memorandum highlights five key points that have largely been ignored:

1. Medical malpractice payments have fallen steadily for years and are now at or near historic lows;
2. Although an experiment in Texas has been promoted as proof of the potential benefits of so-called "tort reform," health care cost increases in that state have far outpaced the national average since it instituted strict liability limits in 2003. Meanwhile, its worst-in-the-nation uninsured rate has gotten even worse;
3. Most of the money paid out for medical malpractice is for serious outcomes, such as death or quadriplegia. Damage caps would affect the ability of seriously injured people to obtain reasonable compensation; they would not reduce the incidence of alleged "junk lawsuits";
4. A serious patient safety crisis does exist; and
5. Addressing senseless medical errors would save several times as much money as the combined costs of the medical malpractice litigation system, including those for verdicts and settlements, defense litigation, and liability insurance companies' profits and overhead.

#### **Getting to the Bottom of the Crisis: It's Malpractice, Not Litigation**

Neither empirical evidence nor simple logic supports the argument that reducing patients' legal rights is justified. Medical malpractice litigation fell steadily throughout most of the past decade and is now at or near the lowest level on record, analysis of the federal National Practitioner Data Bank shows.<sup>1</sup>

The cost of the entire medical liability system – including payments, litigation costs and insurance company profits and overhead – amounts to less than six-tenths of 1 percent of national health care

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<sup>1</sup> Public Citizen, "The 0.6 Percent Bogeyman," July 1, 2009, Appendix, Table 1 and Table 3, p. 13 and p. 15 (available at [http://www.citizen.org/documents/NPDB\\_Report\\_200907.pdf](http://www.citizen.org/documents/NPDB_Report_200907.pdf)). Report analyzed figures from the National Practitioner Data Bank (downloadable at <http://www.npdb-hipdb.hrsa.gov/publicdata.html>).

expenditures, according to Public Citizen's analysis.<sup>2</sup> Insurance industry consulting firm Towers Perrin, meanwhile, puts liability costs at about 1.3 percent of our national health care bill.<sup>3</sup> Either way, and contrary to the ideologues' drumbeat, there is no justification for blaming litigation for our steadily rising health care costs and uninsured rates.

As policymakers have become more familiar with the fact that medical malpractice litigation is actually quite rare and accounts for only a tiny fraction of overall health care costs, the tort reformers have turned to a new argument. Now they claim that it is not litigation, but the *fear* of litigation, that drives skyrocketing health care costs, with doctors ordering excessive tests and procedures (so-called "defensive medicine").

But that argument cannot withstand empirical analysis either. Since Texas instituted one of the most restrictive liability laws in the country in 2003, medical malpractice payments in that state have fallen by 67 percent. By the tort reformers' logic, spending for diagnostic testing (the supposed symptom of "defensive medicine") should be steadily declining there. In fact, such spending in Texas has risen more than 50 percent faster than the national average since the state's liability limits took effect and litigation began plummeting.

The real crisis surrounding medical malpractice is not the cost of litigation but rather the amount of malpractice. The best available data indicate that several times as many people die every year because of avoidable medical errors as receive any form of medical malpractice payment. The Institute of Medicine (IOM), for example, found in 1999 that 44,000 to 98,000 people die each year due to avoidable medical errors.<sup>4</sup> Even the low end of the IOM's estimate is four times the number of injured patients or family members of fatally injured patients who receive any form of medical malpractice payment annually.<sup>5</sup> More recent studies, including inquiries by hospital rating firm HealthGrades, have found similarly shocking casualty rates from avoidable errors.

Setting the clear moral implications aside, lawmakers who think medical malpractice litigation is a place to look for significant cost savings are simply mistaken. Medical malpractice litigation is already rare. Most of the compensation goes to seriously injured people who need lifelong medical care as a result of their injuries or to the families of patients who died due to negligence. Much more money would be saved by reducing medical errors. The IOM's 1999 report, for instance, found that avoidable

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<sup>2</sup> *Ibid*, Appendix, Table 11, p. 23 (showing cumulative hospital and physicians medical malpractice premiums in 2006 totaled \$12.3 billion) and Centers for Medicare and Medicaid Service, "National Health Expenditures Aggregate, Per Capita Amounts, Percent Distribution, and Average Annual Percent Growth, by Source of Funds: Selected Calendar Years 1960-2008" (showing total U.S. health care costs in 2006 were \$2.1 trillion) (available at <http://www.cms.hhs.gov/NationalHealthExpendData/downloads/tables.pdf>).

<sup>3</sup> Towers Perrin, "2009 Update on U.S. Court Cost Trends," Appendix 5, p. 18 (showing estimated 2008 medical malpractice tort costs of \$29.8 billion) (available at [http://www.towersperrin.com/tp/getwebcachedoc?webc=USA/2009/200912/2009\\_tort\\_trend\\_report\\_12-8\\_09.pdf](http://www.towersperrin.com/tp/getwebcachedoc?webc=USA/2009/200912/2009_tort_trend_report_12-8_09.pdf)) and Centers for Medicare and Medicaid Services, "National Health Expenditures Aggregate, Per Capita Amounts, Percent Distribution, and Average Annual Percent Growth, by Source of Funds: Selected Calendar Years 1960-2008" (showing total U.S. health care costs in 2008 were \$2.3 trillion) (available at <http://www.cms.hhs.gov/NationalHealthExpendData/downloads/tables.pdf>).

<sup>4</sup> "To Err is Human: Building a Safer Health System," Institute of Medicine, National Academies Press, 1999, p. 1 (available at <http://www.nap.edu/openbook.php?isbn=0309068371>).

<sup>5</sup> There were 11,037 malpractice payments made on behalf of doctors in 2008. Public Citizen, "The 0.6 Percent Bogyman," July 1, 2009, Appendix, Table 1, p. 13 (available at [http://www.citizen.org/documents/NPDB\\_Report\\_200907.pdf](http://www.citizen.org/documents/NPDB_Report_200907.pdf)). Report analyzed figures from the National Practitioner Data Bank (downloadable at <http://www.npdb-hipdb.hrsa.gov/publicdata.html>).

errors add between \$17 billion and \$29 billion in costs every year (and that's in 1999 dollars).<sup>6</sup> Our 2009 study found that instituting 10 patient safety measures alone would save \$35 billion per year, conservatively.<sup>7</sup> Even the IOM's low end figure is 65 percent greater than the 2008 cost for the entire medical malpractice litigation system.

### **I. Malpractice Payments Are at or Near Historic Lows**

- In 2008, the number of medical malpractice payments on behalf of doctors in the United States was the lowest of any year since 1991 (the earliest year for which reliable figures are available), according to the National Practitioner Data Bank.<sup>8</sup>
- The sum of money paid out for medical malpractice payments in 2008, as adjusted by the consumer price index (CPI), was the lowest since 1992. If one adjusts by a blend of the CPI and the medical services inflation index (accounting for the estimated portion of malpractice payments that compensate for future medical costs), the sum of payments in 2008 was the lowest on record.<sup>9</sup>
- The number of payments and sum of payments through the first three quarters of 2009 were running below the 2008 pace. (Fourth quarter 2009 figures are not yet available.)

Public Citizen's report assessing national medical malpractice data is available at [http://www.citizen.org/documents/NPDB\\_Report\\_200907.pdf](http://www.citizen.org/documents/NPDB_Report_200907.pdf).

### **II. Case Study: Medical Malpractice "Reform" in Texas Provides None of Its Purported Benefits**

Texas, which instituted some of the nation's strictest liability limits in the fall of 2003, is often cited by Republican leaders as a model for tort reform. For example, the GOP's health care alternative calls for "enacting medical liability reforms modeled after the successful state laws of California and Texas."

But Public Citizen analyzed the available data and found that the Texas experiment has been a flop. [We did not analyze data from California because its tort reform laws were instituted in the 1970s, and we lack the data to do the "before and after" comparisons that we did for Texas. California's 2007 per capita health care costs, as measured by Medicare, were the ninth highest in the United States.]

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<sup>6</sup> "To Err is Human: Building a Safer Health System," Institute of Medicine, National Academies Press, 1999, p. 27 (available at <http://www.nap.edu/openbook.php?isbn=0309068371>).

<sup>7</sup> Public Citizen, "Back to Basics: Ten Steps to Save 85,000 Lives and \$35 Billion a Year in Health Care Delivery" August 2009, p. 1 (available at <http://www.citizen.org/documents/BackToBasics.pdf>).

<sup>8</sup> Public Citizen, "The 0.6 Percent Bogeyman," July 1, 2009, Appendix, Table 1, p. 13 (available at [http://www.citizen.org/documents/NPDB\\_Report\\_200907.pdf](http://www.citizen.org/documents/NPDB_Report_200907.pdf)). Report analyzed figures from the National Practitioner Data Bank (downloadable at <http://www.npdb-hipdb.hrsa.gov/publicdata.html>).

<sup>9</sup> *Ibid.*, Appendix, Table 3, p. 15.

Malpractice payments on behalf of doctors in Texas have fallen every year since its laws took effect. The amount paid out in 2008 was 67 percent lower than in 2003.<sup>10</sup> This certainly has not helped injured patients. But other patients haven't benefited either:

- Texas' uninsured rate remains the nation's highest and has risen slightly since 2003.<sup>11</sup>
- Per patient health care spending in Texas (as measured by Medicare) has increased at nearly double the national rate since 2003.<sup>12</sup>
- Per patient spending on diagnostic tests in Texas (again, as measured by Medicare) has grown more than 50 percent faster than the national rate since 2003.<sup>13</sup> This point is critical to the current debate over medical malpractice liability. Proponents of liability limits often claim that doctors order excessive tests because they are afraid of litigation. But as medical malpractice payments dropped 67 percent in Texas, testing costs grew – and grew far faster than the national average. Clearly something else is responsible for excessive testing – possibly that medical providers are paid for each test and procedure, which gives them an incentive to order more.

After Public Citizen reported on Texas' burgeoning medical costs last year, Texas Medical Association President William Fleming responded, "The goal of tort reform was never cost containment."<sup>14</sup> That might surprise the procession of Republicans promoting tort reform as the centerpiece of their plan to cut costs and increase access. Lawmakers have issued the following false statements:

- "In the handful of states that have enacted tort reform, health care costs have fallen, and the availability of medical care has expanded."  
– Rep. Lamar Smith (R-Texas), October 2009
- "Medical liability reform works to bring down healthcare costs for patients and doctors."  
– Sen. Jon Kyl (R-Ariz.), press release, October 2009
- "The state of Texas did a wonderful job of lawsuit reform and actually saw medical costs come down. We know it works."  
– Rep. Michele Bachmann (R-Minn.), September 2009

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<sup>10</sup> U.S. Census, "Income, Poverty, and Health Insurance Coverage in the United States," 2003-2008 (available at <http://www.census.gov/hhes/www/hlthins/reports.html>).

Public Citizen, "Liability Limits in Texas Fail to Curb Medical Costs," December 2009, Appendix, p. 7 (available at [www.citizen.org/documents/Texas\\_Liability\\_Limits.pdf](http://www.citizen.org/documents/Texas_Liability_Limits.pdf)).

<sup>11</sup> *Ibid.*, p. 8.

<sup>12</sup> *Ibid.* and Dartmouth Atlas of Health Care, "Selected Medicare reimbursement measures" (query search engine available at <http://www.dartmouthatlas.org>).

<sup>13</sup> *Ibid.*

<sup>14</sup> Cheryl Clark, "Don't Use Texas as Model for Tort Reform, Advocacy Group Warns," Media Health Leaders, Dec. 18, 2009 (available at [www.healthleadersmedia.com/content/PHY-243762/Dont-Use-Texas-as-Model-for-Tort-Reform-Advocacy-Group-Warns](http://www.healthleadersmedia.com/content/PHY-243762/Dont-Use-Texas-as-Model-for-Tort-Reform-Advocacy-Group-Warns)).

Public Citizen's report analyzing Texas' 2003 liability law is available at [http://www.citizen.org/documents/Texas\\_Liability\\_Limits.pdf](http://www.citizen.org/documents/Texas_Liability_Limits.pdf).

### **III. Damages Caps Would Not Address “Junk Lawsuits”**

Those who demonize medical malpractice litigation focus on purported “junk lawsuits.” But their typical solution – a \$250,000 cap on non-economic damages – does not match the alleged problem. The junk lawsuit theory says that defendants are badgered into agreeing to make payments for unjust claims to avoid litigation costs. If such capitulations were to occur, they would be for low-stakes cases that would not be affected by a \$250,000 non-economic damages cap. Insurance companies will not pay \$250,000 just to make a “junk lawsuit” go away.

Instead, the proposed cap would hit people who have been seriously injured, hindering their ability to bring cases and preventing them from receiving compensation for future medical expenses to treat their injuries. Nearly two-thirds (65 percent) of the dollars paid out for medical malpractice in 2008 compensated for a “significant permanent injury;” a “major permanent injury;” quadriplegia, brain damage or the need for lifelong care; or death, according to the National Practitioner Data Bank.<sup>15</sup> A \$250,000 cap would stick these seriously injured individuals – and the rest of us, as taxpayers – with the costs of treating their injuries, instead of charging the negligent doctors or hospitals that caused the problem.

The “junk lawsuit” theory is also contradicted by Iowa doctors' response to recent findings that medical malpractice payments in that state are down by 50 percent. The state's medical association credits the reduction to efforts to improve safety.<sup>16</sup> The medical association's response should be taken as an acknowledgement that medical errors – not opportunism – were the chief driver of malpractice litigation there in the first place. If medical malpractice litigation were truly driven by “frivolous” cases, improvements in patient safety would not reduce litigation.

### **IV. A Patient Safety Crisis Exists**

- As referenced above, the IOM in 1999 reported that between 44,000 and 98,000 people die every year because of avoidable medical errors. Other organizations have reached similar conclusions. For example, hospital rating company HealthGrades estimated in 2004 that more than 190,000 people die annually because of medical errors.<sup>17</sup>
- Only about 11,000 malpractice payments are made on behalf of doctors every year.<sup>18</sup> That means that even taking the low end of the Institute of Medicine estimate, four times as many people die every year because of medical malpractice errors as the total number of victims and survivors who receive a medical malpractice payment.

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<sup>15</sup> Public Citizen, “The 0.6 Percent Bogeyman,” July 1, 2009, p. 7 (available at [http://www.citizen.org/documents/NPDB\\_Report\\_200907.pdf](http://www.citizen.org/documents/NPDB_Report_200907.pdf)). Report analyzed figures from the National Practitioner Data Bank (downloadable at <http://www.npdb-hipdb.hrsa.gov/publicdata.html>).

<sup>16</sup> Tony Leys, “Malpractice Cases Drop, But Views on Why Differ,” *Des Moines Register*, Jan. 31, 2009 (available at <http://www.desmoinesregister.com/article/20100131/NEWS/1310335/Malpractice-cases-drop--but-views-on-why-differ>).

<sup>17</sup> “HealthGrades Quality Study: Patient Safety in American Hospitals,” July 2004, p. 6 (available at [http://www.healthgrades.com/media/english/pdf/HG\\_Patient\\_Safety\\_Study\\_Final.pdf](http://www.healthgrades.com/media/english/pdf/HG_Patient_Safety_Study_Final.pdf)).

<sup>18</sup> Public Citizen, “The 0.6 Percent Bogeyman,” July 1, 2008, Appendix, Table 1. Report analyzed figures from the National Practitioner Data Bank (downloadable at <http://www.npdb-hipdb.hrsa.gov/publicdata.html>).

## **V. Addressing Safety Would Save Money as Well as Lives**

The IOM estimated in 1999 that avoidable errors cost between \$17 billion and \$29 billion a year. Even the lower of those estimates is 65 percent greater than the 2008 costs for medical malpractice payments, defense litigation and malpractice insurance companies' profits and overhead combined. A 2009 Public Citizen analysis of peer-reviewed studies of patient safety measures found that implementing 10 basic patient safety measures would save \$35 billion annually.

Public Citizen's report proposing patient safety measures to save lives and dollars is available at <http://www.citizen.org/documents/BackToBasics.pdf>.

The true inequity in the malpractice system is that so few victims receive any compensation. But even if injured patients were to receive compensation for their medical needs, that still would fail to address the tragedies inflicted by medical malpractice. The best course is clear. Policymakers from both parties should set their partisan instincts aside and reduce patients' needs to seek redress instead of limiting their rights to it.

If Congress needs a real villain to crack down on, it should focus on the liability insurance companies that have hoarded all the savings from the reduction in medical malpractice litigation.

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Public Citizen is a national, nonprofit consumer advocacy organization based in Washington, D.C. For more information, please visit [www.citizen.org](http://www.citizen.org).