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## President Bush Dis-Torts the Truth About Lawsuits' Impact on Health Care and the Economy

President Bush argues that weakening our legal system will strengthen the economy and improve access to health care. But his understanding of economics is faulty, and his factual assertions are incorrect. The tort system ensures that the costs of injuries are borne by those who cause them, thus compensating victims and deterring unsafe conduct. The quotes below are typical of statements made regularly by President Bush in speeches. Each quote is followed by the true facts, as determined by government agencies or other authorities.

- **Lawsuits are “driving docs out of business.”** President Bush in Kutztown, PA, July 9, 2004. <http://www.whitehouse.gov/news/releases/2004/07/20040709-5.html>

**The facts: Doctors are not leaving states with high malpractice insurance premiums.**

Only two months before he made that comment, the *Allentown Morning Call* reported that the number of doctors in Pennsylvania had increased during the malpractice “crisis.”<sup>1</sup> In the summer of 2003, the Government Accountability Office, formerly the General Accounting Office, reported that the volume of medical care delivered in Pennsylvania had increased during the crisis.<sup>2</sup> Statistics from state medical boards in every other so-called “crisis” state show the same—doctors are not being driven from practice.<sup>3</sup>

- **“All these junk lawsuits are running up the cost of medicine.”** President Bush in Greensboro, NC, July 25, 2002. <http://www.whitehouse.gov/news/releases/2002/07/20020725-5.html>

**The facts: Malpractice costs are .62 percent of the nation’s health care expenditures.**

According to the Department of Health and Human Services actuaries’ most recent report on growth in health care expenditures, in 2002 health care expenditures rose 9.3 percent to \$1.553 trillion.<sup>4</sup> Expenditures on malpractice premiums reported to the National Association of Insurance Commissioners that year were \$9.6 billion,<sup>5</sup> making malpractice costs about .62 percent of national health care expenditures. Malpractice costs rated only an eleven-word mention in the actuaries’ 13-page report.

- **“Docs and hospitals practice what’s called ‘defensive medicine’ in order to protect themselves in a court of law.”** President Bush, Albuquerque, NM, March 26, 2004. <http://www.whitehouse.gov/news/releases/2004/03/20040326-9.html>

**The facts: Independent researchers reject the “defensive medicine” theory.** The only study ever attaching a price tag to defensive medicine — extra medical tests given to avoid lawsuits—was one conducted by the Bush Administration’s own Mark McClellan.<sup>6</sup> No other

independent researcher has been able to replicate his findings. The contention that doctors practice defensive medicine is crucial to the Bush Administration's claim of high tort costs because the cost of malpractice insurance is relatively minor. Using McClellan's article to project \$25 billion in "defensive medicine" costs<sup>7</sup> allows Bush to attach an artificially-inflated legal cost to the federal budget. But both the Congressional Budget Office<sup>8</sup> and the Government Accountability Office<sup>9</sup> dismiss the theory and thus refuse to make cost estimates.

- **"Too many frivolous lawsuits ... are being filed"** President Bush, Madison, MS, August 7, 2002. <http://www.whitehouse.gov/news/releases/2002/08/20020807-1.html>

**The facts: Businesses and their attorneys are sanctioned much more often for frivolous suits.** In a survey of the 100 most recent cases of federal judges imposing sanctions for the filing of frivolous claims or defenses, businesses and their attorneys were 69 percent more likely than individual tort plaintiffs and their attorneys to be sanctioned. Only individuals representing themselves without counsel were sanctioned more often than businesses.<sup>10</sup>

**The facts: So-called "frivolous" suits have little impact on health care costs.** Doctors define as "frivolous" any lawsuit in which no payment is made to the victim. But they fail to mention that nearly all of those claims are withdrawn voluntarily by patients and their lawyers,<sup>11</sup> after thoroughly investigating the cause of the injury, usually at great expense to the lawyer. Cases that are taken to trial and rejected by a jury constitute only 5 percent of all claims.<sup>12</sup> Lawyers have no incentive to file frivolous cases because they are not paid unless they win a case. Only about 12 percent of malpractice premium dollars are spent defending claims that are closed without payment.<sup>13</sup> If attorneys *never* filed an unsuccessful suit, the savings would constitute less than one-tenth of one percent of national health expenditures.<sup>14</sup>

- **"Lawsuits threaten to close the doors of too many small businesses and factories."** President Bush, Washington, DC, July 21, 2004. <http://www.whitehouse.gov/news/releases/2004/07/20040721-14.html>

**The facts: U.S. businesses file four times as many lawsuits as private citizens.** A survey of case filings in two states (Arkansas and Mississippi) and two local jurisdictions (Cook County, Ill., and Philadelphia, Pa.) in 2001 found that businesses were 3.3 to 5.8 times more likely to file lawsuits than were individuals.<sup>15</sup> These locations appear to be the only jurisdictions that require attorneys to provide sufficient detail to distinguish business-initiated suits from trial attorney-initiated suits.

**The facts: A lawsuit can't wipe out a business, unless the business depends upon unsafe or illegal activities to make a profit.** Sometimes a business that is capable of earning a profit through lawful means will try to earn extra income by cutting corners. If court judgments awarded to those harmed by the unsafe or illegal practices exceed the value of the business (i.e., its plants, equipment, customer relationships, etc.) the company could be liquidated; but often the plants and equipment are not scrapped, nor are innocent employees fired. For instance, Johns-Manville continues to manufacture non-asbestos insulation; its bankruptcy simply led to much of its stock being held in trust for people injured by asbestos.

- **“Industry estimates show that litigation is a \$200 billion a year burden on the U.S. economy.”** President Bush in Kansas City, MO, September 4, 2003.  
<http://www.whitehouse.gov/news/releases/2003/09/20030904-5.html>

**The facts: The \$200 billion “lawsuit burden” figure (so-called “tort tax”) has been repudiated by the Congressional Budget Office.** This highly misleading figure was calculated by Tillinghast-Towers Perrin, a private actuarial firm.<sup>16</sup> It represents the total cost of liability insurance purchased in the United States, including insurance company administrative costs. But these costs would not disappear if there were no tort system. The costs of liability insurance represent the costs of injuries that would take place with or without a tort system, such as the estimated \$230 billion annual cost of automobile crashes.<sup>17</sup> Even if the tort system were abolished, the overall cost of automobile injuries would remain the same, as would the amount Americans pay for automobile insurance, since everyone would have to insure themselves.

- The non-partisan CBO explained that most of the \$200 billion in payments “merely shift money from injurers to victims and thus are not true costs to society as a whole.” In economic terms, payments that do not involve any use of resources to produce goods or services are called ‘transfer payments.’ Those that do involve using resources for production are known as ‘real resource costs’ (also ‘social costs’ or simply ‘costs’). Specifically, the portion of a settlement or judgment that goes to the plaintiffs is a transfer payment.”<sup>18</sup>
- Forty-six percent of the tort cost estimate is for payments made to injured victims for lost wages, medical care, and pain and suffering, according to Tillinghast. These costs are the result of injuries caused by defendants and would be borne by society anyway, through private health insurance, government programs, charities or absorbed by the victims and their families.
- Twenty-one percent of the tort cost estimate is for insurance industry overhead, according to Tillinghast. Much of this insurance overhead would exist even in the absence of lawsuits because administering first party insurance would also require underwriting, claims adjusting, marketing, profit and other costs.
- **“See, everybody is getting sued.”** President Bush in Washington, DC, March 16, 2004.  
<http://www.whitehouse.gov/news/releases/2004/03/20040316-5.html>

**The facts: Tort lawsuit filings have decreased since 1992, according to the Court Statistics Project.**

- The period 1992 through 2001 saw an overall 9 percent decline in the number of tort filings, according to a joint tracking project of the Conference of State Court Administrators, the Bureau of Justice Statistics and National Center for State Courts.<sup>19</sup> The filing data from 30 states in their sample, including three of the four most populous states, California, Texas and Florida, represents a total of 77 percent of the U.S. population.

- When adjusted for population growth, tort filings declined by 15 percent, from 269 to 228 per 100,000. Population adjusted filings dropped 25 percent or more in 11 of the 30 states. The largest decreases occurred in Texas and Massachusetts, where tort filings fell by 41 percent.<sup>20</sup>
- **“It’s like a giant lottery.”** President Bush in Washington, DC, March 16, 2004.  
<http://www.whitehouse.gov/news/releases/2004/03/20040316-5.html>

**The facts: The median jury award for personal injury cases fell 30 percent in 2002.** The median jury verdict in personal injury cases peaked in 2000 at \$45,000 declined to \$42,945 in 2001 and dropped to \$30,000 in 2002. Overall this represents a decline of 33 percent in two years.<sup>21</sup>

- **“...there needs to be a cap on non-economic damages at \$250,000...”** President Bush in Washington, DC, March 16, 2004.  
<http://www.whitehouse.gov/news/releases/2004/03/20040316-5.html>

**The facts: A \$250,000 cap on non-economic damages only amounts to 1 percent in insurance savings.** One of the nation’s top writers of medical malpractice insurance recently was asked to justify how its rates reflected the potential impact of recent tort law changes in Texas. Among other things, the new law caps non-economic damages at \$250,000. The company responded, “Non-economic damages are a small percentage of total losses paid. Capping non-economic damages will show loss savings of 1.0 %.”<sup>22</sup>

**The bottom line: Bush mis-underestimates the importance of the legal system.** Tort law not only compensates and deters; it prevents injury by removing dangerous products and practices from the market; spurs safety and health innovations; forces public disclosure of information about dangers consumers face in the marketplace; serves as an early warning of the need for government action to prevent harm; and protects responsible companies by punishing the wrongdoers.

## Endnotes

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- <sup>1</sup> “Diagnosis of the numbers shows doctors not leaving state in droves,” *Allentown Morning Call*, April 18, 2004.
- <sup>2</sup> United States General Accounting Office, Report GAO-03-836, “Medical Malpractice: Implications of Rising Premiums on Access to Health Care,” August 2003. On-line at: <http://www.gao.gov/new.items/d03836.pdf>.
- <sup>3</sup> See, e.g. “Physician count clouds malpractice argument; State data show increase in doctors” *Chicago Tribune*. July 16, 2004. Public Citizen’s Congress Watch has prepared studies in more than 15 states, many of them claimed by the American Medical Association to be experiencing a liability “crisis,” showing that the doctor population continues to increase at a steady rate; <http://www.citizen.org/congress/civjus/medmal/>
- <sup>4</sup> Levit et al, “Health Spending Rebound Continues in 2002,” *23 Health Affairs* 147 (2004).
- <sup>5</sup> Statistical Compilation of Annual Statement Information, 2002, National Association of Insurance Commissioners (2003).
- <sup>6</sup> “Do Doctors Practice Defensive Medicine,” *Quarterly Journal of Economics*, May 1996. McClellan was appointed by Bush to head the Food and Drug Administration and the Center for Medicare and Medicaid Services.
- <sup>7</sup> <http://www.whitehouse.gov/news/releases/2002/07/20020725-5.html>
- <sup>8</sup> Congressional Budget Office, Cost Estimate for H.R. 5, HEALTH Act of 2003, ordered by the House Committee on the Judiciary, submitted March 10, 2003. The CBO said McClellan’s “research was based largely on a narrow part of the population and considered only hospital spending for a small number of ailments. ...[U]sing a different data set, CBO could find no statistically significant difference in per capita health care spending between states with and without malpractice tort limits.”
- <sup>9</sup> United States General Accounting Office, Report GAO-03-836, “Medical Malpractice: Implications of Rising Premiums on Access to Health Care,” August 2003, p. 27. Medical provider groups admitted to GAO investigators that “factors besides defensive medicine concerns also explain differing utilization rates of diagnostic and other procedures. For example, a Montana hospital association official said that revenue-enhancing motives can encourage the utilization of certain types of diagnostic tests, while officials from Minnesota and California medical associations identified managed care as a factor that can mitigate defensive practices. According to some research, managed care provides a financial incentive not to offer treatments that are unlikely to have medical benefit.”
- <sup>10</sup> *Frequent Filers: Corporate Hypocrisy in Accessing the Courts*, Public Citizen’s Congress Watch, October 2004; <http://www.citizen.org/congress/civjus/tort/myths/articles.cfm?ID=12369>
- <sup>11</sup> Physician Insurers Association of America (PIAA) Claim Trend Analysis, 2001 Edition, Exhibit 1, Trend Analysis of Claims by Close Year, Combined Specialties.
- <sup>12</sup> *Id.*
- <sup>13</sup> *Id.* PIAA companies spent \$741 million on claims and expenses in 2001. \$94 million, or 12.6 percent, was spent on claims which were closed without payment to the plaintiff.
- <sup>14</sup>  $.12 \times .0062 = .00078$
- <sup>15</sup> *Frequent Filers: Corporate Hypocrisy in Accessing the Courts*, Public Citizen’s Congress Watch, October 2004; <http://www.citizen.org/congress/civjus/tort/myths/articles.cfm?ID=12369>
- <sup>16</sup> *U.S. Tort Costs: 2003 Update*, Tillinghast-Towers Perrin.
- <sup>17</sup> per National Highway Traffic Safety Administration, Economic Impact of Motor Vehicle Crashes, 2000; <http://www.nhtsa.dot.gov/people/economic/econimpact2000/>
- <sup>18</sup> The Economics of U.S. Tort Liability: A Primer, Congressional Budget Office, October 2003, p. 20.
- <sup>19</sup> Examining the Work of State Courts, 2002, National Center of State Courts, Court Statistics Project (2003).
- <sup>20</sup> *Id.*
- <sup>21</sup> Jury Verdict Research News Release April 1, 2004. Jury Verdict Research maintains the only nationwide database of more than 213,000 plaintiff and defense verdicts, and settlements resulting from personal-injury claims.
- <sup>22</sup> The Medical Protective Company, Texas Physicians and Surgeons Actuarial Tort Reform Memorandum, October 31, 2003, projected losses based on a \$250,000 cap.