Medical Misdiagnosis in Georgia:

Challenging the Medical Malpractice Claims of the Doctors' Lobby

Congress Watch
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Acknowledgments

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Public Citizen is a 160,000 member non-profit organization based in Washington, D.C., with more than 1,900 members in Georgia. We represent consumer interests through lobbying, litigation, research and public education. Founded in 1971, Public Citizen fights for consumer rights in the marketplace, safe and affordable health care, campaign finance reform, fair trade, clean and safe energy sources, and corporate and government accountability. Public Citizen has five divisions and is active in every public forum: Congress, the courts, governmental agencies and the media. Congress Watch is one of the five divisions.

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Executive Summary

As conscientious physicians will attest, a misdiagnosis can have tragic consequences. It can lead to the wrong treatment of an ailment. It can imperil the patient. Georgia's doctors now complain of a temporary upturn in the costs of medical malpractice insurance – but this "ailment" requires the same kind of careful evaluation and responsible treatment that any medical patient deserves.

No consumer wants to see doctors pay more for their liability insurance, even if they are specialists who earn hundreds of thousands of dollars annually. And if they have a problem, it should be solved in a fair and factual manner.

But medical leaders and their political allies have jumped to the conclusion that a recent spike in malpractice insurance rates was caused by an "explosion" of unmeritorious lawsuits and large jury awards. But reliable data does not support their assumption.

And with equal abandon, doctors have decided that the best treatment for their problem is to punish their patients by placing a $250,000 cap on the amount victims of malpractice can receive in non-economic damages – no matter what life-threatening or life-altering injury they may have suffered from medical error or negligence.

This report by Public Citizen, which relies on official government data and information from other reliable sources, shows that the so-called malpractice "crisis" in Georgia was a temporary situation that already is abating – and not an extreme problem that justifies such a draconian solution as attacking the legal rights of patients.

In February, Public Citizen issued a companion report that documented deficiencies in the quality of Georgia's medical care and found a lack of accountability in the state's health care system. That report, "Increasing Doctor Accountability & Patient Safety: Solving Georgia's Medical Malpractice 'Crisis,'" is available on-line.[1]

Key findings of this report:

- **Georgia is not losing doctors – but gaining them at a rapid rate.** In 1994, there were 13,157 licensed physicians practicing in Georgia, according to the Composite State Board of Medical Examiners. In 2003, the last year for which data is available, the number had risen to 18,134 – an increase of 4,977, or 38 percent. This data refutes claims by the medical community, which insists medical malpractice costs are driving doctors to quit their practices or leave the state.

- **The number of physicians has increased considerably faster than Georgia's overall population.** The state's population grew 26 percent in the 1990s, from 6.5 million in 1990 to 8.2 million in 2000. The physician population, by comparison, grew 38 percent from 1994 to 2003.

- **At the height of the so-called malpractice "crisis," the number of new medical licenses issued in Georgia was 36.3 percent greater in 2003 than it had been in 2001.** The Georgia Composite Board of Medical Examiners issued 1,316 licenses in 2001 and 1,794 licenses in 2003, an increase of 478 licenses, or 36.3 percent.

- **From 1990 to 2001, the ratio of physicians per 1,000 Georgia residents rose 20.9 percent – faster than in Florida or Virginia.** In comparison, according to the American Medical Association, the growth rate for this ratio was 12 percent in Florida, where the state imposes strong restrictions on patients' legal rights in malpractice cases (and also recently enacted caps on medical malpractice damage awards that have not had time to influence conditions); and 18.5 percent in Virginia, which has an overall cap of $1.7 million on malpractice awards.

- **Georgia's median payouts to victims of malpractice declined by a third from 1998 to 2003, when adjusted for medical services inflation.** When measured against the rising costs of medical services, the median amount paid to victims of medical malpractice in Georgia *declined* from $175,000 to $116,841 – or 33.2 percent – over this five-year period. Even without adjusting for medical services inflation, the median malpractice payout in Georgia declined from $175,000 in 1998 to $145,000 in 2003 – a *drop* of 17.1 percent. These statistics come from the federal National Practitioner Data Bank (NPDB), which has received all reports of medical malpractice judgments and settlements paid on behalf of doctors nationwide since September 1990.

- **The median payout to victims of malpractice in Georgia dropped 30.6 from 2001 to 2003.** During the height of the so-called medical malpractice "crisis," 2001 to 2003, the amount of the median payout in Georgia declined 23.7 percent, from $190,000 to $145,000, according to the NPDB. Adjusted for medical services inflation, this drop was even more dramatic – 30.6 percent from 2001 to 2003.

- **The total amount of malpractice payouts on behalf of Georgia physicians increased an average of 1.7 percent a year from 1998-2003, when adjusted for medical services inflation.** According to the NPDB, the total amount of physician medical malpractice payouts in Georgia, measured in 1998 dollars, increased from $87 million in 1998 to $94.6 million in 2003 – a total of 8.7 percent, or an average of only 1.7 percent annually.

- **The number of medical malpractice payouts per 100 Georgia doctors remained nearly flat from 1997 to 2003.** In 1997, there were 254 malpractice payouts on behalf of Georgia doctors, which represented 1.7 payouts per 100 doctors in Georgia. In 2003, there were 318 payouts, which represented 1.8 payouts per 100 doctors.

- **Atlanta-area trend shows a dramatic decrease in jury verdicts in favor of victims of malpractice.** *Georgia Trial Reporter* data show only two verdicts in favor of medical malpractice plaintiffs during 2003 – the lowest total since 1988, the first year for which data were available. In 2002, there were only five plaintiff verdicts – the least

since 1990. (The *Georgia Trial Reporter* receives information on a voluntary basis about jury verdicts, most of which are from the greater Atlanta area. Its data is not comprehensive and does not represent statewide totals, but it sheds light on trends over the past 15 years.)

- **Georgia health care providers paid less in malpractice premiums in 2002 than in 1998, when payments are adjusted for medical services inflation**. Measured in 1998 dollars, health care providers paid $169.6 million for malpractice coverage in 2002, compared with $177.4 million in 1998, according to the National Association of Insurance Commissioners (NAIC). This represents a 4.4 percent *decrease*. During these four years, the cost of malpractice premiums increased 13.1 percent – from $177.4 million to $200.6 million – or 3.3 percent annually. During this same period, costs of medical care services increased 18.3 percent – or 4.6 percent annually.

- **Malpractice insurance costs comprise only 3.6 percent of Georgia physicians' expenses.** Georgia doctors spend less than the national average for medical malpractice insurance. According to the federal government's Medicare program, Georgia doctors spend an average of only 3.6 percent of their practice incomes on malpractice insurance, compared with a nationwide average of 3.9 percent. This means Georgia doctors pay 7.7 percent less than the national average. Moreover, the Medicare actuary calculates that doctors nationwide spend an average of 52.5 percent of their practice incomes on their own salaries and 30.8 percent on such overhead as office payroll and rent.

- **Reduced fees – not insurance rates – are the biggest financial burden on doctors.** The AMA estimates that since 1991 physician practice costs have risen by 35 percent, but Medicare payments have risen only 10 percent. That means practice costs have risen two-and-a-half times the rate of Medicare payments. This pressure has contributed greatly to doctor stress and sensitivity to any increases in their practice costs. In fact, the long-term reduction in fees paid to doctors represents a much more significant burden than the temporary spike in malpractice insurance rates that doctors recently experienced.

- **Rather than facing "runaway litigation," doctors benefit from a claims gap.** In a landmark study, Harvard researchers found that only a small percentage of medical errors result in lawsuits. Using a sample of hospitalizations in New York State, researchers compared medical records to claims files and found that only one in 7.6 instances of medical negligence committed in hospitals results in a malpractice claim. Researchers replicating this study made similar findings in Colorado and Utah.

- **Florida's health agency shows a similar claims gap.** A Florida statute requires hospitals to report "adverse incidents," defined as "an event over which health care personnel could exercise control" that results in death or injury. Tables prepared by Florida's Agency for Health Care Administration have compared reports of adverse incidents to filing of new malpractice claims. From 1996 through 1999 (the last year for which data is available), Florida hospitals reported 19,885 incidents but only 3,177 medical

malpractice claims. In other words, for every six preventable medical errors only one claim is filed.

- **Expenditures on medical liability comprise less than 1 percent of overall health care costs.** In 2002, the federal government estimates, health care expenditures rose 9.3 percent to $1.553 trillion. Expenditures on malpractice premiums reported to the NAIC that year were $9.6 billion – making malpractice costs only about 0.62 percent of national health care expenditures.

- **The Congressional Budget Office has rejected the defensive medicine theory.** The Congressional Budget Office (CBO) was asked to quantify the savings from reduced "defensive medicine" if Congress passed H.R. 5. This bill, which contained very stringent restrictions on patients' ability to recover damages, passed the U.S. House in 2003. CBO declined, saying it could find "no statistically significant difference in per capita health care spending between states with and without malpractice tort limits."

- **The General Accounting Office has rejected the defensive medicine theory.** 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."

- **Few malpractice lawsuits are "frivolous."** Lobbyists for the Georgia physicians have claimed that medical liability insurance will become affordable only if patients can be discouraged from filing lawsuits in which "lawyers win and consumers lose." In reality, the high cost of preparing a medical malpractice case discourages frivolous claims – and meritorious claims as well. Medical malpractice cases are very expensive for plaintiffs' attorneys to bring, with out-of-pocket costs for cases settled at or near the time of trial (when most cases are settled) ranging from $15,000 to $25,000. If the case goes to trial, the costs can easily be doubled. These costs do not include the plaintiff's attorney's time, and an attorney pursuing a frivolous case incurs opportunity costs in not pursuing other cases.

- **The small numbers of claims pursued to a defense verdict are not frivolous.** Researchers at the American Society of Anesthesiologists arranged for pairs of doctors to review 103 randomly selected medical negligence claims files. The doctors agreed on the appropriateness of care only in 62 percent of the cases; they disagreed in 38 percent of cases. The researchers concluded, "These observations indicate that neutral experts commonly disagree in their assessments when using the accepted standard of reasonable and prudent care." The percentage of all medical malpractice claims that go to trial is only 6.6 percent – meaning that the parties and their attorneys ultimately reach agreement about liability five times more often than neutral doctors do. If truly frivolous lawsuits were being

pursued, the proportion of claims going to trial would exceed the 38 percent of claims on which even doctors will disagree.

- **The costs of defending claims that are ultimately dropped are not unreasonable.** Medical liability insurers have complained about the costs of defending cases that are ruling out the possibility of proving medical negligence before terminating a claim (just as doctors must rule out the possibility of illnesses suggested by their patients' symptoms). Plaintiffs' lawyers have no financial incentive to abuse the litigation process: they are using their own time and money to pursue discovery activities, and are paid only for work on behalf of clients whose cases are successful.

There Is No Evidence of a Doctor Exodus

Leaders of the medical community insist that medical malpractice costs are having "a devastating effect on the Georgia health care system," and driving doctors out of their practices or out of the state.[2] They maintain that Georgia's reserve of qualified physicians is dangerously low and that the state is having difficulty attracting new, young doctors. Statistics from the Georgia Consolidated Board of Medical Examiners, as provided to the Federation of State Medical Boards (FSMB), reveals that the opposite is true.

- **The number of Georgia doctors rose 38 percent from 1994 to 2003.** In 1994, there were 13,157 licensed physicians practicing in Georgia. In 2003, the last year for which data is available, the number had risen to 18,134 – an increase of 4,977, or 38 percent. [See Figure 1] (Although the number recorded for 1998 appears to show a sharp, single-year drop, the Georgia Composite State Board of Medical Examiners acknowledges that this total is a likely statistical error.)[3]

Figure 1

Georgia Licensed Physicians and Osteopaths Practicing In-State, 1994-2003

Year	Number of Licensed Practicing Physicians *
1994	13,157
1995	14,447
1996	13,912
1997	15,430
1998	13,331
1999	17,436
2000	17,151
2001	17,964
2002	17,944
2003	18,134
Increase (1994 - 2003)	**4,977** **38%**

Source: Georgia Composite State Board of Medical Examiners, as reported by the Federation of State Medical Boards of the United States (FSMB), "Annual Summaries 1994 through 2003."
* Not all physicians licensed in a state maintain practices within that state. The FSMB uses the term "licensed physicians practicing in-state" to designate physicians who are actually practicing within a specific state.

- **The number of physicians increased at a considerably faster rate than Georgia's overall population.** The state's population grew 26 percent in the 1990s, from 6.5 million in 1990 to 8.2 million in 2000.[4] The physician population, by comparison, grew 38 percent from 1994 to 2003.

- **The number of new medical licenses issued annually increased 13.5 percent from 1994 to 2003.** In 1994, the Georgia Composite Board of Medical Examiners issued 1,581 new medical licenses. In 2003, the last year for which complete data is available, the number of new licenses issued was 1,794 – 13.5 percent greater than in 1994.[5] [See Figure 2]

- **At the height of the so-called malpractice "crisis," the number of new medical licenses issued in Georgia was 36.3 percent greater in 2003 than it had been in 2001.** The Georgia Composite Board of Medical Examiners issued 1,316 licenses in 2001 and 1,794 licenses in 2003, an increase of 478 licenses, or 36.3 percent.

Figure 2

New Medical Licenses Issued by Year in Georgia

Year	New Licenses Issued
1994	1,581
1995	1,820
1996	1,793
1997	1,912
1998	1,808
1999	1,694
2000	1,280
2001	1,316
2002	1,403
2003	1,794
Difference (1994-2003)	**479** **13.5%**

Source: Georgia Composite State Board of Medical Examiners.

Ratio of Doctors to Residents Has Increased Faster in Georgia than in Other Southern States

Data compiled by the American Medical Association indicate the ratio of doctors-to-residents has grown steadily in Georgia – greater than in such fast-growing southern states as Florida or Virginia – despite Florida's stronger restrictions on patients' legal rights in malpractice cases and Virginia's overall limit on medical malpractice awards.

- **From 1990 to 2001, the ratio of physicians per 1,000 Georgia residents rose 20.9 percent – faster than in Florida or Virginia.** In comparison, the growth rate for this ratio was 12.0 percent from 1990-2001 in Florida, where the state imposes tort restrictions on malpractice cases and also recently enacted caps on medical malpractice damage awards (which have not had time to influence conditions); and 18.5 percent in Virginia, which has an overall cap of $1.7 million on all malpractice awards. [See Figure 3]

Figure 3

Physician/Population Ratios for Georgia, Virginia and Florida, 1990-2001

Year	Georgia	Virginia	Florida
1990	1.87	2.33	2.51
1995	2.14	2.53	2.69
2001	2.26	2.76	2.81
Percent Change 1990-2001	**+20.9%**	**+18.5%**	**+12.0%**

Source: American Medical Association, "Nonfederal Civilian Population, and Physician/Population Ratios for Selected Years 1975-2001," table 5.17 from "Physician Characteristics and Distribution in the U.S.," 2002-2003 and prior editions.

Median Amount of Malpractice Payouts in Georgia Declined by a Third in the Past Five Years

If there has been an explosion of malpractice lawsuits – as doctors and their lobbyists claim[6] – this so-called "lawsuit lottery" should be driving payouts to victims of medical malpractice through the roof. But that's not what has happened in Georgia.

The median amount of payouts to individuals in Georgia declined significantly in 2003 – the second consecutive annual drop, according to year-end statistics that were released March 15, 2004, by the federal National Practitioner Data Bank (NPDB). And this decline is even more pronounced when dollar values are adjusted for medical services inflation.

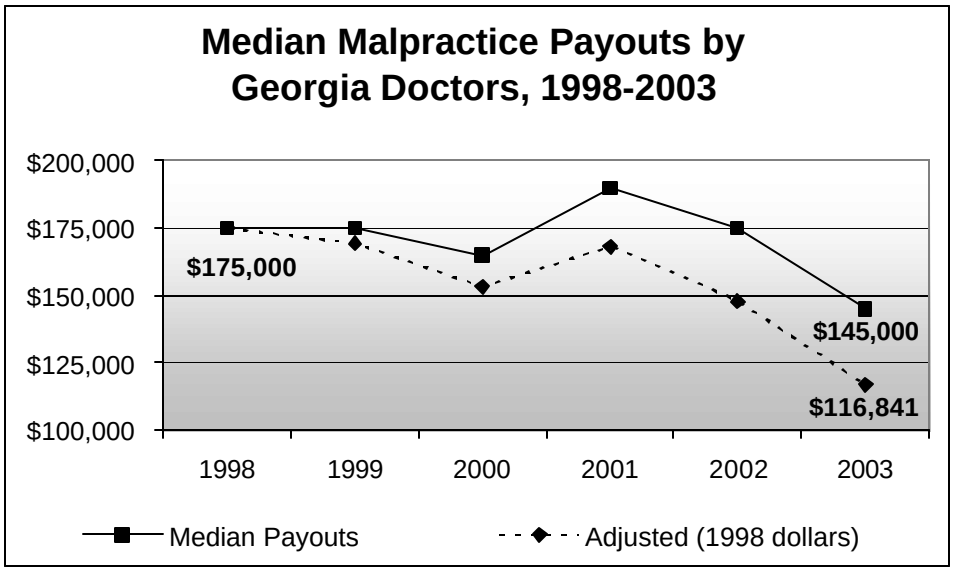
Since the bulk of a malpractice payout customarily goes toward covering medical expenses, the amount of malpractice payouts can be expected to rise along with the costs of medical services. In addition, since a malpractice payout also is intended to provide compensation for lost income over a patient's lifetime, median payouts also can be expected to increase along with wages, productivity, and average life expectancy.

- **Georgia's median malpractice payouts declined by a third from 1998 to 2003, when adjusted for medical services inflation.** When measured against the rising costs of medical services (using 1998 dollars), the median amount paid to victims of medical malpractice in Georgia declined from $175,000 to $116,841 – or 33.2 percent – over this five-year period. [See Figure 4]

- **Not adjusting for medical services inflation, the median amount of Georgia's malpractice payouts still declined 17.1 percent from 1998 to 2003.** In 1998, the median malpractice payout in Georgia was $175,000. By 2003, Georgia's median payout declined to $145,000 – a *drop* of 17.1 percent.

- **The median malpractice payout in Georgia dropped 30.6 percent from 2001 to 2003.** During the height of the so-called medical malpractice "crisis," 2001 to 2003, the amount of the median payout in Georgia declined 23.7 percent, from $190,000 to $145,000. Adjusting for medical services inflation, this drop is even more dramatic – 30.6 percent.

Figure 4



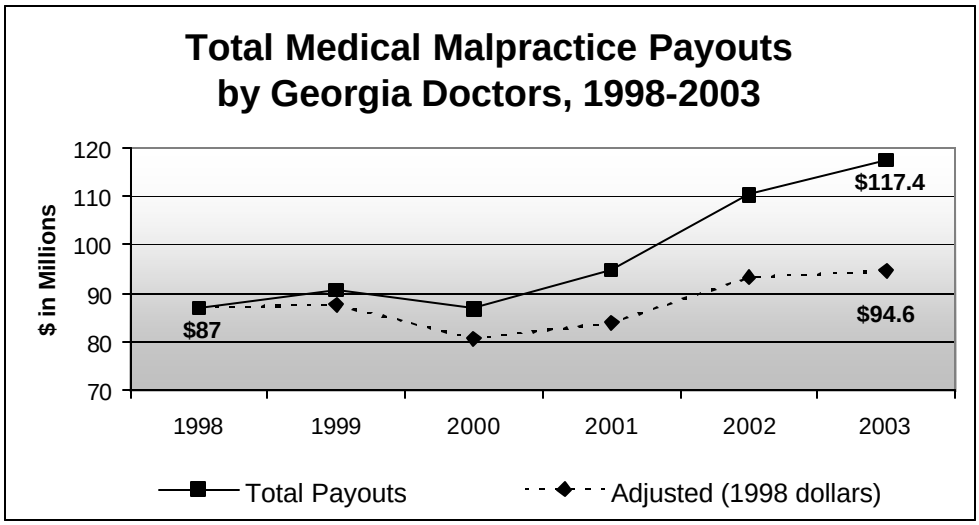
Sources: National Practitioner Data Bank, Jan. 1, 1998 – Dec. 31, 2003; Bureau of Labor Statistics – Medical Care Services CPI.

Total Malpractice Payouts by Georgia Doctors Increased 1.7 Percent Annually When Adjusted for Inflation

While physicians in Georgia complain that premiums for medical malpractice insurance have risen at a "devastating" rate,[7] their insurers have not experienced a dramatic spike in the amounts they have paid to injured patients. NPDB statistics show that annual amounts paid out on behalf of physicians increased only slightly during the past five years when medical inflation is taken into account.

- **The amount of malpractice payouts on behalf of Georgia physicians increased by an average of only 1.7 percent a year from 1998-2003, when adjusted for inflation.** When measured against the rising costs of medical services (using 1998 dollars), the total amount of physician medical malpractice payouts in Georgia increased from $87 million in 1998 to $94.6 million in 2003 – a total of 8.7 percent, or an average of only 1.7 percent annually. [See Figure 5]

Figure 5



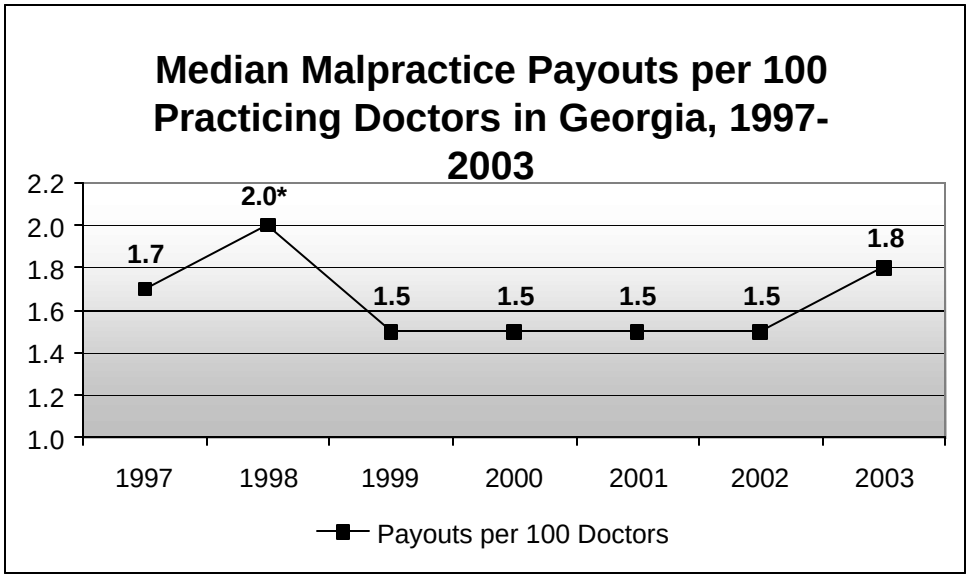
Sources: National Practitioner Data Bank, Jan. 1, 1998 – Dec. 31, 2003; Bureau of Labor Statistics – Medical Services CPI.

The Number of Malpractice Payouts per Doctor Has Remained Nearly Flat in Georgia

According to claims made by Georgia's physicians and their lobbyists, medical malpractice payouts have become more common because patients are lining up to play the "lawsuit lottery."[8] In fact, the number of payouts made to victims of malpractice in Georgia has remained nearly flat since 1997 when measured against the growing number of doctors practicing in the state.[9]

- **The number of medical malpractice payouts per 100 Georgia doctors was nearly flat from 1997 to 2003.** In 1997, there were 254 malpractice payouts of behalf of Georgia patients, according to the NPDB, which represented 1.7 payouts per 100 doctors practicing in Georgia. In 2003, there were 318 payouts, which represented 1.8 payouts per 100 doctors. [See Figure 6]

Figure 6



Sources: Number of payouts from National Practitioner Data Bank, Jan. 1, 1997-Dec. 31, 2003. Number of physicians from Georgia Composite State Board of Medical Examiners, as reported by the Federation of State Medical Boards of the United States, Inc.," Annual Summaries 1994 through 2003."

* *Note*: Re-evaluation by the Georgia Composite State Board of Medical Examiners and Public Citizen has raised questions about the reliability of the 1998 total for "in-state practicing" physicians.

Number of Malpractice Jury Verdicts in Favor of Victims Declined Dramatically in the Atlanta Area

Physicians argue that an "explosion" of medical malpractice jury verdicts has driven up the cost of their liability insurance premiums. Although Georgia does not have a central clearinghouse that tracks the number of medical malpractice verdicts in the state, the most consistent source of verdict information documents no such spike in verdicts.

- **Trend shows a dramatic decrease in jury verdicts for victims of malpractice.** *Georgia Trial Reporter* data show only two verdicts in favor of medical malpractice plaintiffs during 2003 – the lowest total since 1988, the first year for which data were available. In 2002, there were only five plaintiff verdicts – the least since 1990. [See Figure 7]

  The *Georgia Trial Reporter* receives information on a voluntary basis about jury verdicts, most of which are from the greater Atlanta area. While its data is not comprehensive and does not represent statewide totals, the publication's statistics do shed light on medical malpractice verdict trends in Georgia's most populous region over the past 15 years.

Figure 7
Jury Verdicts in Favor of Malpractice Victims, Atlanta Area, 1988-2003

Year	Medical Malpractice Verdicts in Favor of Plaintiffs
1988	11
1989	7
1990	5
1991	10
1992	10
1993	6
1994	6
1995	12
1996	7
1997	6
1998	10
1999	8
2000	9
2001	9
2002	5
2003	2

Source: Georgia Trial Reporter Data.

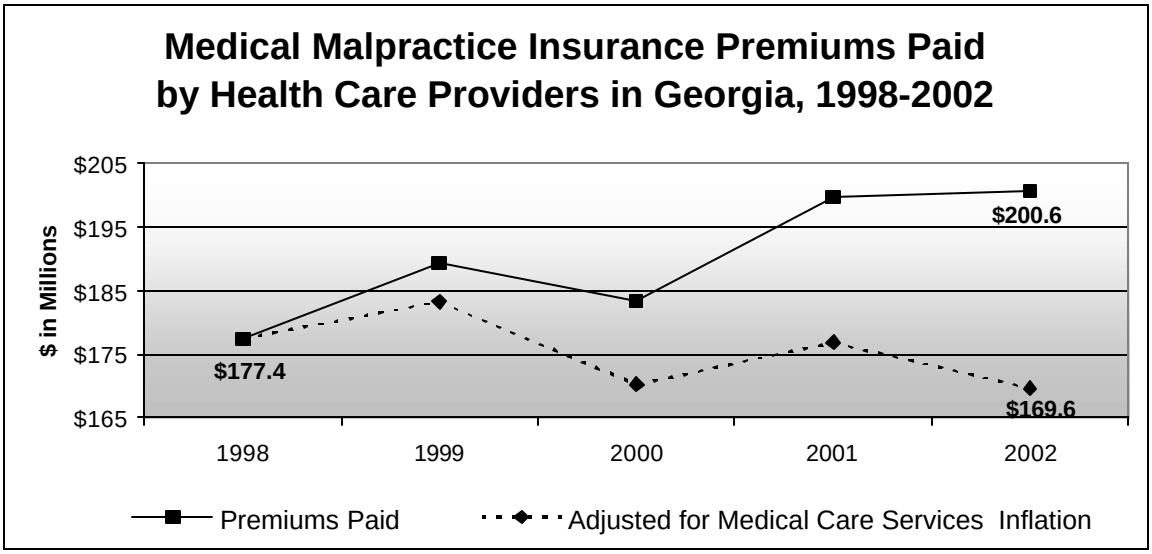
Malpractice Insurance Costs to Health Care Providers in Georgia Have Decreased When Adjusted for Inflation

The cost of medical malpractice insurance can be expected to rise significantly over the years if payouts keep pace with dramatically rising health care costs incurred by injured patients – as well as increased wages and productivity for which the victims are compensated. In fact, the cost of medical liability insurance in Georgia has risen slightly slower than medical costs in recent years.

Like much of the country, Georgia benefited from a "soft" market for liability insurance throughout most of the 1990s. During these years when Wall Street returns were high, insurance companies chose not to raise malpractice insurance premiums – instead, they preferred to increase their marketshares and cash flow so they had more money available for investments.[10] As a result of these pricing and profit policies, the amounts that insurance companies collected in malpractice premiums, when adjusted for medical services inflation, actually declined from 1998 to 2002 (the last year for which complete statistics are available).

- **Georgia health care providers paid less in malpractice premiums in 2002 than in 1998, when payments are adjusted for medical services inflation.** Measured in 1998 dollars, health care providers paid $169.6 million for malpractice coverage in 2002, compared with $177.4 million in 1998, according to the National Association of Insurance Commissioners. [See Figure 8] This represents a 4.4 percent *decrease*. During these four years, the cost of malpractice premiums increased 13.1 percent – from $177.4 million to $200.6 million – or 3.3 percent annually. During this same period, costs of medical care services increased 18.3 percent – or 4.6 percent annually.

Figure 8



Source: National Association of Insurance Commissioners, "Medical Malpractice Insurance Net Premium and Incurred Loss Summary," editions 1992-2001; and draft report to NAIC's Property and Casualty Committee, "Medical Malpractice Insurance – A Study of Market Conditions," table 13, "2002 Medical Liability Profitability Results By State," Dec. 3, 2003.

* *Note*: Each state decides which insurance companies must report earnings/losses to the NAIC. Generally, state-administered funds, surplus lines insurers, self-insured organizations or in some cases, single-state insurers, do not report their premiums/losses. Companies reporting usually include most of the voluntary market (stock and mutual insurers) and most risk retention groups that are formed by doctors or hospitals.

Malpractice Insurance Costs Comprise Only 3.6 Percent of Georgia Physician Expenses

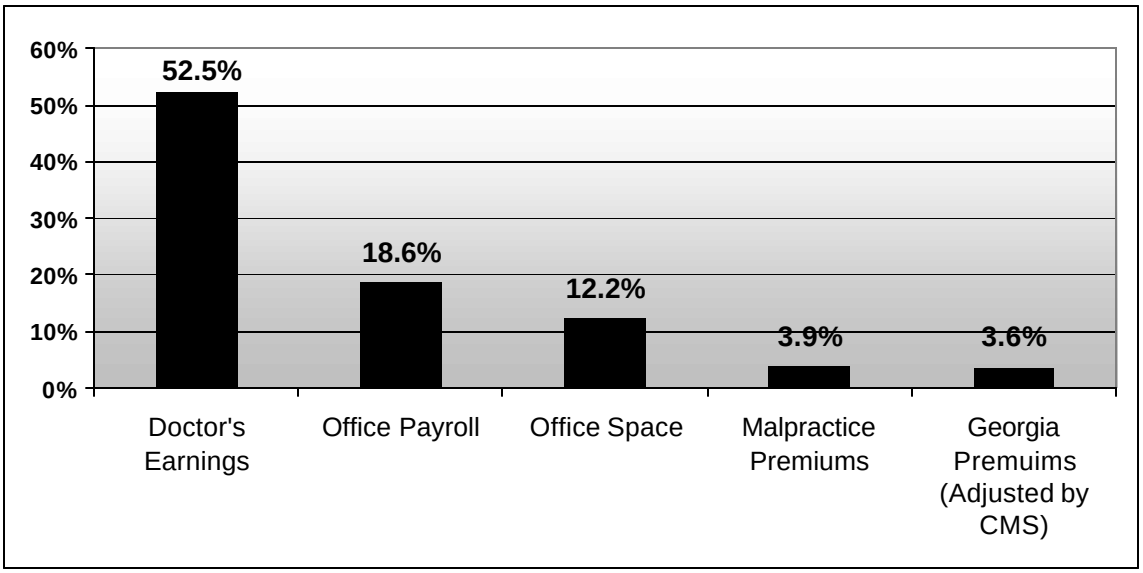
The federal government's Medicare actuary calculates that doctors spend a large amount of their practice income on their own salaries and very little for malpractice insurance. The large difference between these two numbers undercuts claims that the cost of malpractice insurance is a major reason Georgia doctors feel financial pressures.

- **Doctors allocate far more money for their salaries than they pay in malpractice premiums.** According to the federal government's Medicare program, doctors nationally spend an average of 52.5 percent of their practice incomes on their own salaries, 30.8 percent on such overhead as office payroll and rent, and only 3.9 percent of their practice incomes on malpractice insurance.[11] [See Figure 9]

- **Georgia doctors spend less than the national average for medical malpractice insurance.** According to the federal government's Medicare program, Georgia doctors spend an average of only 3.6 percent of their practice incomes on malpractice insurance, compared with a nationwide average of 3.9 percent.[12] This means Georgia doctors pay 7.7 percent less than the national average.

Figure 9

Where Doctors' Practice Income Goes



Source: "Annual Percent Change in the Revised and Rebased Medicare Economic Index, 2004 – Cost Categories and Price Measures," Centers for Medicare and Medicaid Services, Nov. 7, 2003.

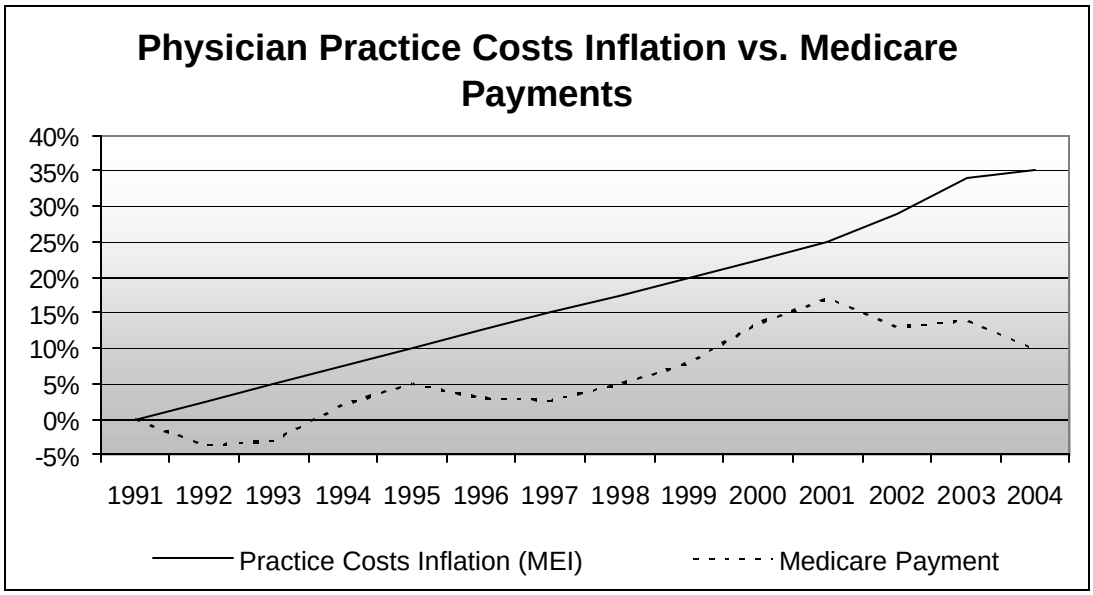
Reduced Fees – Not Insurance Rates – Are the Biggest Financial Burden on Doctors

Doctors across the country have seen their fees slashed in recent years as managed care companies tried to increase profits, and government programs, such as Medicare and Medicaid, tried to cut costs. It has gotten so bad that the Medical Association of Georgia sued Georgia Blue Cross/Blue Shield over their payment for services, procedures and products. The HMO was ordered to disclose its fee schedule and the method by which that schedule is calculated.[13]

Medicare reimbursement rates no longer come close to keeping pace with increases in doctors' practice expenses. The AMA estimates that since 1991 physician practice costs have risen by 35 percent, but Medicare payments have risen only 10 percent. That means practice costs have risen two-and-a-half times the rate of Medicare payments. [See Figure 10]

This pressure on fees has contributed greatly to doctor stress and sensitivity to any increases in their practice costs. In fact, the long-term reduction in fees paid to doctors represents a much more significant burden than the recent, temporary spike in malpractice insurance rates. The tort system is a convenient whipping boy for doctors who will continue to chafe from cost containment measures, but victims of medical negligence should not be made to compensate for declining reimbursement rates

Figure 10



Sources: American Medical Association Web site, based on physician practice cost inflation (Medicare Economic Index – MEI) all years, Centers for Medicare and Medicaid Services (CMS); 1992-97 payments, Physician Payment Review Commission; 1998-2003 payments, American Medical Association; 2004 projections, CMS.

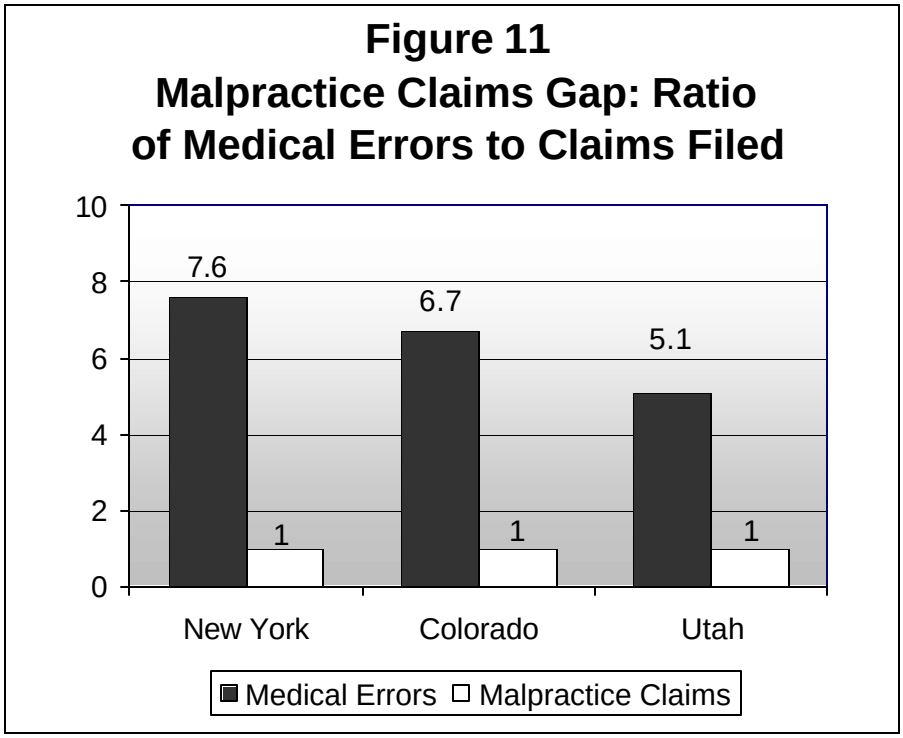
Rather than Facing "Runaway Litigation," Doctors Benefit from a Claims Gap

Although no comparable studies have been cited in Georgia, there is convincing evidence from around the nation that the majority of patients who suffer injuries from medical malpractice never file lawsuits.

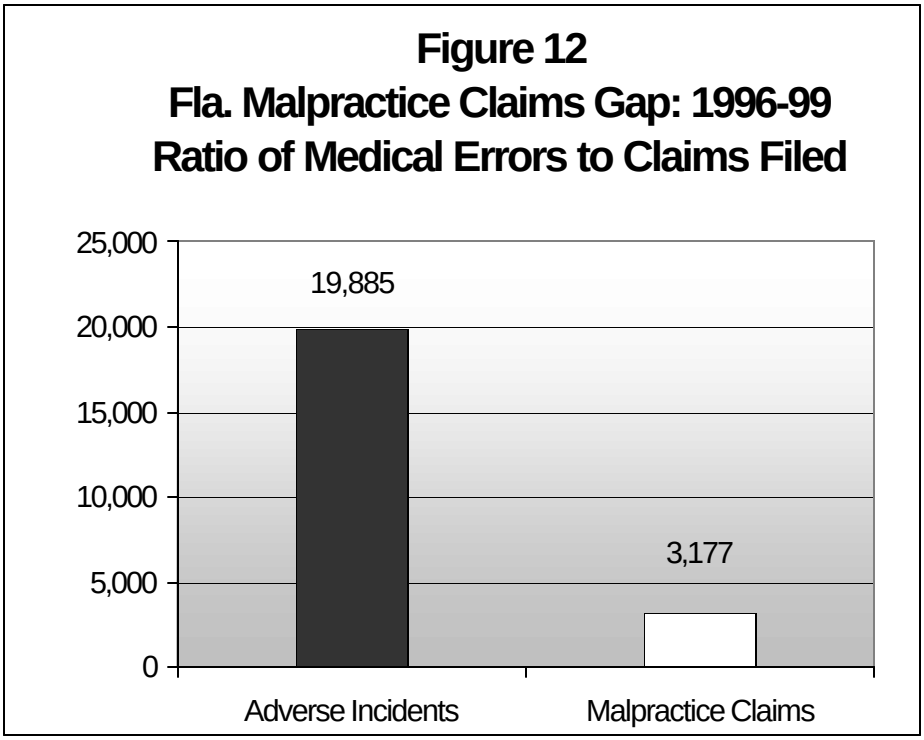
- **A landmark Harvard Medical Practice Study found that only a small percentage of medical errors result in lawsuits.** Twelve years ago, Harvard researchers using a sample of hospitalizations in New York State compared medical records to claims files. They found that only one in 7.6 instances of medical negligence committed in hospitals results in a malpractice claim.[14] Researchers replicating this study made similar findings in Colorado and Utah.[15] [See Figure 11]

- **Florida's health agency shows a similar claims gap.** A Florida statute requires hospitals to report "adverse incidents," defined as "an event over which health care personnel could exercise control" that results in death or injury. Tables prepared by Florida's Agency for Health Care Administration have compared reports of adverse incidents to filing of new malpractice claims. From 1996 through 1999 (the most recent year for which data are available), Florida hospitals reported 19,885 incidents but only 3,177 medical malpractice claims.[16] In other words, for every six preventable medical errors only one claim is filed. [See Figure 12]

- **Expenditures on medical liability comprise less than 1 percent of overall health care costs.** In January, when the federal Centers for Medicare and Medicaid Service (CMS) actuaries released a 13-page report on growth in health care expenditures, the subject of medical malpractice costs rated only an 11-word mention. That's probably because 2002 health care expenditures rose 9.3 percent to $1.553 trillion,[17] yet expenditures on malpractice premiums reported to the National Association of Insurance Commissioners (NAIC) that year were only $9.6 billion – making malpractice costs about .0062 percent of national health care expenditures.[18]



Source: Harvard Medical Practice Study Group, *Patients, Doctors and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York* (1990); Studdert et al, "Beyond Dead Reckoning: Measures of Medical Injury Burden, Malpractice Litigation, and Alternative Compensation Models from Utah and Colorado," 33 Ind. L. Rev. 1643 (2000).



Source: The Agency for Health Care Administration, Division of Health Quality Assurance. Reported malpractice claims by district compared to reported adverse incidents 1996, 1997, 1998, 1999.

Empirical Evidence Does not Confirm the Existence of "Defensive Medicine" – Patient Injuries Refute It

In many states, when questions about malpractice "reform" arise, doctors and their lobbyist's claim that a fear of litigation has prompted physicians to perform additional medical tests – resulting, they say, in higher costs and risks to patients. A search of studies and scholarly literature, however, finds no empirical evidence that doctors are actually practicing this sort of "defensive" medicine:

- **A search of the scholarly literature on medicine will turn up dozens of studies documenting the incidence of medical errors, but not one peer-reviewed study documenting purely defensive medicine.** One might laugh at the spectacle of a lobbying campaign constructed around a flimsy theory unsupported by any empirical evidence. Unfortunately, the evidence *disproving* the theory is so overwhelming and compelling as to be truly frightening. Several recent studies demonstrate that current disincentives to unsafe and sloppy practices are inadequate, and show how much more dangerous medical care would be if deterrents were further weakened.

- **The Congressional Budget Office has rejected the defensive medicine theory.** The Congressional Budget Office (CBO) was asked to quantify the savings from reduced "defensive medicine" if Congress passed H.R. 5. This bill, which contained very stringent restrictions on patients' ability to recover damages, passed the U.S. House in 2003. CBO declined, saying:

  Estimating the amount of health care spending attributable to defensive medicine is difficult. Most estimates are speculative in nature, relying, for the most part, on surveys of physicians' responses to hypothetical clinical situations, and clinical studies of the effectiveness of certain intensive treatments. Compounding the uncertainty about the magnitude of spending for defensive medicine, there is little empirical evidence on the effect of medical malpractice tort controls on spending for defensive medicine and, more generally, on overall health care spending.

  A small number of studies have observed reductions in health care spending correlated with changes in tort law, but that 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.[19]

- **The General Accounting Office has rejected the defensive medicine theory.** 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."[20]

A 1996 study by two economists has been cited by the Bush Administration to argue that tort "reform" will yield a 5 to 9 percent savings in health care costs from decreased defensive medicine. "However," said the GAO, "this study did not control for other factors that can affect hospital costs, such as the extent of managed care penetration in different areas. When controlling for managed care penetration in a 2000 follow-up study, the same researchers found that the reductions in hospital expenditures attributable to direct tort reforms dropped to about 4 percent. Moreover, preliminary findings from a 2003 study [by CBO] that replicated and expanded the scope of these studies to include Medicare patients treated for a broader set of conditions failed to find any impact of state tort laws on medical spending."[21]

- **Defensive medicine hasn't prevented wrong-patient surgery.** New York hospitals reported 27 instances of invasive procedures performed on the wrong patient between April 1998 and December 2001.[22] There were nine such instances in Florida in 2001.[23] In trying to determine how such shocking errors could occur, researchers analyzed one case in detail. The case study determined that medical personnel had ignored "many seemingly clear signals that they were subjecting the wrong patient to an invasive procedure." In this case, "defensive medicine" measures would have included follow-up questioning or record-checking when the patient told personnel she had not been admitted for cardiac treatment. Surely if the medical providers were frightened of lawsuits they would have made such minimal inquiries.

- **Defensive medicine hasn't prevented medication errors.** An Auburn University study of 36 hospitals and nursing homes in Colorado and Georgia found that on average, 19 percent of medication doses were given in error, with 7 percent judged to be potentially harmful.[24] The authors said this amounts to about 40 potential adverse drug events per day in a typical 300-patient facility. The errors were made in spite of the presence of observers from the research team – who could easily have been called as witnesses in a medical liability lawsuit. An earlier study by Boston researchers estimated that there are some 500 preventable adverse drug events in the average hospital each year, in spite of the fact that "drug injuries frequently result in malpractice claims, and in a large study of closed claims… accounted for the highest total expenditure of any type of procedure-related injury."[25]

- **Defensive medicine hasn't prevented mammography errors.** The *New York Times* reported in June 2002 some very disturbing facts about errors committed by radiologists in reading mammograms.[26] Studies indicate that some doctors and clinics miss as many as one in three cancers. Despite the possibility of lawsuits, doctors with no aptitude for mammography continue to read mammograms. Clinics continue to employ doctors who read too few mammograms to keep their skills sharp. It appears that only reviews by regulators spur doctors and clinics to meet minimum standards.

- **Defensive medicine hasn't prevented hospital infections**. The *Chicago Tribune* reported on July 21, 2002 that some 75,000 Americans die each year because of infections acquired in hospitals that "were preventable, the result of unsanitary facilities, germ-laden instruments, unwashed hands and other lapses."[27] If medical providers fear being sued over the slightest lapse, why would doctors and nurses neglect to take the most elementary precautions of washing their hands and changing scrub uniforms? Why would American hospitals "have collectively pared cleaning staffs by 25 percent since 1995"?[28] Previously, consultants retained by medical provider groups have argued that medical providers *overspend* on precautionary measures by five to nine percent.[29]

- **Defensive medicine hasn't caused hospitals to keep nursing staffs up-to-strength.** Two reports published in the past 6 months concluded that patients in hospitals where nurses had heavier workloads had a higher risk of dying.[30] One report found specifically that each additional patient per nurse corresponded to a 7 percent increase in both patient mortality and deaths following complications.[31] Nevertheless, nursing shortages persist, even though the defensive medicine theory predicts.

Few Malpractice Lawsuits Are "Frivolous"

Lobbyists for the Georgia physicians have claimed that medical liability insurance will become affordable only if patients can be discouraged from filing lawsuits in which "lawyers win and consumers lose."[32]

Some Washington, D.C., politicians have made similar comments about "frivolous lawsuits" and "junk lawsuits" in their efforts to promote a federal medical malpractice bill that would place caps on pain-and-suffering awards to injured patients.[33]

In reality, medical malpractice cases are brought on a contingency fee basis, meaning the attorney receives payment only in the event there is a settlement or verdict. If the claim is closed without payment, the attorney does not receive a fee. Since attorneys must earn money to stay in business, it follows that they would not intentionally take on a non-meritorious case.

- **The high cost of preparing a medical malpractice case discourages frivolous claims – and meritorious claims as well.** Medical malpractice cases are very expensive for plaintiffs' attorneys to bring, with out-of-pocket costs for cases settled at or near the time of trial (when most cases are settled) ranging from $15,000 to $25,000.[34] If the case goes to trial, the costs can easily be doubled.[35] These costs do not include the plaintiff's attorney's time, and an attorney pursuing a frivolous case incurs opportunity costs in not pursuing other cases. An attorney incurs expenses beginning with the determination of whether a case has merit. First, the attorney is required to obtain copies of the patient's medical records from all the providers for analysis by a competent medically trained person. If that initial consultation reveals a likelihood of medical negligence, the records must then be submitted to medical specialists, qualified to testify in court, for final review. Typically, the records must be sent to experts outside of the plaintiff's state, as physicians within the state will refuse to testify against local colleagues. As a result, the experts who agree to review records and testify can and do charge substantial fees. Fees from $1,000 per hour to several thousand dollars are not uncommon.[36] Discovery involves taking the sworn testimony of witnesses and experts. Such depositions cost $300 and up, depending upon their length and complexity. If an expert witness is deposed, the plaintiff's attorney is charged for the witness' preparation time and time attending the deposition.

- **The small numbers of claims pursued to a defense verdict are not frivolous.** Researchers at the American Society of Anesthesiologists arranged for pairs of doctors to review 103 randomly selected medical negligence claims files.[37] The doctors were asked to judge whether the anesthesiologist in question had acted reasonably and prudently. The doctors only agreed on the appropriateness of care in 62 percent of the cases; they disagreed in 38 percent of cases. The researchers concluded, "These observations indicate that neutral experts (the reviews were conducted in a situation that did not involve advocacy or financial compensation) commonly disagree in

their assessments when using the accepted standard of reasonable and prudent care." The percentage of all medical malpractice claims that go to trial is only 6.6 percent, according to PIAA, meaning that the parties and their attorneys ultimately reach agreement about liability five times more often than neutral doctors do. If truly frivolous lawsuits were being pursued, the proportion of claims going to trial would exceed the 38 percent of claims on which even doctors will disagree.

- **The costs of defending claims that are ultimately dropped are not unreasonable.** Medical liability insurers have complained about the costs of defending cases that are ultimately dropped. But the professional obligation of lawyers to exercise due diligence is essentially identical to the duty of physicians. The lawyer must rule out the possibility of proving medical negligence before terminating a claim, just as doctors must rule out the possibility of illnesses suggested by their patients' symptoms. The doctor performs his duty by administering tests; the lawyer performs hers by using discovery procedures. Both processes can lead to dead ends. But plaintiffs' lawyers have no financial incentive to abuse the litigation process: they are using their own time and money to pursue discovery activities, and are only paid for work on behalf of clients whose cases are successful.

End Notes

[1] "Increasing Doctor Accountability & Patient Safety: Solving Georgia's Medical Malpractice 'Crisis,'" February 2004, available on-line at: http://www.citizen.org/congress/civjus/medmal/articles.cfm?ID=11077.
[2] Linda S. Morris, "Georgia Coalition Travels State to Push for Tort-Reform Legislation," *Macon Telegraph*, March 16, 2004.
[3] E-mail communication to Public Citizen from LaSharn Hughes, Executive Director, Composite State Board of Medical Examiners, March 22, 2004. Not only is the 1998 total contrary to the trend for preceding and subsequent years, the category of Georgia's "licensed doctors" increased 13.7 percent in 1998, the same year that the number of "licensed, practicing in-state" doctors appeared to drop 11.9 percent.
[4] U.S. Census Bureau, No. 18, Resident Population – States: 1980 to 2000. Statistical Abstract of the United States: 2001.
[5] E-mail communication to Public Citizen from Jean Rice, Composite Board of Medical Examiners, Feb. 26, 2004.
[6] "House Democrats and Republicans Introduce Bipartisan Legislation to Stop Frivolous Lawsuit Abuses," press release from Georgia Coalition for Civil Justice Reform, Feb. 6, 2004.
[7] Linda S. Morris, "Georgia Coalition Travels State to Push for Tort-Reform Legislation," *Macon Telegraph*, March 16, 2004.
[8] "House Democrats and Republicans Introduce Bipartisan Legislation to Stop Frivolous Lawsuit Abuses," press release from Georgia Coalition for Civil Justice Reform, Feb. 6, 2004.
[9] The number of doctors in Georgia increased from 15,430 in 1997 to 18,134 in 2003, according to the Georgia Consolidated Board of Medical Examiners. See also, "No Evidence of a Doctor Exodus," in this report.
[10] For a more detailed explanation of insurance economics and the rationale for recent premium increases, see "Medical Liability Premium Spike is Caused by the Insurance Cycle and Mismanagement, Not the Legal System," in Public Citizen's February 2004 report, "Increasing Doctor Accountability & Patient Safety: Solving Georgia's Medical Malpractice 'Crisis,'" available on-line at: http://www.citizen.org/congress/civjus/medmal/articles.cfm?ID=11077.
[11] "Annual Percent Change in the Revised and Rebased Medicare Economic Index, 2004 – Cost Categories and Price Measures," Centers for Medicare and Medicaid Services, *Federal Register*, vol. 68, No. 216, Nov. 7, 2003.
[12] *Id.* The federal government indexes the average malpractice insurance cost nationwide at 3.86 percent of a doctor's practice income. For Georgia, it assigns a local malpractice cost value of .935, indicating Georgia doctors pay 93.5 percent of the national average in malpractice insurance costs. The 3.6 percent statistic for Georgia is calculated by multiplying these two numbers.
[13] Medical Association of Georgia v. Blue Cross & Blue Shield of Georgia, Inc., 244 Ga. App. 801, 536 S. E. 2d 184 (Ga.App. June 19, 2000).
[14] Harvard Medical Practice Study Group, *Patients, Doctors and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York*, 1990.
[15] Studdert et al, "Beyond Dead Reckoning: Measures of Medical Injury Burden, Malpractice Litigation, and Alternative Compensation Models from Utah and Colorado," 33 Ind. L. Rev. 1643 (2000).
[16] The Agency for Health Care Administration; Division of Health Quality Assurance, "Reported Malpractice Claims by District Compared to Reported Adverse Incidents 1996, 1997, 1998, 1999."
[17] Katharine Levit, Cynthia Smith, Cathy Cowan, Art Sensenig, Aaron Catlin and the Health Accounts Team, National Health Statistics Group, Office of the Actuary, Centers for Medicare and Medicaid Services, "Health Spending Rebound Continues in 2002," *Health Affairs*, Vol. 23, No. 1, January-February 2004.
[18] National Association of Insurance Commissioners, "Medical Malpractice Insurance Net Premium and Incurred Loss Summary," 2003 edition.
[19] 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.
[20] United States General Accounting Office, Report GAO-03-836, "Medical Malpractice: Implications of Rising Premiums on Access to Health Care," p. 27, August 2003. Available on-line at: http://www.gao.gov/new.items/d03836.pdf.
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[22] Chassin & Becher, "The Wrong Patient," 136 *Ann Intern Med.* 826, 2002.
[23] Agency for Health Care Administration, Risk Management Reporting Summary, March 2002.

[24] Barker et al, "Medication Errors Observed in 36 Heath Care Facilities," 162 *Arch Intern Med. 1897*, 2002.
[25] Bates et al, "The Costs of Adverse Drug Events in Hospitalized Patients," 277 *JAMA 307*, 1997.
[26] Moss, "Spotting Breast Cancer: Doctors Are Weak Link," *New York Times*, June 27, 2002.
[27] Berens, "Infection epidemic carves deadly path," *Chicago Tribune*, July 21, 2002. This number is attributed to the "Tribune's analysis, which adopted methods commonly used by epidemiologists."
[28] *Id.*
[29] U.S. Department of Health and Human Services, "Confronting the New Health Care Crisis," July 24, 2002.
[30] J. Needleman, P. Buerhaus, S. Mattke, M. Stewart, K. Zelevinsky, "Nurse-Staffing Levels and the Quality of Care in Hospitals," *New England Journal of Medicine*, 2002; 346:1715-1722, May 30, 2002. Also: L.H. Aiken LH, S.P. Clarke, D.M. Sloane et al., "Hospital Nurse Staffing and Patient Mortality, Nurse Burnout and Job Dissatisfaction," *JAMA*, 2002;288:1987-1993, Oct. 23/30, 2002.
[31] *Id.*
[32] "House Democrats and Republicans Introduce Bipartisan Legislation to Stop Frivolous Lawsuit Abuses," press release from Georgia Coalition for Civil Justice Reform, Feb. 6, 2004.
[33] "Remarks by the President on Medical Liability Reform," University of Scranton, Scranton, Pa., Jan. 16, 2003. Transcript at: http://www.whitehouse.gov/infocus/medicalliability/
[34] Based on Public Citizen interviews with plaintiff attorneys.
[35] N. Vidmar, *Medical Malpractice and the American Jury*, 1995.
[36] According to the Physician Insurers Association of America, expert witnesses in a medical malpractice case are paid on average over $4,800.
[37] Posner et al, "Variation in Expert Opinion in Medical Malpractice Review," 85 *Anesthesiology 1049*, 1996.