



Texas Health Care

PATIENT SAFETY CALLS FOR LEGISLATIVE PRIORITY

Because medical errors have reached crisis proportions in Texas, patient protection and healthcare liability reforms demand priority attention in the 2003 legislative session.

Research documented by the *Dallas Morning News* lists **6038** medical malpractice claims reported to the Texas State Board of Medical Examiners between January 2001 and May 2002. Of that number, there were **0** claims investigated by the board. In that period and, in fact since 1997, the number of doctors' licenses revoked because of medical errors was **0**.

Clearly, the Board, in its inability or unwillingness to investigate and discipline doctors, is not meeting its mission to regulate the practice of medicine in protecting the public.

The entire Texas healthcare system is further debilitated by insurance companies' unjustifiable rate increases, refusal to file legitimate claims and to insure potential policyholders. The statewide insurance crisis is also due to lack of adequate oversight and authority.

Consumers and victims of medical malpractice will be advocating for dramatic pro-active reforms to the medical accountability systems in Texas, including:

- **Creating a system to identify, monitor and correct medical errors**
- **Requiring the state to collect information on hospital medical errors and**

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A Case Of Misdirected Reform

Federal Cap on Malpractice Claims Will Not Solve Health Care Problem

President Bush's proposal for strict limits on medical malpractice awards to control soaring premiums for medical liability insurance will benefit neither doctors nor patients. The problem is too complex to be fixed with a single rigid ceiling on jury awards.

A federally-imposed \$250,000 cap for pain and suffering doesn't address the root of the problem—skyrocketing insurance costs—and the insurance industry which, exempt from anti-trust laws, operates with a free hand in controlling America's health care system and in forcing doctors to pay for its recent investment losses.

Applying a one-size-fits-all cap to the amount the insurance industry should pay to victims of medical negligence is an arbitrary, insensitive and unjust method to determine fair compensation to those whose lives have been devastated or destroyed by medical carelessness.

While the president and a lobbying alliance financed by the American Medical Association and the insurance industry say that caps will lower doctors' premiums driven up by jury awards, experiences in several states disprove the prediction:

- West Virginia just passed caps on injured patients last year and insurers did not reduce rates. West Virginia physicians walked out early this year protesting high premiums.
- Nevada insurers pled with the legislature to pass caps on patients' rights last year. As soon as caps were enacted, insurers announced they would *not* reduce rates.
- In Missouri, which has caps, the number of claims and the cost per claim have been declining, yet medical malpractice premiums have been spiraling out of control.
- Malpractice premiums in California increased by 190 percent during the first 12 years following enactment of the \$250,000 cap on non-economic damages. It took that state's Proposition 103 – insurance reform – to lower and stabilize malpractice premium rates.

Even representatives of the insurance industry attribute premium increases to factors other than jury awards. When Florida passed caps in the mid-80s, Aetna

and St. Paul studied their own medical malpractice claims history. Their internal memos conclude that caps do not save doctors money on medical malpractice premiums. And, in the June 24, 2002 *Wall Street Journal*, the chief executive of a leading California malpractice insurer was quoted: "I don't like to hear insurance company executives say it's the tort system. It's self-inflicted."

Those other factors—poor investment returns and insurers' own business practices—have received little attention. Figures collected by the federal government show that court judgments in malpractice cases have not risen nearly as fast as advocates of new limits have asserted. In fact, the average size of judgments against doctors and other health care workers dropped in the first nine months of 2002. Yet, malpractice premiums in some areas have escalated to unaffordable levels. Miami obstetricians paid up to \$210,000 last year for liability insurance, while general surgeons were charged up to \$174,000 according to the Medical Liability Monitor, an independent newsletter which tracks the malpractice insurance industry. Specialties like internal medicine, general surgery and obstetrics and gynecology each had average increases nationally of 30 to 40 percent over the last two years. In addition to soaring malpractice charges, budget cuts and pressures to limit the cost of treatment from government plans like Medicare have driven doctors to leave the profession, retire or give up high-risk procedures.

Until insurance practices are more closely regulated, doctors' livelihoods and patient lives will continue to be threatened by corporate interests that put profits over patients. Removal of insurance companies' anti-trust exemption, requiring prior rate approval and demanding justification for rate increases should be the focus of state insurance commissioners.

Would the insurance industry consider imposing a cap on premiums, which would not be allowed to escalate and would be linked directly to limits on malpractice awards?

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High Court Ruling Orders Insurer To Fund Charity

In what is believed to be an unprecedented legal decision, the Ohio Supreme Court, in a recent ruling against a major health insurer, ordered the creation of a memorial charity to be funded with punitive damages.

The unusual order derived from allegations of breach of contract, bad faith and demand for punitive damages brought by Robert Dardinger against Anthem Blue Cross and Blue Shield and its parent company, Anthem Insurance, on behalf of his late wife, Esther Dardinger, who was 49. Esther Dardinger died in 1997 from a brain tumor while appealing Anthem's decision to stop paying for chemotherapy treatments.

The Ohio Supreme Court, upholding \$30 million of \$49 million in punitive damages awarded by a lower court against Anthem, directed the creation of a memorial cancer research fund at Ohio State University in Esther Dardinger's name.

Esther Dardinger's physician had recommended her for intra-arterial chemotherapy. A hospital review board approved the treatment and the insurer approved the first of 12 treatments. Two more treatments were approved before a higher-level reviewer deemed the treatment "experimental." The company refused further payments.

The patient responded well to the treatments but her health deteriorated during the appeal process that culminated with a final denial letter arriving the day after her funeral.

The state high court majority awarded \$10 million of the punitive damages, plus \$2.5 million in compensatory damages and an estimated \$9 million in post-trial interest to Robert Dardinger. The remaining \$20 million, after attorney fees and court costs, are to be donated to the newly created cancer research fund.

The majority said funding research at OSU would bridge the "void between the reasons we award punitive damages and how the damages are distributed" by achieving "a societal good that can rationally offset the harm done by the defendants in this case."

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The Cost of Corporate Fraud

Chamber of Commerce Ad Attack Shifts Attention To Legal System

The TV, newspaper and internet "lawsuit abuse" ads run by the U.S. Chamber of Commerce, at an estimated cost of \$15 million, are a calculated attempt to divert public attention away from an unprecedented wave of corporate fraud.

The absurd assumption that 2 percent of the cost of goods and services purchased by American consumers is due to excessive litigation underlies the ads, which claim that "phony lawsuits" add \$500 to the cost of a car, \$3.12 to a week's worth of groceries and 70 cents to a pair of blue jeans.

The ads are based on numbers from a study by the White House Council of Economic Advisers (CEA), who got *its* numbers from a report by an insurance consulting firm.

The CEA labels \$40 billion of injury costs as "excessive," suggesting that all non-economic damages—compensation for injuries and loss of lives due to dangerous products or medical errors—are random and unwarranted. A second faulty assumption is that transaction costs of the civil justice system should be at the same level as those of the workers' compensation system. Workers' compensation is a no-fault system that determines payment according to a schedule for particular injuries, not an assessment of responsibility that addresses questions about product safety or corporate wrongdoing.

Further false advertising by the Chamber of Commerce suggests that only attorneys benefit from class action awards. In fact, judges are required to fix reasonable attorneys' fees and do so by basing the fee on the entire sum of benefits provided to all class members, not the amount that each class member receives. The ad implies that consumers have to pay money out of their own pockets to cover class counsel's fees. There is only one such case on record. The Chamber trumpets the "Bill of Rights" provisions of H.R. 2341, legislation that would require "judicial scrutiny of coupon settlements," overlooking the fact that stronger versions of these redundant provisions are already due to take effect this year.

The claim that legal costs are a "tax" is designed to deceive the American public, shifting attention away from the *real* abuse tax foisted on countless Americans, who have seen their financial security destroyed by widespread corporate corruption.

Recent corporate accounting scandals have cost Americans more than \$200 billion. The Institute for America's Future reports that losses from individual retirement accounts, alone, totaled \$175 billion, and public pension

funds nationwide lost at least \$6.4 billion as the stock market plummeted. [In Texas, investors in 401(k) plans had total losses of \$11.47 billion from 2000-2001.] The report estimated that more than a million workers lost their jobs while company executives cashed out billions of dollars in their stock.

The trend of reporting high profits to shareholders and low profits to the IRS also cost the treasury billions of dollars in federal tax revenue. Using data provided by the Institute on Taxation and Economic Policy, American Family Voices found close to \$13 billion that went uncollected due to this practice.

Corporate annual reports and/or 10-K forms show, for example, that in 2000, Enron reported a profit of \$618 million to shareholders and \$794 million to the IRS, resulting in a \$494 million income tax gap from shareholder profits. In 2001, Microsoft reported \$9,612 million to shareholders, \$3,363 million to the IRS with a gap of \$2,187 million. While 4500 Enron employees lost their jobs, CEO Ken Lay received \$33.5 million in total compensation for 2000.

Hidden behind the transparent agenda of the Chamber of Commerce advertising campaign—to undermine public support for the legal system—is the economic devastation to millions of innocent people as a result of corporate fraud.

TEXAS HEALTH CARE

(Continued From Page 1)

creating a task force to recommend how hospitals can eliminate errors

- Making complaint and medical error information available to the public
- Posting details of disciplinary orders about doctors and hospitals on the internet

- Prohibiting a doctor whose license has been revoked or suspended in another state from practicing in Texas

- Creating criminal penalties for failure to disclose a prior disciplinary action
- Providing whistle-blower protection for doctors, nurses and other caregivers

Patient Safety Advocates, a project of Texas Watch, will not only support these desperately needed reforms but will also promote legislative initiatives to change the way Texas regulates insurance companies and to improve legal protections and rights of Texas patients.

SOUTH CAROLINA SETS PRECEDENT IN BANNING SECRET SETTLEMENTS

Last November, South Carolina's 10 active federal trial judges took the historic action of banning the common practice of secret settlements, marking the nation's first attempt in a state federal court system to open a secret part of the courts to the public that supports them.

On January 21, a proposal to ban secret settlements in all state courts in South Carolina became the subject of an active debate in a public hearing in the Supreme Court's chambers. Of the more than 150 pages of comments and documents received regarding the proposed ban, most favored continuing to allow court secrecy. Opposition to Rule 38, barring confidential court settlements, proposed by Supreme Court Chief Justice Jean Toal, an advocate of openness, came from doctors, insurers and corporate attorneys.

It is not surprising that insurance companies, the health care industry and the legal experts who represent them would oppose open records. Secret settlements keep allegations of unsafe products and harmful conduct away from the press and out of the public eye.

Secret settlements prevent public disclosure of dangerous doctors and dangerous products. Secret settlements keep the public from knowing about child molesters. Secret settlements avoid trial and publicity by paying a victim money in return for the victim's silence.

The state of South Carolina should be applauded for taking the lead in banning agreements that hide the truth and endanger lives. Other states should follow suit, and the precedent established by South Carolina's federal court should influence passage of the proposal to bar confidential settlements in the state courts. A three-fifths vote in each house of the General Assembly is required for approval.

By denying the public open access to court documents, secrecy cripples health and safety initiatives and undermines the integrity of the judicial system. Courts are the province of the people, who have a fundamental right to know what goes on behind closed doors. Secret settlements are an insidious practice that over the years have led to untold suffering, hundreds of injuries and deaths and increased legal costs.

ALT-RUISM

DESTINY IS NOT A MATTER
OF CHANCE, IT IS
A MATTER OF CHOICE.

Front Row, Left to Right:
Alex Escamilla, Kirston St. John,
Hannah Baker, Susan Abusi,
Hannah Kirkland, Carissa La Fleur

Second Row, Left to Right:
Paige Phillips, Bianca Saldana,
Kamilah Todd, Breanna Stafford,
Lindsey Landers

Back Row, Left to Right:
Coach Ron Escamilla,
Coach Alton Todd,
Coach Karin St. John,
Coach Tony Escamilla



Alton Todd Coaches Lady Altlaws' Final Season

The Lady Altlaws U-10 girls soccer team had their best season ever, tying for 2nd place in their division at the end of the regular season and advancing to the area playoffs. They were defeated in a shoot-out by the host Eastbelt team that easily won the finals over

Texas City. Six of the girls, including **Kamilah Todd**, had been with the team for six seasons beginning at age 4. They will now move on to Blue team competition and selected from an open draft. Coach Alton Todd is going to miss his Lady Altlaws.

TEXAS JUDGMENT AGAINST FORD 4TH HIGHEST JURY VERDICT IN 2002

The 4th highest jury verdict issued in 2002 to individual plaintiffs injured in a single incident was a \$225 million award against Ford Motor Company. The judgment in San Diego, Texas, to compensate the families of two people killed when they were ejected from an overturning Ford F-150 extended-cab pickup is one of the largest ever compensation-only products liability awards.

Plaintiffs' attorneys in *Benavides v. K.A. Childs Motors Inc. and Ford Motor Company* successfully argued that the doors opened during the accident because Ford removed the center roof pillar when it expanded the truck with a four-door crew cab. The Insurance Institute of Highway Safety gave the F-150 a "poor" rating based on crash tests during which the passenger side doors opened because of impact.

In the largest verdict in the annual list compiled by *Lawyers Weekly USA*, a small-firm lawyer in Los Angeles recovered a record punitive damage award of \$28 billion for a woman who blamed her lung cancer on smoking Philip Morris cigarettes. A judge later reduced the award to \$28 million.

A Missouri jury awarded \$2.2 billion to a victim of pharmacist Robert Courtney who received a 30-year prison sentence for diluting cancer drugs.

It took a Kentucky jury just two hours last year to return the 3rd highest verdict of \$270 million against Equitable Resources for a man burned in an explosion at his home. An Oregon jury awarded \$150 million to a plaintiff who died from cancer after smoking "light" cigarettes.

Relentless discovery was the key to a \$122 million accident award in Alabama against General Motors for eliminating safety features in an Oldsmobile vehicle. A California jury awarded \$97.2 million in a fraud suit against the company operated by the state's Republican candidate for governor by a plaintiff who was a convicted drug smuggler.

A New York jury rejected a defense argument that doctors acted properly in delivering a child prematurely, and the result was a \$94.5 million award for the badly injured child. Also in Brooklyn, in a case that could have settled for \$1 million, a medical malpractice suit over a child born with cerebral palsy resulted in a \$91 million plaintiff's verdict.

Two \$80 million awards tied for the 10th highest verdicts. For the second time in less than two years, a New York attorney won a verdict against the same pair of obstetricians, and a Missouri jury award faulted General

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MULTIPLE MALPRACTICE SUITS FOR STATE OF UNION GUEST

A Florida obstetrician invited to President Bush's State of the Union address has been sued three times for medical malpractice. All of the lawsuits were settled in the past three years.

One of the cases involved the death of a newborn who suffered brain damage during birth. Another followed a hysterectomy in which the doctor punctured the woman's bowel during laparoscopy.

Considering her track record, Dr. Denise Baker was not a good choice to represent doctors as victims, squeezed by medical malpractice costs. One of the plaintiffs' attorneys in the settlements noted that her record proves she is part of the reason for the current medical liability crisis.

The cases were settled for \$225,000, \$250,000 and \$95,000 (none exceeding the federal limits proposed for medical malpractice awards), and Baker's insurance company notified her of a 244 percent premium increase. The obstetrician opted to give up delivering babies, referring her pregnant patients to other doctors.

Top 10 Jury Verdicts

(Continued From Page 3)

Motors for an accident in which a woman's car suddenly ricocheted out of her driveway as she was backing out of her garage.

All of the top awards in 2001 were reduced, are under appeal or awaiting a new trial. The same is expected for the highest jury verdicts of 2002.

Litigation Is American Way To Achieve Social Justice

Ours is a "suit-happy" society, where the contentious can win millions by successfully blaming large corporations for their own accidents and irresponsible actions.

Such is a common criticism of litigation policies in America and the greedy lawyers who perpetuate them.

But, the critics are dead wrong, says Thomas F. Burke, assistant professor at Wellesley College and author of *Lawyers, Lawsuits and Legal Rights: The Battle over Litigation in American Society*. Burke, who has drilled deeply into America's unique culture of litigation, offers dispassionate and compelling support that the function of litigation in America is a distinctly cultural phenomenon, having deep roots in our Constitution and politics. While other countries rely on bureaucratic judgment to resolve debates, America turns to the courts.

The widespread attack on litigation, Burke reasons, results from the dedicated efforts of image makers and business interests who have invented a litigation "crisis" to serve their own purposes.

This insightful and fascinating study contrasts the American judicial tradition with the European system of bureaucracies where government policies are decided by centralized hierarchies. To illustrate his theory, Burke spotlights recent efforts to eliminate whole categories of litigation and replace them with alternative bureaucratic mechanisms, like the 9/11 victims compensation act, no-fault automobile insurance or workers' compensation. These "replacement reforms" are not successful because of the distrust of the

expanding government, for one obvious reason, as well as the great advantages to policy makers of litigious policies.

These advantages represent the strength of the author's meticulous analysis and conclusions: **First**, litigation is insulated from political pressures that affect bureaucratic agencies. Moreover, courts are relatively unaccountable for their decisions. Voters unhappy with a court decision cannot easily trace responsibility for it back to choices originally made by legislators and are in a poor position to demand policy change.

Secondly, litigious policies can shift costs. Litigation is mainly funded by the parties who do the litigating with only minor costs to the government. **Thirdly**, litigious policies offer a way to control the actions of states and localities. The right to sue gives victims the ability to exercise local control over wrongdoers.

Finally, favored by both the public and by policy makers, litigation fits our constitutional structure, reflecting the fundamental political values of our society. Litigation is the touchstone of American law, the American way of achieving social justice.

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