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## **Debunking Medical Malpractice Myths: Unraveling the False Premises Behind “Tort Reform”**

**Geoff Boehm, J.D.\***

Medical malpractice—negligence and recklessness by hospitals and physicians—injures hundreds of thousands of people each year. In 2000, the Institute of Medicine released a lengthy report, *To Err Is Human*, revealing that preventable medical errors result in up to 98,000 deaths in hospitals annually.<sup>1</sup> Unfortunately, lawmakers and others have focused too much on reducing liability for those preventable errors and too little on reducing their occurrence. As a result, a July 2004 study shows that over a decade in which two-thirds of states passed “tort reform” measures that limit or restrict medical malpractice lawsuits, there was no improvement in safety: The number of avoidable deaths in hospitals alone is now approximately 195,000 per year, not including obstetrics patients.<sup>2</sup> Despite these bleak statistics, when organizations like the American Medical Association (AMA) speak about a malpractice “crisis,” they are referring not to the people injured or killed by medical errors or the widespread failure to discipline negligent doctors (including repeat offenders), but rather to doctors’ increasing malpractice insurance premiums.<sup>3</sup>

### **I. THE UNFOUNDED RHETORIC OF TORT REFORM LOBBYISTS**

Tort reform lobbyists seeking to limit the rights of victims of medical

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\* Legal Director, Center for Justice & Democracy.

1. INST. OF MEDICINE, *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM* (2000), <http://www.nap.edu/openbook/0309068371/html/> (reporting only on deaths in hospitals, therefore not including those in physicians’ offices).

2. HEALTHGRADES, *HEALTHGRADES QUALITY STUDY: PATIENT SAFETY IN AMERICAN HOSPITALS 6* (2004), [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) (“[E]xcluding obstetric patients, we calculated that . . . 575,000 preventable deaths occurred, as a direct result of the 2.5 million patient safety incidents that occurred in U.S. hospitals from 2000 through 2002.”).

3. *See, e.g.*, Donald Palmisano, AMA Past-President, Letter to Editor, *N.Y. TIMES*, July 2, 2004, at A18.

malpractice through caps on damages often string together various concerns about health care in the United States that are unrelated to, or would not be addressed by, the reforms they seek. In particular, the insurance industry and other tort reform proponents rely on misinformation and largely anecdotal evidence that the civil justice system is “out of control” and needs to be scaled back.<sup>4</sup> However, the facts reveal a different picture.

First, the number of medical malpractice cases being filed per capita has dropped over the last ten years, as have tort filings generally.<sup>5</sup> Even in the states that the AMA has labeled “crisis states,”<sup>6</sup> the number of cases per capita has been dropping.<sup>7</sup> The vast majority of those injured by malpractice never file a claim seeking to hold the wrongdoers accountable. Even though medical malpractice kills some 195,000 hospital patients every year and injures many more, only about one in eight of those injured files a claim.<sup>8</sup>

Second, while the claim that medical malpractice cases tend to be “frivolous” is frequently heard,<sup>9</sup> proponents of that claim have failed to

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4. *E.g.*, Texans Against Lawsuit Abuse, *Lawsuit Abuse: Patients Are Paying the Price*, at <http://www.sickoflawsuits.org/news/patients.cfm> (last visited Sept. 23, 2004) (referring to “increasing number of lawsuits in the healthcare industry,” “runaway tort system,” and “lawsuit abuse”).

5. NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2002, at 28 (2003) [hereinafter NCSC, EXAMINING STATE COURTS, 2002]; Nat’l Ctr. for State Courts, *Medical Malpractice Filings per 100,000 Population in 11 and 17 States, 1993-2002* (July 19, 2004) (unpublished manuscript, on file with author) [hereinafter NCSC, *Medical Malpractice Filings*].

6. Am. Med. Ass’n, *America’s Medical Liability Crisis: A National View* (2004), at <http://www.ama-assn.org/ama/noindex/category/11871.html>.

7. *See* NCSC, EXAMINING STATE COURTS, 2002, *supra* note 5, at 28; NCSC, *Medical Malpractice Filings*, *supra* note 5. Ironically, the type of cases being filed ever more frequently are contract cases, which are much more likely to be filed by a business and are not affected by caps or any other “tort reforms.” *See* THOMAS H. COHEN ET AL., U.S. DEP’T OF JUSTICE, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001, at 3 (2004); NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2003, at 23 (2004).

8. HARVARD MED. PRACTICE STUDY, PATIENTS, DOCTORS AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK (1990).

9. *See, e.g.*, Elizabeth Zuckerman, *Doctors Protest Rising Medical Liability Insurance Rates*, ASSOCIATED PRESS, Sept. 23, 2004 (“[T]he immediate past president of the AMA . . . faults what he said is a higher number of frivolous lawsuits.”). President George W. Bush apparently referred to “junk” or “frivolous” lawsuits in 224 different speeches between January 1 and November 8, 2004, and in 86 speeches in 2003. Search on Nexis, *Public Papers of the Presidents Database* (Nov. 8, 2004).

support it with strong empirical support.<sup>10</sup> Politicians, insurance industry executives, and medical society lobbyists often support their claim that the system is filled with “frivolous” malpractice lawsuits by citing the statistic that patients only prevail in their medical malpractice lawsuits about twenty-seven percent of the time.<sup>11</sup> Yet, a 2004 report from the Federal Trade Commission and the U.S. Department of Justice found that doctors’ own lawsuits against employers and hospitals fare even worse: Doctor-plaintiffs win only fourteen percent of those verdicts.<sup>12</sup> The fact is that some types of cases are difficult to win, even when they are legitimate—that they will have low win percentages is not a reflection of frivolity.

Our civil justice system has various checks and balances to discourage frivolous suits and punish those who file them. Not only can sanctions be imposed on the lawyers responsible,<sup>13</sup> but the contingency fee arrangement under which plaintiffs’ attorneys work—they only get paid and have their expenses reimbursed if they succeed in the case—also screens out baseless lawsuits. As far back as 1986, James Gattuso, then of the conservative Heritage Foundation, wrote an article for the *Wall Street Journal* entitled *Don’t Rush To Condemn Contingency Fees*. He argued that the contingency fee system ensures that injured persons who could not otherwise afford legal representation obtain access to the legal system and “helps screen [baseless lawsuits] out of the system.”<sup>14</sup> Even insurance executives, when put under

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10. See, e.g., Alisa Ulferts, *Hitch in Malpractice Deal? Bush*, ST. PETERSBURG TIMES, July 16, 2003, at 1B (“Florida Medical Association CEO Sandy Mortham said she wasn’t in a position to say whether frivolous lawsuits caused higher insurance rates, even though the FMA has blamed such lawsuits in news releases and statements on its Web site.”).

11. Lawrence Smarr, President of the Physician Insurers Association of America, has stated that a properly functioning system “would be a system where only cases with merit would be brought forward, where the trial lawyers would triage the cases so that they don’t lose 80 percent of the time when they go to court. . . . We have a legal system that encourages the filing of frivolous lawsuits.” THOMAS H. COHEN, U.S. DEP’T OF JUSTICE, MEDICAL MALPRACTICE TRIALS AND VERDICTS IN LARGE COUNTIES, 2001, at 1 (2004); see also, e.g., Donald J. Palmisano, President, AMA, Speech at National Press Club (July 9, 2003), <http://www.npr.org/programs/npc/2003/030709.dpalmisano.html>; *NewsHour with Jim Lehrer* (PBS television broadcast, Jan. 16, 2003).

12. FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION 38 (2004), [http://www.usdoj.gov/atr/public/health\\_care/204694.htm](http://www.usdoj.gov/atr/public/health_care/204694.htm) (describing antitrust health care litigation).

13. See, e.g., FED. R. CIV. P. 11. State corollaries also provide for such sanctions.

14. James Gattuso, *Don’t Rush To Condemn Contingency Fees*, WALL ST. J., May 15, 1986, at 28.

oath, have admitted that frivolous suits are not a problem.<sup>15</sup>

It should also be noted that the issue of “frivolous lawsuits” is a red herring when caps are being considered. By limiting award amounts, caps target the most egregious cases of malpractice and the most severely injured patients—the very opposite of the “frivolous” or “junk” lawsuits that advocates for caps portray when they are trying to rile up the public or lawmakers to limit victims’ rights. Two recent studies have confirmed that caps on damages in medical malpractice cases, such as California’s draconian \$250,000 cap on non-economic damages, are most devastating to those who suffered the most heinous injuries, those killed by the defendants’ acts, and those who suffered the greatest loss to their quality of life.<sup>16</sup>

In addition to mischaracterizing the quantity and quality of medical malpractice suits, supporters of tort reform make unsupported assertions about the impact of medical malpractice litigation on the quality and availability of health care. Despite the claims of the AMA and state medical societies, the number of medical professionals is growing. Moreover, these organizations repeatedly aver that doctors are leaving the twenty “AMA crisis states,” and even the twenty-four “AMA problem states,” in droves because of litigation concerns, resulting in a lack of access to care. However, investigations of such claims by the U.S. General Accounting Office, various reporters, and state agencies have shown the claims to be false or widely exaggerated. To the extent there are access problems, many

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15. *E.g.*, *Hearing To Receive Testimony from Invited Parties Regarding Medical Malpractice Before the Fla. Senate Comm. on Judiciary*, 2003 Leg., C Sess. 56 (Fl. 2003) (testimony of Robert White, President, First Professional Ins. Co.) (“I don’t feel you can have a frivolous lawsuit in the State of Florida.”); *see also* Paige St. John, *Testimony Reveals Malpractice Myths*, FLA. TODAY, July 15, 2003, at 1; Ulferts, *supra* note 10.

16. NICHOLAS M. PACE ET AL., RAND INST. FOR CIVIL JUSTICE, CAPPING NON-ECONOMIC AWARDS IN MEDICAL MALPRACTICE TRIALS: CALIFORNIA JURY VERDICTS UNDER MICRA 32-33, 47, 48 (2004) [hereinafter RAND INST.]; David M. Studdert et al., *Are Damage Caps Regressive? A Study of Malpractice Jury Verdicts in California*, 23 HEALTH AFF. 54 (2004). California’s cap also has a disproportionate impact on children under a year old and females who are injured by medical malpractice. RAND INST., *supra*, at 32 (female); *id.* at 48 (infant). Victims of medical malpractice with the severest injuries—“brain damage, paralysis, or a variety of catastrophic losses”—had their recoveries capped most often. *Id.* at 47. Patients who suffered “a great loss to their quality of life” but who had smaller economic damages lost the highest percentage of their total awards. *Id.* Death cases, where the malpractice resulted in the patient’s death, are capped more frequently and have higher percentage reductions than injury cases. *Id.*

other explanations can be established.<sup>17</sup>

For example, it is true that some rural and impoverished urban areas do not have a sufficient supply of health care providers.<sup>18</sup> But it is a fiction to tie that lack of access to malpractice litigation or jury awards, or to claim that a cap would make a difference. Such areas often have difficulty attracting or retaining other professionals as well.<sup>19</sup> Moreover, this problem has existed for a long time, even before physicians considered malpractice insurance premiums problematic. In fact, the Council on Graduate Medical Education has stated, “The relative shortage of health professionals in rural areas of the United States is one of the few constants in any description of the United States medical care system.”<sup>20</sup> Rural health

17. *E.g.*, PUBLIC CITIZEN & ORE. STATE PUB. INT. RES. GROUP, OREGON’S INCREASED NUMBER OF DOCTORS: GOVERNMENT DATA REFUTES MEDICAL LOBBY CLAIMS 1-11 (2004), [http://ospirg.org/reports/ORIncreasedNumberDoctors8\\_04.pdf](http://ospirg.org/reports/ORIncreasedNumberDoctors8_04.pdf); U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE 16-19 (2003), <http://www.gao.gov/new.items/d03836.pdf>; John M.R. Bull, *Doctors Can’t Prove Thinning Ranks: Medical Society Chief Admits Group Lacks Statistics To Show Physicians Are Leaving*, MORNING CALL (Allentown, Pa.), Apr. 23, 2004, at A1; Diane Hirth & Bill Cotterell, *Senate Experts Dispute “Myths”*; *Malpractice Debate*, BRADENTON HERALD (Fla.), July 15, 2003, at A11.

18. *See, e.g.*, U.S. Dep’t of Health & Human Servs., Medically Underserved Areas/Medically Underserved Populations, at <http://bphc.hrsa.gov/databases/newmua/> (last visited Sept. 28, 2004).

19. *See, e.g.*, S. Res. 22, 108th Cong. (2003) (“[R]ural school districts will have difficulty competing with large school districts in recruiting and retaining quality teachers.”); *Saving America’s Great Places: The Role of Tax Incentives in Preserving Rural Communities: Hearing Before the Senate Comm. on Fin.*, 108th Cong. 1, 5 (2004) (testimony of Peter K. Froelich, Coordinator, Great Plains Population Symposium Project) (noting that “rural communities are being silently destroyed by the out-migration of young people” and that out-migration is causing “[t]he loss of our highly educated young people”); Georgeanne Artz, *Rural Brain Drain: Is It Reality?*, CHOICES, Dec. 2003, <http://www.choicesmagazine.org/2003-4/2003-4-03.htm>; *see also* Jim Damici, *Growing the Information Technology Sector in Rural Areas*, MAINE IS TECHNOLOGY, Nov. 2003, at [http://www.state.me.us/newsletter/nov2003/growing\\_the\\_information\\_technolo.htm](http://www.state.me.us/newsletter/nov2003/growing_the_information_technolo.htm) (noting this difficulty as it pertains to information technology professionals); Clayton W. Faubion et al., *Rural/Urban Differences in Counselor Satisfaction and Extrinsic Job Factors*, J. REHABILITATION, Oct./Nov./Dec. 2001, at 1, [http://www.findarticles.com/p/articles/mi\\_m0825/is\\_4\\_67/ai\\_81759712/pg\\_1](http://www.findarticles.com/p/articles/mi_m0825/is_4_67/ai_81759712/pg_1) (noting this difficulty as it pertains to rehabilitation counselors); Nat’l Teacher Recruitment Clearinghouse, *Teacher Shortage Areas*, at [http://www.rnt.org/channels/clearinghouse/becometeacher/121\\_teachershort.htm](http://www.rnt.org/channels/clearinghouse/becometeacher/121_teachershort.htm) (last visited Sept. 28, 2004) (noting that the need for teachers is “greatest in urban and rural communities”).

20. COUNCIL ON GRADUATE MED. EDUC., U.S. DEP’T OF HEALTH & HUMAN SERVS.,

care shortages occur throughout the world, including places where there is nothing like the U.S. civil justice system in place.<sup>21</sup>

## II. THE TRUTH ABOUT CAPS AND OTHER MEDICAL MALPRACTICE “REFORMS”

The increasing cost of health care in the United States and the high costs of medical malpractice insurance are legitimate and pressing concerns.<sup>22</sup> Unfortunately, caps will do little to address these issues.

First and foremost, costs related to litigation are a miniscule portion of health care spending; according to the United States Congressional Budget Office (CBO), these malpractice costs are less than two percent of total spending.<sup>23</sup> CBO has, in fact, noted that “a cap on noneconomic damages and a ban on punitive damages . . . would lower health care costs by only about 0.4 percent to 0.5 percent, and the likely effect on health insurance premiums would be comparably small.”<sup>24</sup>

Tort reform advocates often claim that doctors practice “defensive medicine” because of fears of medical malpractice suits and that this practice, in turn, raises the cost of health care.<sup>25</sup> However, in 1994, the

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PHYSICIAN DISTRIBUTION AND HEALTH CARE CHALLENGES IN RURAL AND INNER-CITY AREAS 11 (Feb. 1998), <http://www.cogme.gov/10.pdf>; see also, e.g., Gregg Broffman, *How Can Pediatric Care Be Provided in Underserved Areas? A View of Rural Pediatric Care*, 96 PEDIATRICS 816, 818 (Supp. 1995); Am. Acad. of Family Physicians, *Rural Practice, Keeping Physicians In* (2002), at <http://www.aafp.org/x16635.xml>; Am. Med. Student Ass'n, *Health Care Delivery: Rural vs. Urban Communities*, at <http://www.amsa.org/programs/gpit/ruralurban.cfm> (last visited Sept. 28, 2004).

21. See, e.g., CTR. FOR JUSTICE & DEMOCRACY (CJ&D), *RURAL ACCESS TO HEALTH CARE-A GLOBAL PROBLEM, NOT A LAWSUIT PROBLEM* (2004), at [http://centerjd.org/free/mythbusters-free/MB\\_Rural-International.pdf](http://centerjd.org/free/mythbusters-free/MB_Rural-International.pdf).

22. See, e.g., U.S. CONG. BUDGET OFFICE, *LIMITING TORT LIABILITY FOR MEDICAL MALPRACTICE I* (2004) (“On average, premiums for all physicians nationwide rose by 15 percent between 2000 and 2002—nearly twice as fast as total health care spending per person.”).

23. *Id.* at 6. CBO’s “malpractice costs” are based on premiums paid, which is presumably the cost passed on to health care spenders (patients, health insurers, etc.). Such premiums cover all damages paid, the costs of litigation, insurance overhead, and other related expenses. See *id.* at 1 n.3, 6; Tillinghast Towers-Perrin, *U.S. Tort Costs: 2003 Update* 16-17, app. 5 (2003), at [http://www.towersperrin.com/tillinghast/publications/reports/2003\\_Tort\\_Costs\\_Update/Tort\\_Costs\\_Trends\\_2003\\_Update.pdf](http://www.towersperrin.com/tillinghast/publications/reports/2003_Tort_Costs_Update/Tort_Costs_Trends_2003_Update.pdf); Ams. for Ins. Reform, *Tillinghast’s “Tort Cost” Figures Vastly Overstate the Cost of the American Legal System* (Jan. 6, 2004), at [http://centerjd.org/air/pr/Tillinghast\\_Overstates.pdf](http://centerjd.org/air/pr/Tillinghast_Overstates.pdf).

24. *Id.* at 5-6.

25. E.g., President George W. Bush’s Remarks in a Discussion on Health Care in

congressional Office of Technology Assessment (OTA) found that less than eight percent of all diagnostic procedures result primarily from liability concerns.<sup>26</sup> OTA found that most physicians who “would order aggressive diagnostic procedures . . . would do so primarily because they believe such procedures are medically indicated, not primarily because of concerns about liability.”<sup>27</sup> Thus, the effects of tort reform on defensive medicine “are likely to be small.”<sup>28</sup> The CBO has also reported that “some so-called defensive medicine may be motivated less by liability concerns than by the income it generates for physicians or by the positive (albeit small) benefits to patients. . . . CBO believes that savings from reducing defensive medicine would be very small.”<sup>29</sup>

The insurance industry, the U.S. Chamber of Commerce, and corporate front groups such as the American Tort Reform Association<sup>30</sup> have spent many tens of millions of dollars in pursuit of immunity or limitations on liability from wrongdoing.<sup>31</sup> Their efforts include promoting insurance companies’ legislative agenda to limit liability for doctors, hospitals, HMOs, nursing homes, and drug companies that cause injury. Moreover, federal and state lawmakers, regulators, doctors, and the general public are being told by medical and insurance lobbyists that doctors’ insurance rates are rising due to increasing claims by patients, rising jury verdicts, and exploding tort system costs in general, despite clear evidence to the contrary.<sup>32</sup> Just as caps and other tort reforms do not

Muskegon, Michigan, 40 WEEKLY COMP. PRES. DOC. 1958 (Sept. 13, 2004) (“[T]he cost of health care is skyrocketing because of the defensive medicine being practiced by docs.”).

26. *Id.*

27. OFFICE OF TECH. ASSESSMENT, U.S. CONG., DEFENSIVE MEDICINE AND MEDICAL MALPRACTICE 1 (1994), <http://www.wws.princeton.edu/cgi-bin/byteserv.prl/~ota/disk1/1994/9405/9405.PDF>.

28. *Id.* at 18.

29. CBO, *supra* note 22, at 6.

30. ATRA is funded by the AMA, the tobacco industry, gun makers, and the insurance industry. *See, e.g.*, CARL DEAL & JOANNE DOROSHOW, CJ&D & PUBLIC CITIZEN, THE CALA FILES: THE SECRET CAMPAIGN OF BIG TOBACCO AND OTHER MAJOR INDUSTRIES TO TAKE AWAY YOUR RIGHTS (2000).

31. *Id.*; DAVID C. JOHNSON, COMMONWEAL INST., THE ATTACK ON TRIAL LAWYERS AND TORT LAW 1-20, 26-51 (2003), <http://www.commonwealinstitute.org/reports/tort/tortreport.html>; Am. Tort Reform Ass’n, 50 Representative Members, at <http://atra.org/about/members.php> (last visited Aug. 12, 2004).

32. *See, e.g.*, AMS. FOR INS. REFORM, MEDICAL MALPRACTICE INSURANCE: STABLE LOSSES/UNSTABLE RATES 2003 (2003), <http://insurance-reform.org/StableLosses2003F.pdf> [hereinafter AIR, STABLE LOSSES/UNSTABLE RATES]; NCSC, EXAMINING STATE COURTS 2002,



succeed in significantly reducing aggregate health care costs, they also fail to control individual insurance premiums.

Insurers state that to recoup money paid to patients, they must raise insurance rates or, in some cases, pull out of the market altogether. Since insurers say that jury verdicts are the cause of the current “crisis” in affordable malpractice insurance for doctors, they insist that the only way to bring down insurance rates is to limit an injured consumer’s ability to sue in court.<sup>33</sup> However, historically, the cause of skyrocketing rates has little to do with the legal system.

Insurance companies make profits primarily from investment income. Insurance companies take in money in the form of premiums paid and then hold it for some length of time until they need to make a payout to, or on behalf of, a policyholder.<sup>34</sup> In the interim, the money being held, known as the “float,” is invested and earns money for the insurance company. When the investment market is strong and/or interest rates high, the companies make a good profit by investing the float and may under-price policies in an effort to attract more premium dollars to invest—this scenario is termed a “soft market.”<sup>35</sup> But when investment income falls because of a decline in the markets and/or drops in interest rates, insurance companies will raise their rates or cut back coverage. Such a “hard market” occurred in the mid-1970s, more severely in the mid-1980s, and again between 2002 and 2003. Insurance rates for doctors

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*supra* note 5, at 23-24, 28; NCSC, Medical Malpractice Filings, *supra* note 5; U.S. DEP’T OF JUSTICE, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001, at 9 (Apr. 2004); Press Release, Jury Verdict Research, Jury Verdict Research Releases Verdict Survey (Apr. 1, 2004),

[http://www.juryverdictresearch.com/Press\\_Room/Press\\_releases/Verdict\\_study/verdict\\_study8.html](http://www.juryverdictresearch.com/Press_Room/Press_releases/Verdict_study/verdict_study8.html); Press Release, Public Citizen, New 2002 Government Data Dispute Malpractice Lawsuit “Crisis” (July 7, 2003), <http://www.citizen.org/pressroom/release.cfm?ID=1480> [hereinafter Press Release, Public Citizen] (reporting that malpractice payouts declined as insurance premiums spiked and that 5.2% of doctors are responsible for 55% of malpractice payouts). *But see* Press Release, Ctr. for Justice & Democracy, Flawed Jury Data Masks Trends (2002), <http://centerjd.org/press/release/020322.pdf> (regarding Jury Verdict Research’s over-inflation of award figures).

33. *See, e.g., Patient Access Crisis: The Role of Medical Litigation: Joint Hearing Before the Senate Comm. on the Judiciary and the Senate Comm. on Health, Educ., Labor & Pensions*, 108th Cong. (2003) (statement of Lawrence Smarr, President, Physician Ins. Ass’n of Am.), [http://judiciary.senate.gov/testimony.cfm?id=600&wit\\_id=1594](http://judiciary.senate.gov/testimony.cfm?id=600&wit_id=1594).

34. *See* AIR, STABLE LOSSES/UNSTABLE RATES, *supra* note 32, at 4-6.

35. *Id.* at 1-2, 4-6.

skyrocketed in each of the hard markets.<sup>36</sup>

Thus, while insurers and other tort reform proponents blame malpractice litigation for the hard market premium increases, they are in fact consistently driven by the insurance companies' response to the broader economic cycle.<sup>37</sup> In fact, claims and payouts stayed flat or declined through each of the "crises" or hard markets.<sup>38</sup> With payouts flat, rising premiums have caused property-casualty insurers' profits to skyrocket. From 2002 to 2003, profits rose 997% and they continue to soar<sup>39</sup>—reportedly doubling between the first quarters of 2003 and 2004.<sup>40</sup> Despite these striking statistics, successful lobbying by interest groups in response to increasing insurance rates for doctors has yielded a wave of legislative activity to restrict injured patients' rights to sue for medical malpractice.

Because insurers target the civil justice system, rather than the economic cycle that leads to periodic "crises," "tort reform" remedies—including caps—pushed by insurance companies and their advocates during each hard market failed to bring down rates.<sup>41</sup> When confronted with a report showing that tort reform does not lead to reduced premiums, the American Insurance Association responded, "Insurers never promised that tort reform would achieve specific savings."<sup>42</sup> Over the past year and a half, insurers continued to raise premiums, even in states where tort reforms were enacted, even though claims and payouts dropped<sup>43</sup> and the

36. *Id.* at 4-6.

37. *See, e.g.,* Ralph Nader, *The Assault on Injured Victims' Rights*, 64 *DENV. U. L. REV.* 625, 628 (1988).

38. *See* AIR, STABLE LOSSES/UNSTABLE RATES, *supra* note 32, at 5.

39. *See* Press Release, Ins. Servs. Office, Inc., & Prop. Cas. Insurers Ass'n of Am., Sharp Increase in P/C Industry's Net Income Propels Surplus Upward in 2003 (Apr. 14, 2004), [http://www.iso.com/press\\_releases/2004/04\\_14\\_04.html](http://www.iso.com/press_releases/2004/04_14_04.html) ("The property/casualty insurance industry's net income after taxes rose to \$29.9 billion in 2003—nearly ten times the industry's \$3 billion in net income in 2002.")

40. *See* P/C Industry's Q1 Net Income Doubles, *INS. J.*, June 29, 2004, <http://www.insurancejournal.com/news/national/2004/06/29/43661.htm>.

41. *See* J. ROBERT HUNTER & JOANNE DOROSHOW, CJ&D, PREMIUM DECEIT: THE FAILURE OF "TORT REFORM" TO CUT INSURANCE PRICES (2002), <http://insurance-reform.org/PremiumDeceit.pdf>.

42. Press Release, Am. Ins. Ass'n, AIA Cites Fatal Flaws in Critic's Report on Tort Reform (Mar. 13, 2002), <http://www.aiadc.org/DocFrame.asp?DocID=7027>; *see also* Press Release, Ams. for Ins. Reform, Industry Insiders Admit – And History Shows: Tort Reform Will Not Lower Insurance Rates (June 2, 2003), <http://centerjd.org/air/pr/Quotes.pdf>.

43. A.M. Best, *Medical Malpractice Total Industry (Premiums and Losses), 2002 & 2003*

investment markets began to improve. It appears we are now entering a soft market: Premiums are beginning to drop or increase more slowly in all lines of insurance, including medical malpractice—in states with and without caps or other tort reforms.<sup>44</sup> While the soft market will bring some relief as premiums drop, if there is no significant increase in regulation of the insurance industry, we can expect that the next downturn in the economy and the market will bring back rising premiums and, predictably, renewed efforts to blame injured patients and seek ineffective and harmful tort reforms, as insurers once again raise their rates to make up for investment losses.

So if one puts aside the unfounded rhetoric that claims to connect a need for caps to rising insurance premiums and health care costs, to a supposedly growing number of frivolous lawsuits, and to alleged movement of doctors among the states, what then are the true motivators for tort reform proponents? First, tort reform efforts (including caps), are based on a mistrust of, or discomfort with, the American institution of civil trial by jury. This fundamental right of ordinary citizens and consumers to hold accountable those with power—including corporations, large institutions, professionals, and even government—is a fulcrum of our democracy. In fact, one reason that several state courts have struck down tort reform laws as unconstitutional is the way in which the laws limit the power of juries to decide cases.<sup>45</sup>

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(data set) (copy on file with author).

44. E-mail from J. Robert Hunter, Director of Insurance, Consumer Federation of America, to Joanne Doroshov, Executive Director, Center for Justice & Democracy (July 25, 2004) (on file with author) (reporting this finding based upon Council of Insurance Agents and Brokers' Commercial Property-Casualty Market Surveys); Letter from J. Robert Hunter, Director of Insurance, Consumer Federation of America, & Birny Birnbaum, Executive Director, Center for Economic Justice, on behalf of Americans for Insurance Reform (AIR), to Insurance Commissioners of fifty states and D.C. (May 11, 2004), [http://insurance-reform.org/AIR\\_Ins\\_Comm\\_04.pdf](http://insurance-reform.org/AIR_Ins_Comm_04.pdf) [hereinafter Letter to Insurance Commissioners]; Press Release, Consumer Fed. of Am., Insurer Profits Shoot Up As "Hard Market" of Soaring Commercial Insurance Rates Comes to an End (Nov. 3, 2003), <http://www.consumerfed.org/110303hardmarket.pdf>.

45. *E.g.*, *Mahomes-Vinson v. United States*, 751 F. Supp. 913 (D. Kan. 1990) (holding that a \$1,000,000 overall damage cap and \$250,000 non-economic damage cap violated jury trial right); *Waggoner v. Presbyterian Med. Ctr.*, 647 F. Supp. 1102 (N.D. Tex. 1986) (holding that a \$500,000 cap on medical malpractice recoveries violates equal protection and open courts guarantees); *Smith v. Schulte*, 671 So. 2d 1334 (Ala. 1995) (*per curiam*) (holding that a \$1 million cap in wrongful death cases against health care providers violates both equal protection and the right to jury trial); *Henderson v. Ala. Power Co.*, 627 So. 2d

Judges, who have more intimate knowledge of the system than anyone, find such mistrust of juries inappropriate. A 2000 survey sent to one thousand trial judges, including every federal trial judge, revealed that:

- Judges have “a high level of day-to-day confidence in [the jury] system.”<sup>46</sup>
- “Only 1 percent of the judges who responded gave the jury system low marks.”<sup>47</sup>
- “[N]ine of every 10 trial judges, those who work closest

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878 (Ala. 1993) (holding that a \$250,000 punitive-damage cap violates the right to jury trial); *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 158 (Ala. 1991) (holding that a \$400,000 economic damage cap in medical malpractice cases violates jury trial and equal protection guarantees); *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1089 (Fla. 1987) (per curiam) (holding that a \$450,000 cap on non-economic damages recoverable in actions for personal injury violates open courts provision); *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997) (holding that a \$500,000 cap on non-economic damages was a legislative remittitur, in violation of the separation of powers doctrine, and constituted impermissible special legislation as did abolition of joint and several liability and discovery statutes which mandate the unlimited disclosure of plaintiffs' medical information and records); *Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736 (Ill. 1976) (holding a \$500,000 cap unconstitutional as a denial of equal protection); *Brannigan v. Usitalo*, 587 A.2d 1232, 1237 (N.H. 1991) (holding that a \$875,000 limitation on non-economic damages recoverable in actions for personal injury violates equal protection); *Carson v. Mauer*, 424 A.2d 825, 836-38 (N.H. 1980) (holding that abrogation of the collateral source rule and the \$250,000 non-economic damage cap in medical malpractice cases violate equal protection); *Arneson v. Olson*, 270 N.W.2d 125, 135-36 (N.D. 1979) (holding that the \$300,000 limit on damages recoverable in medical malpractice actions violates state and federal equal protection guarantees); *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999) (holding that a \$250,000 non-economic damages cap, a \$250,000 punitive damages cap, a certificate of merit, and modification of the collateral source rule violate separation of powers); *Lakin v. Senco Prods., Inc.*, 987 P.2d 463 (Ore. 1999) (holding that a \$500,000 cap on non-economic damages in personal injury and wrongful death actions violates the right to a jury trial); *Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996) (holding that a \$1 million medical malpractice compensatory damage cap violates substantive due process); *Lucas v. United States*, 757 S.W.2d 687, 690-92 (Tex. 1988) (holding that a \$500,000 cap for damages in medical malpractice actions violates the open courts guarantee); *Condemarin v. Univ. Hosp.*, 775 P.2d 349, 364, 366 (Utah 1989) (holding that a \$100,000 medical malpractice liability limit for state hospitals violates the right to jury trial).

46. Allen Pusey, *Judges Rule in Favor of Juries: Surveys by Morning News*, *SMU Law School Find Overwhelming Support for Citizens' Role in Court System*, DALLAS MORNING NEWS, May 7, 2000, at 1J.

47. *Id.*

with the nation's jury system, think the system needs only minor tinkering, at best."<sup>48</sup>

- "Overwhelmingly . . . state and federal judges said they have great faith in juries to solve complicated issues."<sup>49</sup>
- "[N]ine of 10 judges responding said jurors show considerable understanding of legal issues involved in the cases they hear."<sup>50</sup>

Statistics also show that juries are generally conservative and reasonable, and their decisions rarely differ from what a judge would decide.<sup>51</sup>

### III. RECOMMENDATIONS

Our civil justice system exists to provide those who have been wronged a forum to seek truth and compensation, even to the dismay of those who may have acted negligently, recklessly, or worse. Caps not only limit the liability of wrongdoers, take away the fundamental power of juries to decide adequate compensation, and leave the most severely injured victims without sufficient means of redress, but they do not even address the increasing costs of health care or medical malpractice insurance.

An important solution to avoiding future spikes in premiums is stronger regulation of the insurance industry. Unlike caps and other tort reforms, insurance industry regulation would lower premiums charged to doctors, hospitals, and other policyholders, while protecting the rights of patients and consumers. Given the soaring profits of insurance companies,<sup>52</sup> such regulation is unlikely to put them in financial harm.

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48. *Id.*

49. *Id.*

50. *Id.*; see also CJ&D, JUDGES SHOW EXTRAORDINARY SUPPORT FOR THE CIVIL JURY SYSTEM, at <http://centerjd.org/private/mythbuster/JudgeSurvey.pdf>.

51. *E.g.*, Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1110-12 & tbl.2 (1996) (citing Mark I. Taragin et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANNALS INTERNAL MED. 780, 782 (1992)).

52. Profits Are the Highest Ever, at <http://centerjd.org/free/mythbusters-free/InsProfitsHighestEver.pdf> (last visited Nov. 29, 2004); Press Release, Ins. Servs. Office, Inc. & Property Cas. Ins. Ass'n of Am., Property/Casualty First-Half Income and Surplus Rose on Strong Underwriting Results and Investment Gains (Oct. 18, 2004), [http://www.iso.com/press\\_releases/2004/10\\_18\\_04.html](http://www.iso.com/press_releases/2004/10_18_04.html); Press Release, Ins. Servs. Office, Inc. & Property Cas. Ins. Ass'n of Am., *supra* note 39.

State insurance regulators should take the following steps, as suggested by Americans for Insurance Reform—a coalition of over one hundred consumer and public interest groups and a project of the Center for Justice & Democracy—in a recent letter sent to all state insurance commissioners:

(1) Undertake a review of rate levels to determine if rates are excessive in any line of insurance; . . . (2) Initiate an investigation into anti-competitive behavior of insurance companies in making statements and other acts to hold off competition; . . . (3) If any insurer files a rate request in excess of current inflation for that line of insurance, a rate hearing should be called; . . . (4) [B]egin the process of careful analysis as to what led to this most recent cycle, and your department's role in it by allowing rates to fluctuate between excessive (such as now at the end of the hard market) and inadequate (such as right before the turn in the market from soft to hard); . . . (5) Alert your legislature to the end of the hard market and advise them that there is no need to rush into legislative fixes, such as legal limits on victims' rights; . . . (6) Review successes from other states in averting the same sort of price spikes you may have endured over the last two years. Clearly, insurance rate regulation is one thing that has helped tremendously to prevent large rate increases in some states. Nowhere has this been more evident than in California, a state that in 1988 passed the strongest insurance reform law in the country.<sup>53</sup>

No one denies that there is a broad array of very serious health care issues facing the United States right now—patient safety, rising costs, availability and affordability of health insurance, and, in some places, rapidly rising malpractice premiums (although they are easing as we enter a soft market). But even with these problems, caps are not a solution. Lawmakers and regulators should stop the insurance industry from price-gouging their policyholders, even while the industry's profits rocket upwards. Moreover, doctors would better serve themselves and their patients by directing their anger and efforts regarding rising premiums toward the questionable practices of the insurance industry and the subset of doctors who repeatedly commit malpractice without facing adequate discipline.<sup>54</sup> Seeking to take away patients' rights is not the answer.

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53. Letter to Insurance Commissioners, *supra* note 44.

54. *See, e.g.*, Press Release, Public Citizen, *supra* note 32 (noting that 5.2% of doctors are responsible for 55% of malpractice payouts).

