

FIVE MYTHS ABOUT MEDICAL NEGLIGENCE

*ONE OF A SERIES OF REPORTS FROM THE
AMERICAN ASSOCIATION FOR JUSTICE ON MEDICAL NEGLIGENCE*

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Formerly the Association of Trial Lawyers of America (ATLA®)

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This report is one of a series from the American Association for Justice (AAJ) highlighting the issue of medical negligence. AAJ previously released *Medical Negligence: A Primer for the Nation's Health Care Debate*, which examined some of the chief myths and facts surrounding medical malpractice, patient safety and access to health care, *The Truth About "Defensive Medicine,"* which debunked claims that the threat of liability drives up the cost of health care, and *The Insurance Hoax*, which analyzed the financial performance of the 10 largest medical malpractice insurers in the United States. This information can be found at www.justice.org/medicalnegligence.

Over the course of the health care debate, many proposals to reform the medical negligence system have flooded the airwaves and the halls of Congress. None of them will lower the cost of health care and all of them distract from the real issues of reform. This paper aims to correct the myths and mistruths surrounding medical negligence.

- **Myth #1: There are Too Many "Frivolous" Malpractice Lawsuits**
- **Myth #2: Malpractice Claims Drive Up Health Care Costs**
- **Myth #3: Doctors are Fleeing**
- **Myth #4: Malpractice Claims Drive Up Doctors' Premiums**
- **Myth #5: Tort Reform will Lower Insurance Rates**

MYTH #1: THERE ARE TOO MANY “FRIVOLOUS” MALPRACTICE LAWSUITS

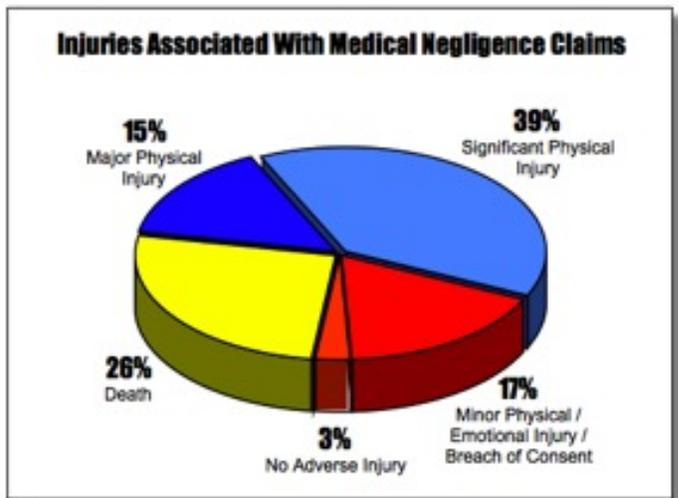
The reality is, there is an epidemic of medical negligence, not lawsuits. Two seminal studies of the patient safety movement have shown that not only are hundreds of thousands of patients injured every year in the health care system, but very few of them sue. According to the Institute of Medicine, 98,000 people die in hospitals each year as a result of preventable medical errors, costing the health care system \$29 billion in excess costs.¹ Hundreds of thousands more suffer non-fatal injuries. Despite the massive number of medical injuries, medical malpractice lawsuits are uncommon. According to researchers at Harvard, only one in eight people injured by medical negligence file a malpractice claim.²

The number of medical negligence filings has steadily declined in the last decade, as has the amount paid out in jury verdicts and settlements. According to the National Center for State Courts (NCSC), tort cases comprise only about six percent of the civil caseload. Medical negligence cases account for just three percent of the tort subsection. And that number is falling; the number of medical negligence filings dropped eight percent between 1997 and 2006.³

Researchers at the Harvard School of Public Health examined over 1,400 closed medical negligence claims and found that 97 percent of claims were meritorious and that 80 percent involved death or serious injury. According to the authors, “portraits of a malpractice system that is stricken with frivolous litigation are overblown.”⁴

The authors also acknowledge that many injured patients are motivated to file a claim to discover what went wrong in the course of their treatment. Many doctors and health care centers are not forthcoming when an error occurs, forcing the injured patient to file a claim to obtain information. The Harvard researchers’ “findings underscore how difficult it may be for plaintiffs and their attorneys to discern what has happened before the initiation of a claim and the acquisition of knowledge that comes from the investigations, consultation with experts, and sharing of information that litigation triggers.”⁵

As the number of medical negligence filings have fallen, so too has the amount of money paid out in settlements and jury verdicts. The National Association of Insurance Commissioners (NAIC) has reported that medical negligence payouts dropped over 50 percent between 2003 and 2008.⁶

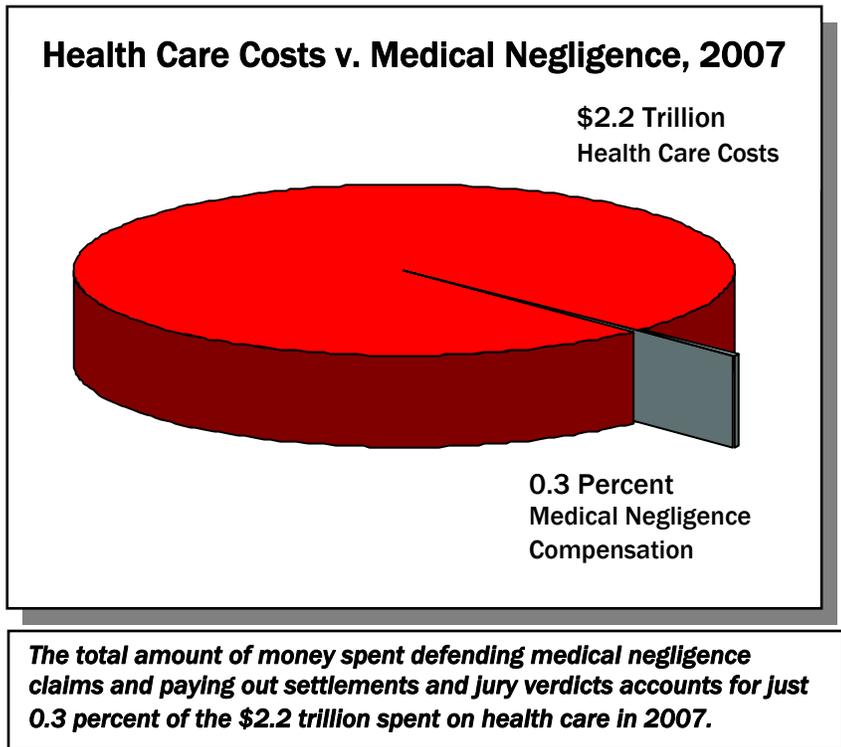


Harvard researchers found that 97 percent of closed medical malpractice claims are meritorious and that 80 percent involved death or serious injury.⁴

MYTH #2: MALPRACTICE CLAIMS DRIVE UP HEALTH CARE COSTS

The direct costs associated with medical malpractice are a tiny fraction of health care costs. According to the National Association of Insurance Commissioners, the total spent defending claims and compensating victims of medical negligence in 2007 was \$7.1 billion—just 0.3% of health care costs.⁷ Any restriction on compensation to victims would thus reap only negligible savings, at best, as it sought to reduce what is already a fraction of costs.

Therefore, those focused on limiting patients' legal rights have turned to the idea of indirect costs, namely "defensive medicine." Some claim that doctors are frightened into ordering hundreds of billions of dollars worth of unnecessary tests to avoid litigation. Despite the fact that the cost of all settlements, jury awards, and even the cost of defending claims makes up only 0.3 percent of health care costs, tort reformers allege that this "defensive medicine" accounts for 10 percent of health care costs.



The problem with this concept is that the vast majority of academic and government research has found that:

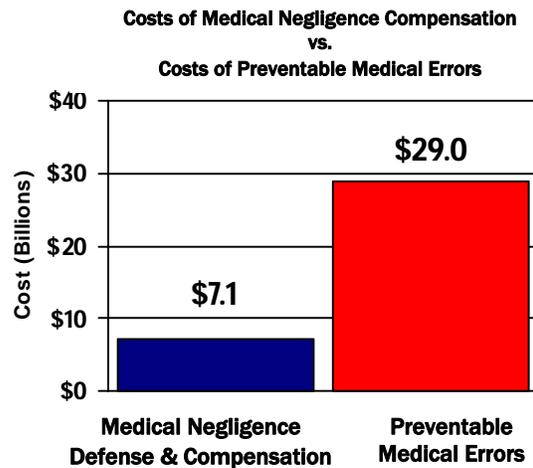
- "Defensive medicine" is not as prevalent as tort reformers suggest;
- There are little or no savings to be gained from reforms aimed at indirect costs. Researchers have found that "tort reforms do not significantly affect medical decisions";⁸
- Much of what can be identified as "defensive medicine" is motivated not by liability concerns but by the desire to generate more income;⁹
- The threat of liability may actually improve health care outcomes. Researchers have found that a 10 percent increase in malpractice costs actually reduces mortality by 0.2 percent, leading the researchers to conclude that, "while the mortality benefits of malpractice may be quite modest, these seem more likely than not to justify its direct and indirect health care costs."¹⁰

Most claims of "defensive medicine" are derived from a 1996 study that has repeatedly been debunked by government agencies and academic researchers. The study, conducted by Daniel Kessler and Mark McClellan, examined data on the costs of treating cardiac patients covered by Medicare in 1984, 1987, and 1990. The authors took this small subset of data and extrapolated the findings to the entire health care system to conclude that tort reform could reduce medical costs by five to nine percent because doctors no longer felt the need to run tests because of liability concerns.¹¹

Subsequent academic and government analysis of the study was critical of its conclusions, and the vast bulk of empirical research since has consistently found no such savings. The [GAO](#) questioned the validity of the study’s results in 1999, saying, “Because this study was focused on only one condition and on a hospital setting, it cannot be extrapolated to the larger practice of medicine. Given the limited evidence, reliable cost savings estimates cannot be developed.”¹²

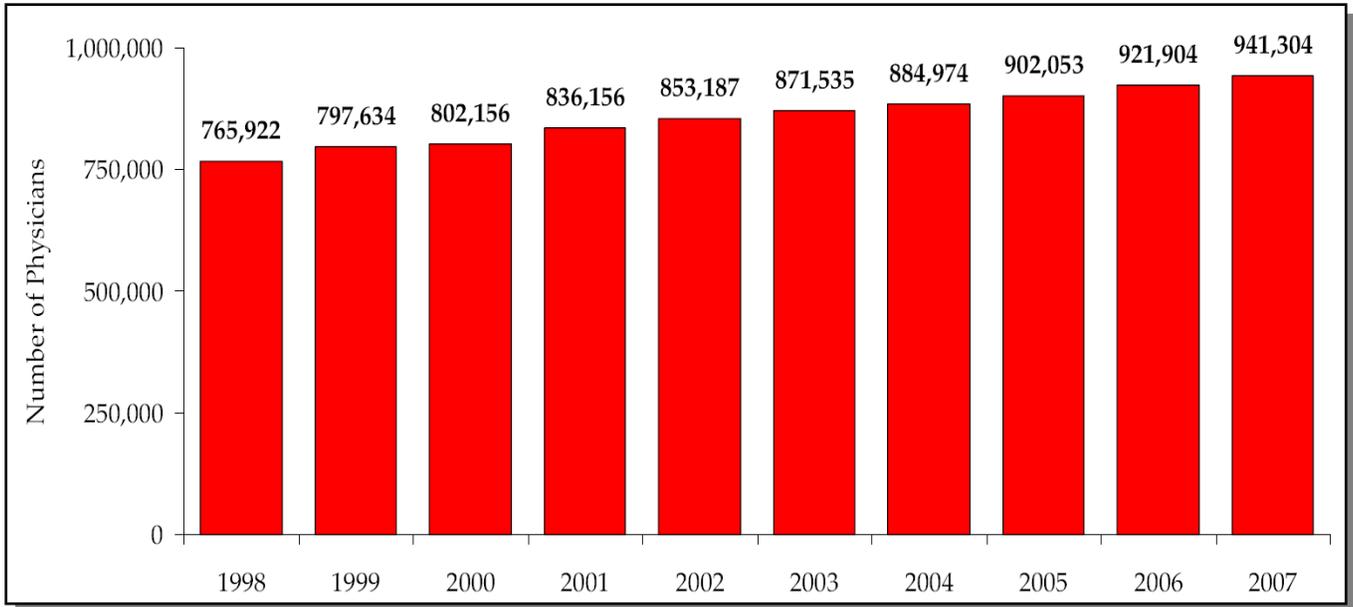
The [CBO](#) tried to replicate the authors’ findings but were unable to find a relationship between health care spending and state medical liability laws. The CBO stated it, “found no evidence that restrictions on tort liability reduce medical spending. Moreover, using a different set of data, CBO found no statistically significant difference in per capita health care spending between states with and without limits on malpractice torts.”¹³

One real and undisputed driver of health care costs that can and should be reduced is medical errors. Each year, 98,000 people die from preventable medical errors in American hospitals, adding \$29 billion in additional costs to the U.S. health care system. This does not include the number of patients or associated costs of those severely, but not fatally injured by preventable medical errors.



MYTH #3: DOCTORS ARE FLEEING

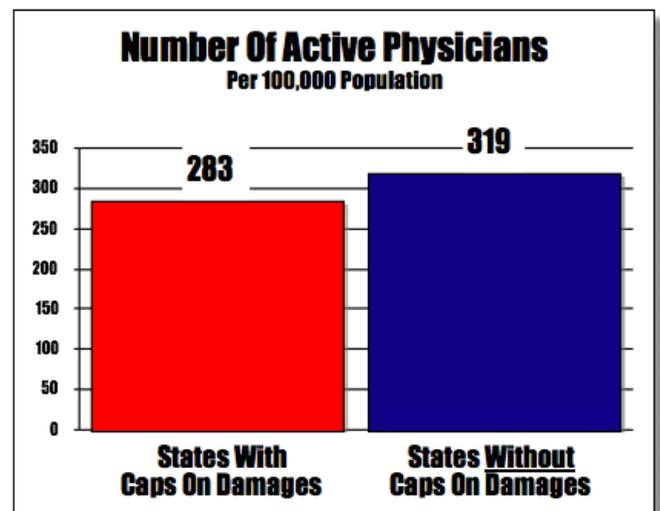
The number of practicing physicians in the United States has been growing steadily for decades. In 2007, the most recent year for which data are available, there were 941,304 physicians in the U.S., nearly 20,000 more than the year before.¹⁴



Not only are there more doctors, but the number of doctors is increasing faster than population growth. In 2007, the number of physicians per 100,000 population is at an all-time high of 307. The increase of physician numbers compared to population growth has climbed steadily for decades. There are now twice as many physicians per 100,000 population as there were when the American Medical Association began tracking figures in the 1960s.

Despite the cries of physicians fleeing multiple states, the number of physicians increased in every state. In addition, in the vast majority of states the increase in physicians either matched or outpaced population growth. The only exceptions were four states with medical malpractice caps: Alaska, Georgia, Montana and Utah.

Capping noneconomic damages does not help a state attract or maintain physicians. The number of physicians per 100,000 population is significantly higher in states WITHOUT caps than in states that cap damages (319 v. 283)

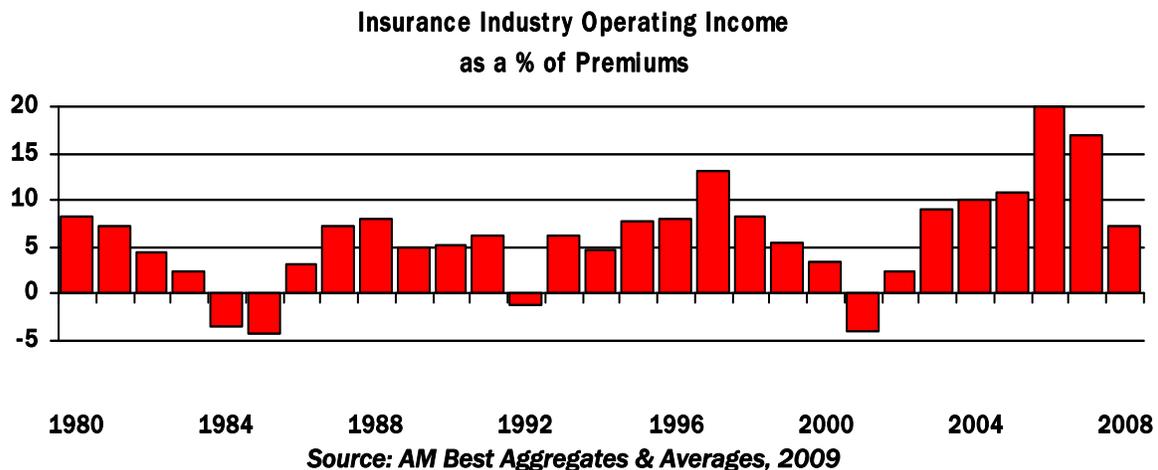


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MYTH #4: MALPRACTICE CLAIMS DRIVE UP DOCTORS' PREMIUMS

Empirical research has found that there is little correlation between malpractice payouts and malpractice premiums paid by doctors. Researchers at the National Bureau of Economic Research (NBER) reported that, "increases in malpractice payments made on behalf of physicians do not seem to be the driving force behind increases in premiums."¹⁵ Similarly, Americans for Insurance Reform (AIR) conducted an analysis of the relationship between insurance payouts and premiums charged to doctors and found that, "[n]ot only was there no 'explosion' in lawsuits, jury awards or any tort system costs to justify the astronomical premium increases that doctors have been charged in recent years. These rate increases were rather driven by the economic cycle of the insurance industry, driven by declining interest rates and investments."¹⁶

This insurance cycle is at the heart of the medical malpractice debate, but few people understand how it works. There are two main sources of income for insurers: underwriting income – the amount of premiums they don't give back in payouts, and investment income – the money they make investing the premiums. When investment income is down, insurers must make up the difference by increasing underwriting income, which they do by raising premiums.

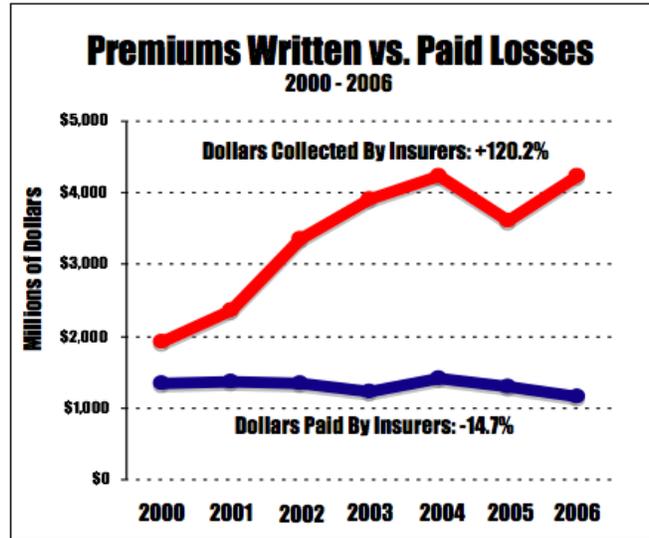


When returns from investments are strong, insurers will slash the premiums they charge in order to attract more policyholders and increase their market share. During this soft market, premiums are often held at artificially low levels, even though insurers know the market will eventually harden and force premiums to skyrocket. When investment returns start to drop off, insurers increase the premiums they charge doctors to make up for the lost income. This policy of aggressive underwriting is unnecessary, imprudent, and destructive to doctors and injured patients. Underwriters seem to agree that getting the cycle under control should be a priority. In a survey of underwriters commissioned by Lloyd's, the respondents reported that "managing the cycle" was their top concern of issues facing the industry.¹⁷

The "financial crises" medical malpractice insurers claim to go through are actually not as bad as they are portrayed. An analysis by the American Association of Justice of the 2008 annual financial statements filed by the 10 largest malpractice insurers found that the average profits of these companies are higher than 99 percent of all Fortune 500

companies and 35 times higher than the Fortune 500 average for the same time period. Medical malpractice insurers have underestimated profits and overestimated losses in part to justify new legislation to restrict the rights of those injured by medical negligence. Years later, when companies file revised financial statements, it becomes clear they were never in the financial peril they claimed.¹⁸

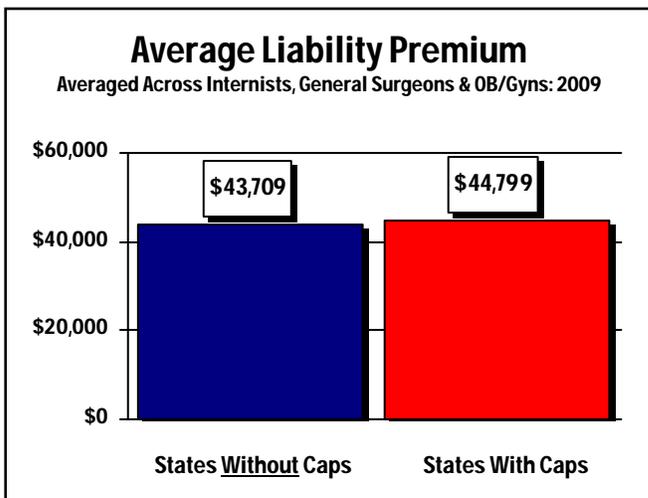
A study of the leading medical malpractice insurance companies' financial statements by former Missouri Insurance Commissioner Jay Angoff found that these insurers artificially raised doctors' premiums and misled the public about the nature of medical negligence claims.¹⁹ According to the study, the amount the leading malpractice insurers projected they would pay out in claims in the future declined; the amount they actually paid out in claims declined; and their surplus—the extra cushion they have accumulated over and above the amount they have set aside to pay claims in the future—increased to an all-time high—five times the state minimum surplus for insurer stability.



*Analysis of Top 15 Medical Malpractice Insurers –
“No Basis for High Insurance Rates,” Jay Angoff,
May 2007*

MYTH #5: TORT REFORM WILL LOWER INSURANCE RATES

Tort reforms are passed under the guise that they will lower physicians' liability premiums. This does not happen. While insurers do pay out less money when damages awards are capped, they do not pass the savings along to doctors by lowering premiums.



There is little variance in premium levels between states that cap damages and states that do not. In fact, in 2009, the average liability premium in states without caps on damages was lower than the average premium in states with caps on damages, with premiums of \$43,709 and \$44,799, respectively.²⁰

Tort reform proponents like to focus on Texas as a success story for tort reform. Texas passed a restrictive cap on damages in 2003, which set the maximum amount of damages a

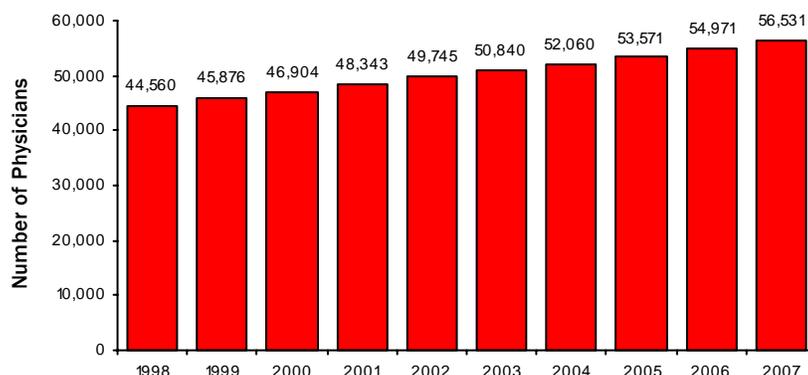
severely injured patient could receive at \$250,000 from the physicians involved and \$250,000 from the hospitals or health care centers where the patient was injured, with a limit of two health care facilities. Patients are rarely injured at two hospitals or health care centers, so Texas' cap is essentially \$500,000.

Following the enactment of the cap, GE Medical Protective, the nation's largest medical malpractice insurer, told the Texas Insurance Commissioner that caps had a negligible impact on rates and announced a 19 percent increase in doctors' premiums. After the company's rate hike request was denied, they announced intentions to use a legal loophole, avoiding state regulation, and increased premiums 10 percent – without approval. Texas legislators were eventually forced to threaten the insurance companies with mandatory rate rollbacks if doctors did not see significant rate relief.²¹

Tort reform proponents also promised that the cap would attract new doctors to the state. Indeed, the number of physicians practicing in Texas did increase following the enactment of the cap, but the rate of the increase does not differ from the rate of increase prior to the cap. The number of practicing physicians in Texas has been steadily increasing for years.²²

The cap in Texas has also done nothing to reduce health care costs. In fact, the average growth

Number of Physicians in Texas: 1998 to 2007



rate of Medicare costs is 16 percent higher in Texas than the national average.²³ Both [The New Yorker](#) and [CNN](#) have traveled to McAllen, Texas, where Medicare costs are rising at the fastest rate in the nation and the cost of health care per patient is the second highest in the nation. Both found that doctors in McAllen were applying business principles to their medical practices and that many may have a profit motive for ordering extra tests, thereby driving up the cost of health care for everyone.²⁴

Even the most ardent tort reformers agree that tort reform will have no effect on insurance rates.

- Sherman “Tiger” Joyce, president of the American Tort Reform Association, admitted to *Liability Week* that tort reform measures do not reduce insurance premiums, saying, “We wouldn’t tell you or anyone that the reason to pass tort reform would be to reduce insurance rates.” Similarly, Victor Schwartz, general counsel of ATRA, told *Business Insurance* that, “[M]any tort reform advocates do not contend that restricting litigation will lower insurance rates, ‘and I’ve never said that in 30 years.’”²⁵
- Dennis Kelly of the American Insurance Association (AIA) has said, “We have not promised price reductions with tort reform.” In addition, an AIA press release stated: “Insurers never promised that tort reform would achieve specific premium savings...”²⁶
- In a 2004 filing with the Texas Department of Insurance, GE Medical Protective, the nation’s largest medical malpractice insurer, admitted that the state’s cap on non-economic damages would do little to lower malpractice premiums. According to the document, “Non-economic damages are a small percentage of total losses paid. Capping non-economic damages will show loss savings of 1.0 percent.”²⁷
- Lawrence Smarr, president of the Physician Insurers Association of America (PIAA), admitted to the *Detroit News* that premiums are in part rising to make up for lost investment income. Similarly, Victor Schwartz, general counsel to the American Tort Reform Association, suggested that premiums increased when the insurance companies’ investment income began to decline: “Insurance was cheaper in the 1990s because insurance companies knew that they could take a doctor’s premium and invest it, and \$50,000 would be worth \$200,000 five years later when the claim came in. An insurance company today can’t do that.”²⁸
- According to Bob White, President of First Professional Insurance Company, the largest medical malpractice insurer in Florida, “[n]o responsible insurer can cut its rates after a [medical malpractice tort ‘reform’] bill passes.”²⁹

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- 1 *To Err is Human*, Institute of Medicine, November 1999.
- 2 *Patients, Doctors and Lawyers: Studies of Medical Injury, Malpractice Litigation, and Patient Compensation in New York*, Harvard Medical Practice Study, 1990.
- 3 *Examining the Work of State Courts, 2007*, National Center for State Courts.
- 4 David M. Studdert, Michelle M. Mello, Atul A. Gawande, Tejal K. Gandhi, Allen Kachalia, Catherine Yoon, Ann Louise Puopolo, and Troyen A. Brennan, *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, *New England Journal of Medicine*, May 11, 2006.
- 5 *Ibid.*
- 6 *Countrywide Summary of Medical Malpractice Insurance Calendar Years 1991-2008*, *National Association of Insurance Commissioners (NAIC), 2009*.
- 7 Insurance numbers from *Countrywide Summary of Medical Malpractice Insurance Calendar Years 1991-2008*, National Association of Insurance Commissioners (NAIC), 2009 – note, in 2008 compensation and defense costs dropped even lower, to \$6.2 billion. Health care costs from National Health Expenditure Data, Centers for Medicaid Services (CMS), U.S. Department of Health and Human Services.
- 8 Frank A. Sloan and John H. Shadle, *Is There Empirical Evidence for “Defensive Medicine”? A Reassessment*, *Journal of Health Economics*, 28 (2009).
- 9 *Limiting Tort Liability for Medical Malpractice*, Congressional Budget Office, January 8, 2004.
- 10 Darius N. Lakdawalla and Seth A. Seabury, *The Welfare Effects of Medical Malpractice Liability*, National Bureau of Economic Research, September, 2009.
- 11 Daniel P. Kessler and Mark B. McClellan, *Do Doctors Practice Defensive Medicine?* *Quarterly Journal of Economics*, May 1996; *President Uses Dubious Statistics on Costs of Malpractice Lawsuits*, Annenberg Political Fact Check, January 29, 2004.
- 12 General Accounting Office: *Medical Malpractice: Effects of Varying Laws in the District of Columbia, Maryland, and Virginia*, October 1999.
- 13 CBO, *supra* note 9.
- 14 All figures were derived from the American Medical Association’s own numbers (*Physician Characteristics and Distribution in the U.S.*, Various Editions).
- 15 Katherine Baicker and Amitabh Chandra, *The Effect of Malpractice Liability on the Delivery of Health Care*, National Bureau of Economic Research, Working Paper, 10709, 2004.
- 16 *Medical Malpractice Insurance: Stable Losses/Unstable Rates 2007*, Americans for Insurance Reform, March 28, 2007.
- 17 Annual Underwriters’ Survey, Lloyd’s, February 2008.
- 18 *The Insurance Hoax*, American Association for Justice, October 2009.
- 19 Jay Angoff, *No Basis for High Insurance Rates*, May 2007, http://www.justice.org/resources/No_Basis_for_High_Insurance_Rates_2007.pdf.
- 20 *Annual Rate Survey Issue*, Medical Liability Monitor, October, 2009; <http://www.justice.org/clips/premiums2009.pdf>.
- 21 *Malpractice Insurer Fails in Bid for Rate Hike*, *Houston Chronicle*, November 21, 2003; *Insurer Switching to Unregulated Product to Raise Premiums*, Associated Press, April 10, 2004; *House Members Upset More Doctors Not Getting Relief*, Associated Press, April 22, 2004.
- 22 *Physician Characteristics and Distribution in the U.S.*, American Medical Association, Various Editions.
- 23 *Restricting Patient Rights Does Not Lower Health Costs*, *Texas Watch*.
- 24 Atul Gawande, *The Cost Conundrum*, *The New Yorker*, June 1, 2009; *Doctor vs. Doctors*, CNN, September 18, 2009, <http://www.cnn.com/video/?/video/bestoftv/2009/09/18/tuchman.doc.vs.docs.cnn>.
- 25 *Liability Week*, July 19, 1999; *Business Insurance*, July 19, 1999.
- 26 *The Chicago Tribune*, January 3, 2005; American Insurance Association press release, March 13, 2002.
- 27 *Consumer Watchdog*, <http://www.consumerwatchdog.org/documents/2059.pdf>.
- 28 *The Detroit News*, July 8, 2005; *The Honolulu Star-Bulletin*, March 20, 2003.

29 Palm Beach Post, January 29, 2003.