

A Texas Public Policy Foundation Publication  
April 2003

# CRITICAL CONDITION



## *How Lawsuit Abuse Is Hurting Health Care & What Texans Can Do About It*

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## **EXECUTIVE SUMMARY**

The legal system in Texas is suffering from medical lawsuit abuse – excessive claims against health care providers and unreasonably exorbitant judgments. While the number of legal claims against health care providers in Texas has skyrocketed, most are being dismissed without any finding of negligence or award for damages. At the same time, however, the amount of payouts from lawsuits is astronomical and growing.

Doctors and health care facilities, burdened with the surging costs of medical liability insurance, are footing the bill. Premiums are doubling, sometimes tripling, when health care providers can find affordable insurance to buy. Many companies have stopped selling medical liability insurance in Texas after incurring punishing losses. Consequently, doctors are limiting care, retiring, and relocating to other states; over 25 percent of hospitals have cut back or completely shut down one or more types of services.

The highest cost of the state's medical litigation, however, is borne by individual Texans who must pay higher medical costs and surmount barriers to getting care. Shrinking services at medical facilities and the scarcity of doctors cause long and dangerous delays in care. Increasingly, the quality of their care is damaged by “defensive medicine” – medically unjustified tests, prescriptions, and surgeries ordered by doctors only to avoid litigation.

### **Medical Lawsuit Abuse Hurts Everyone**

- Americans pay about 30 percent extra in medical costs as a result of the medical litigation system.
- The cost of Medicare, CHIP, VA and health care for federal employees is increased by \$47 billion annually as the result of medical litigation.
- The number of medical liability cases filed in Texas is doubling every five years.
- Over the past three years, medical liability insurance premiums have increased by 200 percent or more for doctors in Texas. From 2002 to 2003, the average premium paid by hospitals more than doubled.
- The likelihood that any doctor in Texas will be sued for malpractice almost doubled between 1996 and 2000.
- Between 25 to 50 percent of all physicians in Texas have malpractice claims filed against them.
- The size of awards from medical liability suits has increased 500 percent in Texas over the last 10 years.
- Today, only five companies sell medical liability insurance in Texas. Since 1999, 14 companies have stopped selling medical liability insurance in the state because of losses incurred by claims.
- Fear of lawsuits drives 40 percent of doctors to order medically unnecessary prescriptions and 50 percent to order invasive procedures more frequently than they believe is medically warranted.
- Seventy-six percent of doctors think “defensive medicine” is damaging the quality of medical care.
- Fifty-nine percent of Americans believe their health care quality is harmed by lawsuits and doctors' fears of being sued.

The medical legal system is a lottery that produces few winners. Few patients gain from malpractice lawsuits. Juries demonstrate little reliability in identifying medical errors and negligent doctors; they seldom provide justice or deter wrongdoing. Almost nine out of 10 health care liability claims in Texas are dismissed without any payment. When claims do reach the court, less than 30 percent of the claims are actually awarded payments. In Texas, most of the money paid out in malpractice cases (57 percent) goes to lawyer fees and court costs, leaving only 43 percent for patients.

Our dysfunctional medical litigation system benefits few and harms many. It must be fixed. Texans can look to efforts of other states that have addressed their own crises in health care by reforming their civil justice systems. Ten states thoroughly demonstrate that tort reform offers an effective prescription for improving the access, affordability and quality of health care. They show that carefully designed reforms, particularly caps on non-economic damages, staunch the hemorrhage of health care providers and restrain increases in the cost of medical liability insurance.

Emerging federal legislation also offers Texans a model for reform. Earlier this spring the U.S. House of Representatives passed House Resolution 5, the HEALTH Act. This federal legislation is designed to solve problems within the civil justice system that adversely affect health care and features a \$250,000 cap on non-economic damages for medical liability. This legislation is also designed to preempt laws in states that offer less protection for health care providers and patients.

Today, legislation to reform the medical litigation system is being debated in the halls of the Capitol. **The key component of House Bill 4 is a cap on non-economic damages; this cap could translate into a 17 to 19 percent reduction in the cost of medical liability insurance, according to the Texas Department of Insurance.** Because a cap on non-economic damages will substantially change the landscape of medical litigation, as well as reduce the cost of malpractice insurance for health care providers, decisions of the 78th Texas Legislature will significantly impact the quality and availability of health care for all Texans.

**Policy Recommendations For The Texas Legislature:  
Resolving Texas' Health Care Crisis With Civil Justice Reform**

- Ensure that victims and their families have the right to recover full economic damages for proven direct and indirect losses.
- Cap non-economic damages at \$250,000 for medical liability.
- Provide for payment of judgments over time.
- Provide that defendants pay in proportion to fault.
- Establish a sliding scale for contingent attorney fees.
- Prohibit an award for products that comply with federal standards.
- Establish immunity for health care providers engaged in peer-review programs that identify past errors and implement patient care protections.

## I. Introduction: Doctor, Lawyer, Indian Chief

The connection between doctors and lawyers is memorialized in a playful nursery rhyme chanted by generations of children.<sup>1</sup> Today this connection has come to be regarded with grave concern. The doctor-lawyer connection is increasingly harmful to the availability, affordability, and quality of health care for every individual in the state and nation.

The legal system in Texas is suffering from medical lawsuit abuse – excessive claims against health care providers and unreasonably exorbitant judgments. While the number of legal claims against health care providers in Texas has skyrocketed, most claims are being dismissed without any finding of negligence or award for damages. At the same time, however, the amount of payouts from lawsuits is astronomical and growing.

Doctors and health care facilities are footing the bill, burdened with the surging costs of medical liability insurance. When health care providers do find insurance, they are frequently faced with doubling, sometimes tripling, premiums. Many companies have stopped selling medical liability insurance in Texas after incurring punishing losses. Consequently, doctors are limiting care, retiring, and relocating to other states; medical facilities are cutting back services and shutting down units.

The highest cost of the state's medical litigation, however, is borne by individual Texans who must pay higher medical costs and surmount barriers to getting care. Increasingly, the quality of their care is damaged by “defensive medicine” – medically unjustified tests, prescriptions, and surgeries ordered by doctors only to avoid litigation.

Recognizing the health care crisis, both the House and Senate called for solutions during the 77<sup>th</sup> Texas Legislature. The House charged the Committee on Public Health to determine how the shortage of health care providers affects delivery of care.<sup>2</sup> The Senate charged the Special Committee on Prompt Payment of Health Care Providers to assess the causes of rising malpractice insurance and the impact of medical lawsuits on access to health care.<sup>3</sup>

Interim committees of both the House and Senate recommended dramatic reform of the state's medical malpractice liability system. And today, meaningful tort reform legislation is being debated in the halls of the Capitol. Decisions of the 78<sup>th</sup> Legislature will significantly affect health care for all Texans – for better or worse.

Texans can look to the efforts of other states that have addressed their own crises in health care by reforming their civil justice systems. Ten states thoroughly demonstrate that meaningful tort reform offers an effective prescription for improving the access, affordability and quality of health care. They show that carefully designed reforms

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<sup>1</sup> “Rich man, poor man, beggar man, thief, doctor, lawyer, Indian chief...,” Jump Rope Nursery Rhyme, <http://www.keeslau.com/TomWaitsSupplement/LyricsCovers/Richmanpoorman.htm>.

<sup>2</sup> *A Report to the House of Representatives 78<sup>th</sup> Legislature*, House Committee on Public Health Texas House of Representatives Interim Report 2002, Austin, TX.

<sup>3</sup> *Issues Facing the 78<sup>th</sup> Texas Legislature*, Senate Research Center, January 2003, Austin, TX.

staunch the hemorrhage of health care providers and restrain increases in the cost of medical liability insurance.

Emerging federal legislation also offers Texans a model for reform. Earlier this spring, the U.S. House of Representatives passed House Resolution 5, the HEALTH Act (Help Efficient, Accessible, Low-cost Timely Healthcare). The HEALTH Act is designed to solve problems within the civil justice system that adversely affect health care.

The following report examines the health care crisis in Texas, reviews the debate among Texans about the proposed solutions, and describes evidence of effective medical liability reform in other states. It concludes with proposals for the Texas Legislature to increase patient protection, create incentives for improving care, and discourage lawsuit abuse.

## II. Health Care Crisis In Texas

### A. Access To Care: No Doctor In The House

Medical treatment is growing difficult – sometimes impossible – to find in Texas. The state’s population growth is quickly surpassing the flagging supply of practicing doctors.<sup>4</sup> Today, Texans have less access to medical care than do the residents of many other states. In 2002, there were only 64 primary care doctors for every 100,000 Texans, while up to 80 doctors cared for the same number of people across the United States.<sup>5</sup> Half of the state’s 254 counties are identified as “shortage areas” by the Texas Department of Health, and 24 of 254 counties have no doctors and 20 counties have only one.<sup>6</sup>

The scarcity of doctors threatens the well-being of every Texan. Last year, an elderly man was taken to a hospital emergency room in McAllen after falling and injuring his head. After seven hours, the emergency room still could not locate a neurosurgeon, although staff searched in Corpus Christi, San Antonio and Austin. The man died from his head injury, one that might have been survived if immediate care had been available.<sup>7</sup>

Shrinking services at medical facilities place Texans at risk – causing long, sometimes too long, delays in the delivery of care. Hospitals throughout Texas report routine diversion of patients, transferring patients with life-threatening conditions to facilities hundreds of miles distant.<sup>8</sup> Recently, an Austin hospital had to fly an individual with severe back injuries to a hospital in Temple, delaying critical surgery for nine hours because a surgeon could not be found in the state’s capitol city.<sup>9</sup>

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<sup>4</sup> *Primary Care Physician Trends, 1981-2001*, Health Professions Resource Center, Texas Department of Health, Austin, TX, <http://www.tdh.state.tx.us/dpa/PCtrends.jpg>.

<sup>5</sup> *House Select Committee on Public Health, Texas House of Representatives Interim Report 2002*, A Report to the Texas Legislature, Austin, TX, January 10, 2003, page 12.

<sup>6</sup> *Ibid*, page 13.

<sup>7</sup> Ed Susman, “*Medical liability crisis causing deaths*” *United Press International*, June 17, 2002, <http://C:/DOCUME~1/CHRISP~1.CPA/LOCALS~1/Temp/triKACFC.htm>.

<sup>8</sup> *Fact, Figures, Truth-Stop Health Care Lawsuit Abuse in Texas!* A Joint Publication of the Texas Medical Association and Texas Hospital Association, Austin, TX, 2003 and *Medical Liability and Lawsuit Abuse Along the Border: Circling the Drain*, Practice Management, Texas Medical Association, <http://www.texmed.org.liability/CirclingDrain.asp>.

<sup>9</sup> *Facts, Figures, Truth – Stop Health Care Lawsuit Abuse in Texas!*

## B. Quality Of Care: Too Little And Too Much

While the health care system in the United States is one of the best among industrialized nations, the quality of care is jeopardized by defensive medicine and medical error.

Throughout the nation, an increasing number of patients are exposed to unnecessary medical care because health care providers are practicing “defensive medicine,” tests and treatments that are medically unnecessary but ordered because providers fear lawsuits. Defensive medicine is expensive; a national study found that defensive medicine adds \$50 billion dollars annually to the cost of health care.<sup>10</sup> Defensive medicine increases the risk that patients will suffer adverse medical consequences and side effects.

Fear of excessive litigation pushes about 40 percent of doctors to prescribe medically unwarranted medications and over 50 percent of doctors to order invasive procedures more frequently than they believe is medically necessary, according to a survey conducted by Harris Interactive.<sup>11</sup> Over 76 percent of the doctors surveyed indicate that defensive medicine is eroding the quality of care.<sup>12</sup>

Medical errors also diminish the quality of care, although errors do prove the exception rather than the rule. “While millions of Americans receive high quality care...there is abundant evidence that serious and extensive quality problems exist throughout the U.S. health care system, resulting in harm to many Americans,” according to a 2001 report by the Institute of Medicine.<sup>13</sup> However, the Institute admits that just how many are harmed by medical error is currently unknown<sup>14</sup> – an admission that qualifies an earlier and highly refuted report<sup>15</sup> indicating as many as 98,000 people die each year from medical errors.<sup>16</sup>

Whether the incidence of errors is known or knowable is less important than the fact that most medical errors are preventable. According to research cited by the U.S. Department of Health and Human Services, most medical errors can be prevented because they result from flaws in medical delivery systems – not from individual negligence.<sup>17</sup>

To the dismay of many, particularly health care providers, efforts to reduce medical errors are falling by the wayside. Due to the fear of litigation, health care professionals and institutions are increasingly reluctant to improve care by identifying and resolving

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<sup>10</sup> *Excerpts of Reports Received by the American Tort Reform Association on the Crisis in Medical Liability*, American Medical Association, <http://www.ama-assn.org/ama/pub/article/6282-5928.html>.

<sup>11</sup> *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*, U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, Washington, DC, March 3, 2003, page 7.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Crossing the Quality Chasm: A New Health System for the 21<sup>st</sup> Century*, Institute of Medicine, National Academies Press, Washington, DC, 2001, page 225.

<sup>14</sup> *Ibid.*, page 227.

<sup>15</sup> Troyen Brennan, *The Institute of Medicine Report on Medical Errors – Could It Do Harm?* *The New England Journal of Medicine*, April 13, 2000, Vol. 342, no.15.

<sup>16</sup> *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*, page 9.

<sup>17</sup> *Ibid.*, page 30.

the problems that cause medical errors. Only five percent of doctors, nurses and hospital administrators believe that health care providers feel safe identifying errors or expressing uncertainty about proper treatment, according to a recent national survey conducted by Harris Interactive.<sup>18</sup> This fear poses great danger for the quality of care – as many as 95 percent of adverse events may go unreported, according to the U.S. Department of Health.<sup>19</sup>

Medical errors seem to be encouraged, not deterred, by aggressive medical litigation. This perversion undermines the fundamental purpose of our civil justice system – identifying, punishing and preventing wrongdoing.

### III. Excesses Of The Medical Litigation System

All Americans are feeling the impact of medical lawsuit abuse on the costs and quality of health care, according to a report issued by the U.S. Department of Health and Human Services in March 2003.<sup>20</sup> The explosion of medical lawsuits and unreasonably high dollar awards are driving up the cost of malpractice insurance for health care providers – with ruinous consequences.

**Figure 1.**  
Medical Liability And Litigation – National Facts

- The average jury award for malpractice lawsuits reached \$3.49 million in 1999, a 79 percent increase since 1993.<sup>21</sup>
- In 18 states, premiums for medical liability insurance increased by 39 percent for specialists between 2000 and 2001 and increased an additional 51 percent in 2002.<sup>22</sup>
- Many doctors, through no fault of their own, can no longer afford malpractice insurance; these physicians are restricting care, retiring or moving to states where insurance is affordable.<sup>23</sup>
- Fifty-six percent of Blue Cross/Blue Shield plans in “crisis states” (including Texas) report doctors are leaving the practice of medicine.<sup>24</sup>
- Over one-fourth of hospitals have curtailed or completely discontinued one or more types of services as a result of growing costs of liability premiums.<sup>25</sup>
- Americans pay about 30 percent extra in medical costs because of medical litigation.<sup>26</sup>
- Every American is paying higher federal taxes to provide medical care for others -- \$47 billion dollars annually is added to the cost of Medicare, CHIP, VA and health care for federal employees as the result of medical litigation.<sup>27</sup>

<sup>18</sup> Ibid, page 9.

<sup>19</sup> Ibid, page 10.

<sup>20</sup> Ibid, page 3.

<sup>21</sup> *How Patients and Doctors are Suffering While Lawyers Profit from Litigation*, Health Care Liability Alliance, 2002, <http://www.hcla.org/html/hcla04232002study.htm>.

<sup>22</sup> *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Care*, page 1.

<sup>23</sup> Ibid, pages 1 and 2.

<sup>24</sup> *The Medical Liability Crisis: AMA Talking Points*, American Medical Association, <http://www.ama-assn.org/ama/pub/article/6282-7225.html>.

<sup>25</sup> Ibid.

<sup>26</sup> *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Care*, page 1 and 9.



- Fifty-eight percent of Americans favor new legislation to reduce the cost of medical liability insurance by curbing lawsuits against health care providers.<sup>28</sup>
- Fifty-nine percent of Americans believe that medical litigation harms the quality of health care.<sup>29</sup>
- Seventy-six percent of doctors think that “defensive medicine” harms the quality of medical care.<sup>30</sup>

#### IV. Texas Landscape: Lawyers, Doctors And Dollars

Excesses of the medical litigation system are evident in Texas. Texas is one of the 12 states caught in the throes of a medical liability crisis, according to both the American Medical Association and the American Association of Neurological Surgeons.<sup>31</sup> The American College of Obstetricians and Gynecologists also identifies Texas as a state in crisis – listing Texas as one of the nine states in which access to care is compromised by the affordability and availability of malpractice insurance.<sup>32</sup>

Facts assembled by the Texas Medical Association and Texas Hospital Association draw an alarming picture: the growing likelihood of physicians being sued, increasing number of lawsuits, escalating costs of defending lawsuits, bigger lawsuit payouts, skyrocketing medical liability premiums, and decreasing availability of insurance coverage for health care providers.

##### **Figure 2.**

##### Medical Liability And Litigation - Texas Facts

- The number of medical liability cases filed in Texas is doubling every five years.<sup>33</sup>
- Over the past three years, medical liability insurance premiums have increased by 200 percent or more for doctors in Texas.<sup>34</sup> From 2002 to 2003, the average premium paid by hospitals in Texas more than doubled.<sup>35</sup>
- The likelihood that any doctor in Texas will be sued for malpractice almost doubled between 1996 and 2000.<sup>36</sup>
- Between 25 to 50 percent of all doctors in Texas have claims filed against them.<sup>37</sup>
- Premiums for OB-GYN doctors in North Texas cost \$47,500 for \$500,000 of coverage; in the Rio Grande Valley, doctors pay \$82,000 annually for the same coverage.<sup>38</sup>

<sup>27</sup> *The Medical Liability Crisis-AMA Talking Points*, The American Medical Association, <http://www.ama-assn.org/ama/pub/article/6282-7255.html>.

<sup>28</sup> *National Survey Shows That More Than Half of Adult Americans Support Medical Malpractice Reform*, Health Care Poll, The Wall Street Journal Online, March 6, 2003, Vol. 2, Issue 2.

<sup>29</sup> Ibid.

<sup>30</sup> *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Care*, page 7.

<sup>31</sup> Ibid, page 6.

<sup>32</sup> Ibid.

<sup>33</sup> *Facts, Figures, Truth – Stop Health Care Lawsuit Abuse in Texas!*

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> *Excerpts of Reports Received by the American Tort Reform Association on the Crisis in Medical Liability; and Medical Malpractice Insurance: Overview and Discussion*, Texas Department of Insurance, Austin, TX, February 12, 2003, page 40, <http://www.tdi.state.tx.us/general/promtppay.pdf>.

<sup>38</sup> Ibid.

- The number of suits and amount of awards in Texas has pushed premiums for medical liability insurance up to third highest in the nation for surgeons and internists and sixth highest in the nation for OB/GYNs.<sup>39</sup>
- The average judgment in Texas is \$2.1 million dollars.<sup>40</sup>
- The size of awards from medical liability suits has increased 500 percent in Texas over the last 10 years.<sup>41</sup>
- The Texas Department of Insurance found that regulated insurance companies in Texas lost \$103.5 million dollars in 1999 and an additional \$229 million in 2000.<sup>42</sup>
- In 2001, insurance companies selling medical liability insurance in Texas incurred net underwriting losses of \$1.6 billion dollars.<sup>43</sup>
- Today, only five companies sell medical liability insurance in Texas (one of which is the Joint Underwriting Association, the carrier of last resort available when doctors are denied coverage by other companies). Since 1999, 14 companies have stopped selling medical liability insurance in the state because of losses incurred by claims.<sup>44</sup>
- In the last quarter of 2002, the number of doctors who were denied medical liability coverage tripled in Texas; the number of doctors covered through the Texas Department of Insurance's Joint Underwriting Association increased from 100 to 290 from September through December 2002.<sup>45</sup>
- Ninety-one percent of Texans describe medical liability insurance as a crisis or problem.<sup>46</sup>

## V. Winners And Losers In The Medical Lawsuit Lottery

### A. Patients And Their Doctors Lose

The medical litigation system works for neither patients nor their families. Lawsuits do not accurately identify medical negligence, deter malpractice or give justice to the injured.

According to the U.S. Department of Health and Human Services, research indicates that the medical providers sued for malpractice are generally not negligent in most claims. Several studies conducted by Harvard investigators indicate there is no real relationship between injuries caused by malpractice and medical litigation.<sup>47</sup> In fact, investigators found that only one to three percent of negligent events led to a lawsuit.<sup>48</sup> This research

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<sup>39</sup> *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*, page 19.

<sup>40</sup> *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*, page 13.

<sup>41</sup> *Ibid.*

<sup>42</sup> Robert Kottman, "Liability litigation reform will save many Texas doctors," *San Antonio Express News*, March 27, 2003.

<sup>43</sup> *Medical Malpractice Insurance: Overview and Discussion*, page 23.

<sup>44</sup> *Ibid.*, page 4; and Jan Collmer, *Settlements must be reasonable to end insurance crisis*, *Dallas Morning News*, April 2, 2003.

<sup>45</sup> *Medical Liability and Lawsuit Abuse Along the Border: Circling the Drain*.

<sup>46</sup> *News Release-Current Opinion in Texas*, Texas Alliance for Patient Access, Texas Medical Association and Texas Hospital Association, Austin, TX, March 14, 2003.

<sup>47</sup> *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*, page 8.

<sup>48</sup> Laura E. Stevens and Teresa M. Waters, *Why Are Health Care Costs Rising*, Cost of Care, Texas Medical Association, Austin, TX, September 2002, page 5.

argues that medical litigation does not help identify medical error nor does it identify bad doctors.

Research also shows that medical litigation does not benefit most victims of malpractice. Less than two percent of the individuals who are injured by negligence press claims against their caregivers.<sup>49</sup>

Today, almost nine out of 10 health care liability claims in Texas are dismissed without any payment;<sup>50</sup> however, the cost of defending each claim is approximately \$23,211.<sup>51</sup> When claims do reach the court – after 90 percent have been winnowed out – less than 30 percent actually are awarded payments.<sup>52</sup> Estimates produced by the Texas Medical Association and Texas Hospital Association indicate that 57 percent of awards paid in Texas go toward lawyer fees and court costs.<sup>53</sup>

## **B. Every Texan Loses**

Lawsuit abuse tangibly affects every Texan, imposing higher out-of-pocket medical fees, higher health insurance premiums, and higher federal taxes. Less visible and more pernicious, however, is the effect of abuse on quality of care. Lawsuit abuse places the lives of all Texans at increased risk. Unnecessary medical treatment (defensive medicine) and delays in care can play a critical role in determining whether a patient lives or dies.

## **C. Insurance Companies Lose**

Insurance companies receive little or no financial benefit from medical litigation. Many insurance companies are withdrawing from the medical liability market, preferring to sell other types of insurance that offer more opportunities for profit at a lower risk, according to the National Association of Insurance Commissioners.<sup>54</sup>

In Texas, medical liability insurance carriers have operated at a loss for a number of years and the loss is increasing dramatically. In 1997, the three main insurance companies operated at a \$20 million dollar loss; these companies reported a loss of more than \$40 million for 2002.<sup>55</sup> According to the Texas Department of Insurance, Texas is one of the least profitable places to sell medical malpractice insurance.<sup>56</sup>

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<sup>49</sup> *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Care*, page 15.

<sup>50</sup> *Facts, Figures, Truth – Stop Health Care Lawsuit Abuse in Texas!*

<sup>51</sup> *How Patients and Doctors are Suffering While Lawyers Profit from Litigation*.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Facts, Figures, Truth – Stop Health Care Lawsuit Abuse in Texas!*

<sup>54</sup> *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*, page 21.

<sup>55</sup> *Analyzing Liability Insurance in Texas*, TexasMedicine, the Texas Medical Association, June 2000, <http://www.texmed.org/liability/LiabilityStudy.asp>.

<sup>56</sup> *Medical Malpractice Insurance: Overview and Discussion*, page 21.

#### **D. A Few Lawyers Win Big**

Lawyers generally profit from malpractice suits - some profit hugely. When legal fees are paid on a contingency basis (the case in most medical malpractice lawsuits), the plaintiff receives far less than the actual judgment award. Nationally, individuals who pay lawyers by contingency fees see their awards shaved between 33 to 50 percent.<sup>57</sup> In Texas, it is estimated that 57 percent of medical liability awards go to lawyer fees and court costs.<sup>58</sup>

About \$4.7 billion dollars was collected by attorneys in the United States between 1985 and 1998 for medical claims that were closed without any payment for injury.<sup>59</sup> This incredible investment of resources offers dismaying evidence that Americans spend more per person on litigation than any other country in the world.<sup>60</sup>

### **VI. Federal Prescription For The Ailing Health Care System**

In March of 2003, the U.S. House of Representatives approved legislation to create a framework for reforming states' medical liability systems.

The federal HEALTH Act begins by describing the necessity for reform. "Congress finds that our current civil justice system is adversely affecting patient access to health care services, better patient care, and cost-efficient health care, in that the health care liability system is a costly and ineffective mechanism for resolving claims of health care liability and compensating injured patients and is a deterrent to the sharing of information among health care professionals which impedes efforts to improve patient safety and quality of care."<sup>61</sup>

Key provisions of the HEALTH Act are outlined in Figure 3. This act specifically preempts any state law that imposes less protection for health care providers and health care organizations than those provided by the federal legislation.<sup>62</sup> The HEALTH Act is now awaiting action in the U.S. Senate.<sup>63</sup> If passed, states will be required to use it to remodel their civil justice systems if prevailing statutes fail to provide protection equal to federal law.

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<sup>57</sup> *How Patients and Doctors are Suffering While Lawyers Profit from Litigation.*

<sup>58</sup> *Facts, Figures, Truth – Stop Health Care Lawsuit Abuse in Texas!*

<sup>59</sup> *How Patients and Doctors are Suffering While Lawyers Profit from Litigation.*

<sup>60</sup> *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*, page 1.

<sup>61</sup> H.R.5, Help, Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2003, Section 2. Findings and Purpose, Engrossed as Agreed to or Passed by House, <http://thomas.loc.gov/>.

<sup>62</sup> H.R. 5, Section 11 (a) (b).

<sup>63</sup> Thomas Bill Status, <http://thomas.loc.gov/>.

**Figure 3.**

HEALTH – Key Provisions Of Federal Medical Liability Legislation<sup>64</sup>

- Improves the ability of patients who are injured by negligence to get quicker, unlimited compensation for economic losses, including the ability to provide valuable unpaid services such as care for children.
- Ensures that recoveries for non-economic damages could not exceed a reasonable amount -- \$250,000.
- Avoids unreasonable awards (anything in excess of the greater of two times economic damages or \$250,000) and reserves punitive damages for cases where there is clear and convincing proof that the defendant acted with malicious intent or deliberately failed to avoid unnecessary injury to the patient.
- Provides for payment of a judgment over time rather than in one lump sum.
- Ensures that old cases cannot be brought forward years after an event (not to exceed 3 years after manifestation of the injury except for minors under the age of six).
- Permits the jury to be informed if a plaintiff has other sources of payment for the injury, such as health insurance.
- Provides that defendants pay in proportion to their fault.
- Establishes a sliding scale fee for attorney's contingent fees.
- Prohibits an award for products that comply with Food and Drug Administration (FDA) standards, except if the manufacturer or distributor fails to comply with FDA requirements.
- Expresses the sense of Congress that a health insurer should be liable for harm caused when it makes a decision as to what care is medically necessary and appropriate.

The federal HEALTH Act is based on medical liability reform that was enacted by California in 1975 to curb frivolous lawsuits. Success of California's Medical Injury Compensation Act (MICRA) is evident. Californians have no doctor shortage and medical liability insurance premiums have risen more slowly than in the rest of the country (167 percent in California compared to 505 percent nationally) with no demonstrable impact on health care quality.<sup>65</sup> MICRA saves Californians more than \$1 billion dollars in liability premiums annually.<sup>66</sup>

The American Legislative Exchange Council (ALEC) identifies medical malpractice reform as key to keeping health insurance affordable and accessible, and recommends California's MICRA as a model for states as they confront rising health care costs in a time of budget shortfalls.<sup>67</sup>

## VII. Cap On Non-economic Damages is Key

The central feature of both the federal HEALTH Act and California's MICRA is a cap on non-economic damages in medical liability suits.

<sup>64</sup> H.R. 5 Act of 2003; and *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*, pages 27 and 28.

<sup>65</sup> *Ibid*, pages 27 and 28.

<sup>66</sup> *Ibid*.

<sup>67</sup> *Guide to Health Insurance Solutions*, the American Legislative Exchange Council, March 2003, pages 14 and 15, <http://www.alec.org>.

Awarded on top of compensation for the injured person’s economic loss, non-economic damages represent monetary compensation for intangible, non-monetary losses – such as pain and suffering or loss of enjoyment of life.<sup>68</sup> Non-economic damages are subjective, vary widely and are prone to unreasonable inflation. In contrast, economic damages are monies awarded for demonstrable and replaceable losses, such as wages, health care costs and services that the injured patient can no longer perform (child care, for example).<sup>69</sup>

Because awards for non-economic damages are so large, it is not surprising that caps on non-economic

awards have proven to be the vehicle for driving down the growing number of frivolous lawsuits, constraining unreasonably high payouts for intangible losses, and depressing the skyrocketing costs of medical liability insurance premiums.

<b>Table 1.</b> Rate Of Liability Premium Increases In States <i>With</i> Non-economic Caps		
States with Caps \$350,000 or Less	Average Highest Liability Premium Increase, 2001	Average Highest Liability Premium Increase, 2002
California	20%	20%
Hawaii	0%	5%
Indiana	16%	55%
Michigan	39%	13%
Montana	21%	35%
New Mexico	12%	42%
North Dakota	0%	15%
South Dakota	0%	20%
Utah	5%	35%
Wisconsin	5%	5%
Average Increase	13%	24%
<b>Average over 2 yrs</b>		<b>18%</b>
Constructed from data in Table 6 of <i>Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care</i> , page 23.		

### A. States With Caps On Non-economic Damages

States that have instituted caps on non-economic damages experience lower medical liability insurance costs. Over the past two years, the highest average combined rate increase that states with caps of \$250,000 or \$350,000 on non-economic damages have experienced is 18 percent. However, states without caps – states representing almost half of the population of the United States – have experienced average increases of 45 percent.<sup>70</sup>

### B. States Without Caps On Non-economic Damages

States that allow unlimited awards for non-economic damages post records for the highest payouts in medical liability lawsuits. Jury judgments are leviathan in states without non-economic caps; in these states, at least 50 percent of the judgments represent

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<sup>68</sup> *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*, page 13.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*, page 23.

non-economic damages in medical liability awards.<sup>71</sup>

According to the U.S. Department of Health and Human Services, the average judgment in Texas is \$2.1 million dollars today, and 70 percent of these awards represent non-economic damages (this information is based on a study released by the Council for Affordable and Reliable Health Care in 2002).<sup>72</sup>

**C. Link Between Non-economic Damages And Liability Insurance Costs**

The price of medical liability premiums today is primarily based on the strain that litigation exerts on insurance companies. As the costs of litigation and the severity of damages grow, insurance companies raise premiums to offset their losses.<sup>73</sup>

States without Caps	Average Highest Liability Premium Increase, 2001	Average Highest Liability Premium Increase, 2002
Arkansas	18%	104%
Connecticut	50%	28%
Florida	47%	59%
Georgia	32%	37%
Illinois	52%	72%
Mississippi	0%	66%
Nevada	35%	50%
New Jersey	24%	13%
North Carolina	0%	50%
Ohio	60%	60%
Oregon	56%	80%
Pennsylvania	77%	62%
Rhode Island	60%	9%
Tennessee	17%	49%
<b>TEXAS</b>	<b>32%</b>	<b>45%</b>
Virginia	37%	74%
Washington	55%	6%
West Virginia	44%	46%
Average Increase	39%	51%
<b>Average over 2 yrs</b>		<b>45%</b>
Constructed from data in Table 6 of <i>Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care</i> , Table 6, page 23.		

The evidence of this

relationship is clear, as shown by Tables 1 and 2. In states without caps on non-economic damages, medical liability premiums have risen more rapidly and steeply than in states that have established reasonable limits on non-economic damages.<sup>74</sup> The U.S. Department of Health and Human Services cites an independent study by Brown Brothers

<sup>71</sup> *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*, page 13.

<sup>72</sup> John Thomas, General Counsel of Baylor Health System and President for the Council for Affordable and Reliable Health Care (CARH), Presentation at Health Policy Summit, Jacksonville, FL, December 17, 2002 as cited in *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*, page 13.

<sup>73</sup> *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*, page 33 and 34.

<sup>74</sup> *Ibid.*

Harriman & Company that shows the cost of medical malpractice premiums is primarily based on the amounts they must pay out, particularly for unreasonable non-economic damages.<sup>75</sup>

A study conducted for Florida's governor by a select task force on liability insurance also indicates that medical liability claims are responsible for the large losses of insurance companies – and represents this as the main reason that insurance premiums have risen in Florida.<sup>76</sup> Non-economic damages, representing 77 percent of Florida's medical liability awards, are the primary cause of soaring liability insurance rates, according to the select task force.<sup>77</sup>

The link between non-economic damages, the amount of medical liability losses, and the cost of insurance premiums can also be established in Texas. The Department of Insurance suggests that capping non-economic damages in Texas would significantly reduce medical liability losses. It estimates that a \$250,000 cap on non-economic awards would reduce medical liability losses for doctors and surgeons by 29 to 33 percent, and could reduce liability premiums by 17 to 19 percent.<sup>78</sup>

Both the Texas House and Senate recognize the relationship between liability costs, particularly non-economic damages, and the cost of liability insurance premiums. In interim reports, members of both bodies identify caps on non-economic damages as legislation to be considered during the 78<sup>th</sup> Legislature.<sup>79</sup>

## VIII. Patient Protections

The medical litigation system has proven to be an ineffective means to improve the quality of health care. According to the U.S. Department of Health and Human Services, “results are largely random and unpredictable, the litigation system often does not accurately identify negligence, deter bad conduct or provide justice.”<sup>80</sup>

The Department suggests the best way to improve the quality of health care and protect patients is to establish incentives for health care providers to improve systems within medical facilities. The Baylor Medical Center in Dallas is offered as an example. The center recently introduced a program to reduce medication errors by integrating a system to report errors into its treatment procedures.<sup>81</sup>

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<sup>75</sup> Ibid.

<sup>76</sup> *Report of the Governor's Select Task Force on Health Care Professional Liability*, Office of the President, University of Central Florida, Orlando, FL, January 29, 2003, pages v, vi and xi; and *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*, page 13.

<sup>77</sup> Ibid.

<sup>78</sup> Letter to the Honorable Joe Nixon, Chairman, Committee on Civil Practices, Texas House of Representatives from Jose Montemayor, Commissioner of Insurance, Texas Department of Insurance, Austin, TX, March 14, 2003.

<sup>79</sup> *Issues Facing the 78<sup>th</sup> Legislature*, page 27 and *A Report to the House of Representatives 78<sup>th</sup> Legislature*, page 11.

<sup>80</sup> *Addressing the New Health Care Crisis: Reforming the medical litigation system to improve the quality of health care*, page 8.

<sup>81</sup> Ibid, page 9.



Patient safety programs are being pioneered by several states. Pennsylvania has established a Patient Safety Authority to collect information about adverse events in medical facilities throughout the state and to make recommendations about how to improve patient care.<sup>82</sup> Florida is considering development of a statewide electronic system for ordering medications and medication protocols.<sup>83</sup> Many states, including Texas, are expanding the authorities and resources of their state boards of medical examiners to provide faster response to patient complaints and quicker disciplinary actions. The Senate Special Committee on Prompt Payment of Health Care Providers forwarded this recommendation to the 78<sup>th</sup> Legislature.<sup>84</sup>

However, legislation is desperately needed to support the efforts of health care providers to improve patient care. Hospitals, doctors, and other caretakers must be encouraged to report medical errors and develop programs to improve patient outcomes without the fear of being sued. Statutory protections must be carefully devised to protect the disclosure of information that is specifically used to improve patient care, and health care providers must be shielded against the medical litigation system that punishes the activities necessary to prevent patient harm.

## **IX. Medical Litigation Reform In Texas**

The 78<sup>th</sup> Texas Legislature is committed to improving the quality of health care by resolving impediments to care posed by medical malpractice and medical litigation.

Both the House and Senate passed legislation to strengthen physician licensure and disciplinary procedures. Senate Bill 104 expands authority of the State Board of Medical Examiners and includes provisions to:<sup>85</sup>

- Establish an expert panel to review the medical competency of doctors charged with malpractice.
- Increase penalties for doctors who fail to comply with state laws or who are found negligent.
- Revoke a doctor's license if it has been revoked by another state.
- Revoke the license of a doctor who has been convicted of violating the penal code for an offense that exceeds punishment by a fine.
- Expedite resolution of malpractice complaints.

The Legislature is now hotly debating reform of Texas' civil justice system. House Bill 4 is an omnibus bill that represents the most sweeping rewrite of the civil justice system in more than a decade. H.B. 4 contains some, but not all, of the reforms introduced by the federal HEALTH Act.<sup>86</sup>

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<sup>82</sup> *Governor's Select Task Force on Health Care Professional Liability Insurance*, page vii.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Issues Facing the 78<sup>th</sup> Texas Legislature*, page 27.

<sup>85</sup> SRC-TJG C.S.S.B. 104 78 (R) Bill Analysis, Senate Research Center, <http://www.capitol.state.tx.us/cgi-bin/tlo/viewtext.cmd?LEG=78&SESS=R&CHAMBER=>

<sup>86</sup> House Bill 4, Texas Legislature Online, <http://www.capitol.state.tx.us>.

As H.B. 4 winds its way through the Texas Senate, it can be safely predicted that some provisions will be modified and new provisions added. Based on the latest available

**Figure 4.**

Similarities Between Medical Liability Provisions Of H.B. 4 and the HEALTH Act

- Both ensure that victims and their families have the legal right to recover full economic damages.
- Both establish \$250,000 as the reasonable limit for non-economic damage.
- Both ensure defendants will be responsible for the portion of fault attributable to them and prevent defendants from being held responsible for the fault of others.
- Both allow awards to be paid over time rather than in one lump sum.
- Both prohibit awards for products that comply with federal standards.

version of H.B. 4, there are five points of alignment with the federal HEALTH Act.

Some provisions of the HEALTH Act are already in Texas law and account for some differences between H.B. 4 and the new federal act, such as restriction of punitive damages and disclosure of any payment already received by the plaintiff.<sup>87</sup>

H.B. 4 extends the reform of health care liability in Texas beyond the promises of the HEALTH Act and includes:<sup>88</sup>

- Providing immunity to health care providers who render charity services.
- Furnishing protection from liability to physicians who render emergency care.
- Requiring that health care claims be filed within 10 years.
- Expediting time for processing a claim.
- Clarifying the qualifications of medical experts for testimony.

H.B. 4 also includes a panoply of other civil justice reforms, including:<sup>89</sup>

- Penalties for plaintiffs who refuse settlement offers and fail to get at least 90 percent of the offer at trial.
- Computation of fees for class action attorneys.
- Liability of volunteer fire fighters.
- Restriction of asbestos-related claims.
- Civil immunity for school employees.
- Assignment of judges.
- Liability of municipal hospital management contractors.
- Liability of non-manufacturing sellers of health care products.
- Timing of depositions.
- Evidence of financial damages.
- Standard of proof in cases involving care by emergency physicians.
- Sealing of rate information filed by liability insurers with the commissioner of insurance rates.
- Recovery of attorneys fees in actions against professional employees of school districts.
- Permission for an association or alliance to sue.

<sup>87</sup> Vernon's Texas Civil Statutes, Chapter 21, <http://www.capitol.state.tx.us/statutes/vn/vn007105.html#top>.

<sup>88</sup> House Bill 4.

<sup>89</sup> Ibid.

- Limitation on the liability of hospitals.
- Requirements for judges to refer lawsuits to state agencies if claims fall within the agency's jurisdiction.
- Cost of appeal bonds.
- Regulation and rollback of rates for liability insurance premiums.<sup>90</sup>

The Texas Legislature also passed H.J.R. 3 as a companion to H.B. 4. H.J.R. 3 is a constitutional amendment to ensure that the Legislature possesses authority to enact a cap on non-economic damages.<sup>91</sup> Both H.J.R. 3 and H.B. 4 now await Senate approval. If H.J.R. 3 is approved by the Senate, voters will have the opportunity to decide on the merits of limiting non-economic damages in the courts of Texas.

## **X. Texas Debate: Medical Liability, Litigation And Legislation**

There are many points on which most Texans now agree:

- The situation in Texas is dire and must be remedied now by the Texas Legislature.
- Availability and quality of health care are endangered.
- The high cost of medical liability insurance is driving medical providers to reduce or eliminate care.
- Costs for health insurance and health care are too high for too many.

Texans seem to disagree on what causes the current crisis and how to fix it. This disagreement is sometimes tainted with misinformation and efforts to cast blame. Three allegations threaten to distract and divert the Texas Legislature from solving the health care crisis.

*First Claim:* Civil justice reforms now considered by the Legislature promise to protect negligent doctors. The high costs of medical liability insurance and lawsuit awards are caused by the careless acts of a very small number of physicians. This crisis can only be solved by forcing doctors to police themselves.

*Facts:* Numbers produced by the U.S. Department of Health and Human Services tell a very different story. Nationally, less than two percent of malpractice lawsuits that get to court actually result in a decision for the patient.<sup>92</sup> These numbers suggest that negligence is rare; the courts are not shielding health care providers.

The high cost of medical liability insurance results primarily from high dollar jury awards for non-economic losses, according to the 2003 report, *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*. This report indicts the litigation system – not doctors and

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<sup>90</sup> The Texas Public Policy Foundation recently published a report that describes the long-term ineffectiveness of regulation and rollback on lowering insurance rates – *Shopping for a Solution: Effective consumer protection through competitive regulation of rates*, <http://www.texaspolicy.com>.

<sup>91</sup> *Bill Analysis-HJR 3*, House Research Organization, Austin, TX, March 26, 2003, pages 3 and 4.

<sup>92</sup> *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the quality of Care*, page 15.

not insurance companies – for runaway court costs and soaring medical liability insurance premiums.

The legal system has proven itself unable to identify negligent doctors, rectify medical errors or bring justice to wronged patients. Instead, it has created perverse incentives against identifying negligence and improving care. The legal system is largely responsible for deterioration of the quality of health care today and must be fixed.

*Second Claim:* The legislation proposed to solve today’s crisis will only protect greedy businesses. The high cost of medical liability insurance is the result of irresponsible insurance companies trying to recoup investment losses by hiking premiums. This crisis can only be solved by establishing strict state regulation of the liability insurance rates and forcing insurance companies to swallow their investment losses – without passing along the pain to consumers.

*Facts:* Neither investment income nor asset allocation has caused the increased cost of medical liability insurance premiums, according to an independent study by Brown Brother Harriman & Company, cited by the U.S. Department of Health and Human Services.<sup>93</sup> To explain the rising cost of medical liability insurance, Texas Insurance Commissioner Jose Montemayor told the Valley Morning Star Newspaper, “stock losses are responsible for five percent of the problem and the remaining 95 percent are due to insurance company losses from claims.”<sup>94</sup>

The National Association of Insurance Commissioners (NAIC) states, “the preliminary evidence points to rising loss costs and defense costs associated with litigation as the principle drivers of medical malpractice prices.”<sup>95</sup> After reviewing insurance data, NAIC states that there is no evidence that insurers engage in price fixing, bid rigging or market allocation.<sup>96</sup>

Because over 60 percent of doctors nationally are insured by the Physicians Insurer’s Association of America, a consortium of doctors who insure themselves, it makes no sense to blame the largest insurer of practitioners for increases in the cost of liability insurance when this insurer has no vested interest in higher premiums.<sup>97</sup>

Regulating rates and enacting rollbacks of insurance premiums will not help Texas. Research and experience of other states offer unshakeable evidence that

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<sup>93</sup> *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*, page 34.

<sup>94</sup> “Liability litigation reform will save many Texas doctors.”

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> John T. Wenders, “Time for Tort Reform in Oklahoma” in *Perspective Public Policy Journal*, Oklahoma Council of Public Affairs, March 2003, Volume 10, Number 3.

insurance rate regulation and rollbacks offer no long-term relief from cost hikes and actually worsen problems of insurance availability.<sup>98</sup>

*Third Claim:* A cap on non-economic damages will help no one. It will hurt patients and their families, and it will not lower the cost of medical liability insurance premiums. It is simply a myth that California's cap on non-economic damages has reduced insurance rates.

*Facts:* A cap on non-economic damages would affect very few patients and families. However, a cap would benefit the majority of Texans – individuals who experience delayed access to medical care, unnecessary treatments, and inflated health care expenses, problems caused by a dysfunctional medical legal system.

A non-economic cap does not preclude awards for the economic losses incurred by individuals who are not in the workforce but furnish essential services to others. Compensation for the loss of a mother or grandmother, for example, caring for children in the home can be fully captured as economic damages.

Caps have a proven track record for reducing or constraining the cost of liability insurance in California and nine other states. Between 1994 and 1998, California's tort reform redirected more than \$77 million dollars of high damage awards from trial lawyers to patients, according to the Medical Insurance Exchange of California.<sup>99</sup>

Most people see the need for caps on non-economic damages. Seventy-three percent of Americans support a cap on non-economic damages, according to a survey conducted by the Health Care Liability Alliance.<sup>100</sup> A recent Gallup Poll indicates that 69 percent of Texans favor a constitutional amendment to cap non-economic damages.<sup>101</sup>

While non-economic damages cannot fully compensate for the pain of an injury or emotional anguish, these awards – invariably huge and entirely subjective – wreak untold damage on the medical-legal system for everyone.

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<sup>98</sup> *Shopping for a Solution: Effective consumer protection through competitive regulation of insurance rates.*

<sup>99</sup> *How Patients and Doctors Are Suffering While Lawyers Profit From Litigation.*

<sup>100</sup> *U.S. needs medical liability reform to avert emerging medical crisis*, the American Medical Association, June 12, 2002, <http://www.ama-assn.org/ama/pub/article1616-6352.html>.

<sup>101</sup> *News Release-Current Opinion in Texas.*

## **XI. Conclusion: Improve Health Care With Civil Justice Reform**

The complex, destructive connection between doctors and lawyers must be resolved by reforms of the Texas system of civil justice. Excessive, exorbitant medical litigation benefits few and harms many. Every Texan is afflicted by the eroding quality and availability of health care caused by medical litigation.

The civil justice system should be reformed to serve all Texans – those who sit in courtrooms and those who do not. Texans need the civil justice system to ensure that state courts dispense justice, offer protection from frivolous lawsuits, determine reasonable compensation for loss, and levy fair punishment proportional to responsibility. Texans also need the civil justice system to protect the health care system from the pernicious impact of unreasonable legal jeopardy.

The health care crisis is urgent – every Texan is at risk today of not finding care when it is most needed, and at risk of suffering the effects of too much care. Texans cannot afford to wait until federal legislation is passed to solve this crisis. Today, while the nation awaits the fate of the federal HEALTH Act, Texas has an opportunity to tailor legal solutions for the health care crisis to meet its own unique needs. The Texas Legislature must offer Texans immediate relief and shoulder an ambitious, long-term effort to improve the quality and availability of health care by introducing civil justice reform and patient care protections.

### **Policy Recommendations For The Texas Legislature: Resolving Texas' Health Care Crisis With Civil Justice Reform**

- Ensure that victims and their families have the right to recover full economic damages for proven direct and indirect losses.
- Cap non-economic damages at \$250,000 for medical liability.
- Provide for payment of judgments over time.
- Provide that defendants pay in proportion to fault.
- Establish a sliding scale for contingent attorney fees.
- Prohibit an award for products that comply with federal standards.
- Establish immunity for health care providers engaged in peer-review programs that identify past errors and implement patient care protections.

## **XII. About The Authors**

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