

*Deceptive Rhetoric*  
**vs.**  
*Documented Truth*  
*on Civil Justice*

BRIEFING PAPER

March 2005

BY THE WISCONSIN ACADEMY OF TRIAL LAWYERS



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# EXECUTIVE SUMMARY

In this briefing paper, we are presenting vital data that examines each of the principal assertions of those attacking the civil justice system. From looking at all of the central claims, the evidence clearly establishes that our rights-based legal system is not linked to the mounting failures of the US health system. Similarly, the assertion that US jobs are “driven” overseas by lawsuits is equally unfounded.

Access to the Courts is a fundamental right in this country. It is enshrined in our federal constitution in the Seventh Amendment, which guarantees a right to trial by jury. Yet that right is under attack.

The exercise of this basic legal right has been blamed for some of the nation’s most urgent and emotionally-charged problems. It is portrayed as the cause of rising numbers of uninsured people, soaring health-care premiums, huge increases in doctors’ malpractice premiums, doctors moving from one state to another or quitting the practice, hurting American business competitiveness, and even more dubiously, for US corporations shifting jobs to facilities in Mexico, China, and India.

The attackers incessantly equate our Constitutionally-based legal right to trial by jury with “frivolous lawsuits,” “jackpot justice,” and an “out of control legal system.”

The dissemination of these deceptive claims reflects the self-interested agenda of major political donors. It also advances the political strategy of switching the topic from the severe failings of the US healthcare system.<sup>1</sup> Health-care related interests have contributed \$162.3 million to federal candidates and committees.<sup>2</sup>

The claims that medical malpractice cases and other “frivolous” lawsuits are clogging our courts is repeated ceaselessly by proponents of “reform” and major health care interests<sup>3</sup> Yet evidence to back up these assertions has rarely been

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<sup>1</sup> Despite being the most costly health care system both in terms of per-capita and total health spending (\$1.6 trillion), the US health system has produced overall health outcomes for US citizens ranking only 15<sup>th</sup> best globally (World Health Organization), insurance premiums for families that have escalated nearly 60% since 2001 (Kaiser Family Foundation Survey), and a rapid increase in the number of uninsured Americans, climbing 5.2 million to 45 million since 2000 (US Census Data).

<sup>2</sup> “Paybacks: How the White House and Congress Are Neglecting Our Health Care Because of Their Corporate Contributors,” report issued by Public Campaign and Public Citizen, August, 2004, available at [www.commondreams.org/news2004/0818-06.htm](http://www.commondreams.org/news2004/0818-06.htm).

<sup>3</sup> A preoccupation with tort “reform” and “frivolous” lawsuits has been a hallmark of George W. Bush’s political career, and correlates with the heavy support for his political career by Enron and its CEO Kenneth Lay, founder of Texans for Lawsuit Reform. For example, Bush once declared, “Probably the first and most important thing I will do when I am governor of this state is to insist Texas changes the tort laws and insist we end the frivolous and junk lawsuits that threaten our producers and crowd our courts.” Quoted in Julian Borger and Marvin Kettle, “How big money buys big votes in US Race,” *Guardian Unlimited*, Oct. 10, 2000, available at [www.guardian.co.uk](http://www.guardian.co.uk). See also Kevin Phillips, *American Dynasty: Aristocracy, Fortune, and the Politics of Deceit in the House of Bush*, especially Chapter 5, “The Enron-Halliburton Administration.” (NY:Viking Penguin, 2004).

called for, much less scrutinized.<sup>4</sup> These themes have come to dominate the public debate, despite their careful omission of central issues as pervasive medical errors, the role of insurance corporations in setting malpractice rates, and the fundamental flaws in the US health system. The prominence of the anti-civil justice themes is a reflection of a sustained and systematic public-relations campaign spanning major foundations (including Wisconsin-based Bradley Foundation), pro-corporate think tanks and spokesmen, and a variety of commercial media.<sup>5</sup>

The surrender of vital Constitutional rights—as called for by advocates of tort “reform”—will curb neither the healthcare crisis nor the outflow of jobs to low-wage nations. Legal “de-form” is no substitute for genuine healthcare reform or restoring corporate loyalty to the US workers and communities who provided the basis for their prosperity.

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<sup>4</sup>See Stephanie Mencimer, “False Alarm: How the media helps the insurance industry and the GOP promote the myth of the America’s ‘lawsuit crisis,’” *Washington Monthly*, Oct. 2004; Neil deMause, “Trial by Anecdote: Newsweek’s ‘lawsuit explosion’ blown away by facts,” *Extra!*, March/April 2004, available at [www.fair.org](http://www.fair.org), and commentary by malpractice victim Linda McDougal of Wisconsin in *Newsweek*, Dec. 22, 2003; and “Dart to *Newsweek*,” *Columbia Journalism Review*, March/April 2004. An Oct. 6 news release by Public Citizen carefully analyzes claims by Vice President Cheney, and is available at [www.citizen.org/pressroom/release.cfm?ID=1805](http://www.citizen.org/pressroom/release.cfm?ID=1805)

<sup>5</sup> David C. Johnson, “The Attack on Trial Lawyers and Tort Law,” report released by Commonweal Institute, Oct. 1, 2003

# MYTH 1:

*We're being hit with a "litigation explosion."*

## **REALITY:**

*There is no "litigation explosion." It is a false accusation.*

## **EVIDENCE:**

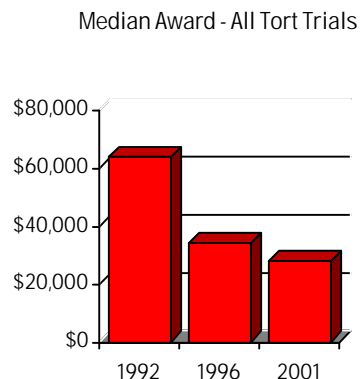
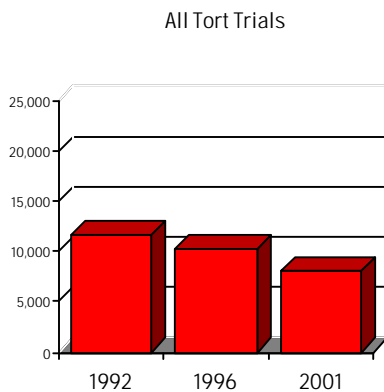
### **NATIONAL CENTER FOR STATE COURTS: State Tort Litigation Decreasing**

Recent analysis from the National Center for State Courts<sup>6</sup> found that since 1992:

- ?? Tort filings have declined by 9%. In addition, contract cases, which overwhelmingly involve businesses suing businesses, exceeded the volume of tort cases in all but 4 years from 1987 to 2001. (Tort cases involve automobile damages, product liability and medical malpractice.)
- ?? Automobile tort filings, which make up the majority of all tort claims, have fallen by 14%.
- ?? Medical malpractice filings per 100,000 population have fallen by 1%.
- ?? In 22 of the 30 states that NCSC examined population-adjusted tort filings declined from 1992 to 2001. The average change in tort filings across all 30 states was a 15% decrease.

### **BUREAU OF JUSTICE STATISTICS: Frequency and Award Size Down**

The Bureau of Justice Statistics, a division of the Department of Justice, found that the number of civil trials dropped by 47% between 1992 and 2001.<sup>7</sup> The number of tort cases decreased by 31.8% during the same period. The trend in award size was also down. The median inflation-adjusted award in all tort cases dropped 56.3% between 1992 and 2001 to \$28,000.

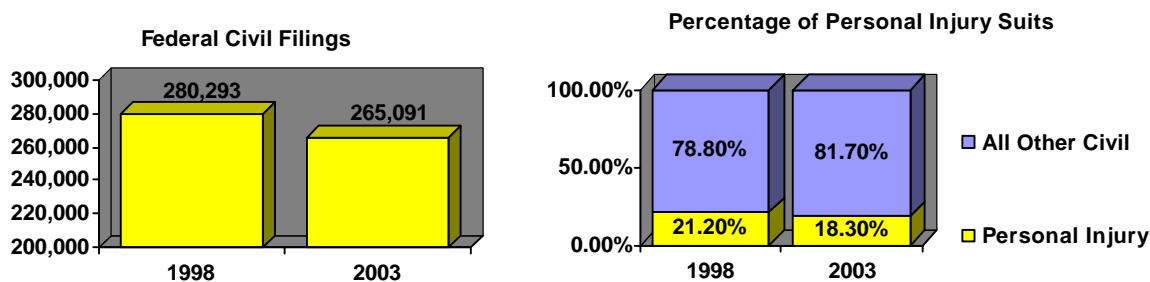


<sup>6</sup> *Examining the Work of State Courts 2002*, p. 25, National Center for State Courts.

<sup>7</sup> *Civil Trial Cases and Verdicts in Large Counties, 2001*, Thomas H. Cohen, Steven K. Smith, Bureau of Justice Statistics, 2004.

**ADMINISTRATIVE OFFICE OF THE U.S. COURTS: Federal Civil Litigation Decreasing**

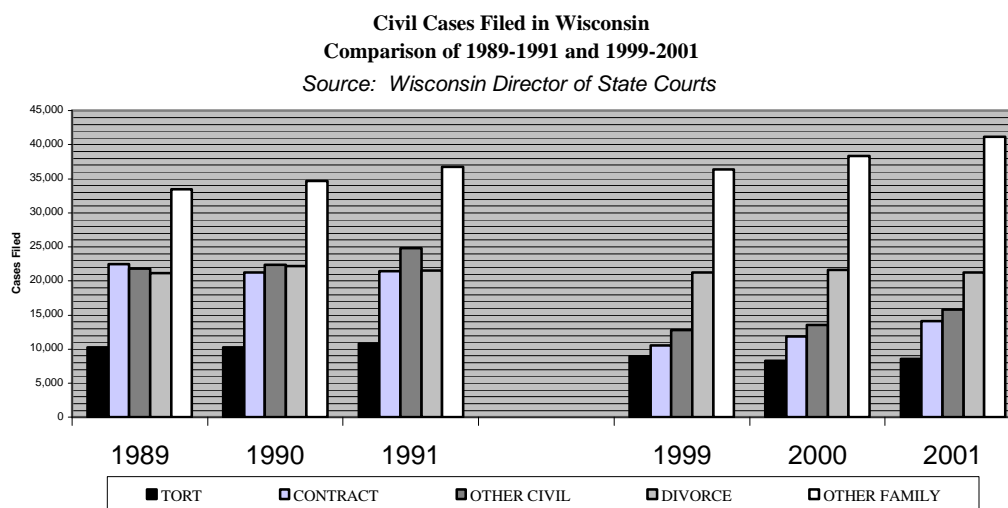
According to the Administrative Office of the U.S. Courts, tort actions in U.S. District Courts dropped by 28% from 2002 to 2003.<sup>8</sup> In addition, over the last five years federal civil filings are not only down, but the percentage of civil filings that are personal injury cases has also declined.<sup>9</sup>



**Wisconsin Director of State Courts Tort Filings are Down**

The data on court filings from the Wisconsin Director of State Courts reveal<sup>10</sup>:

- ?? Torts, those cases that encompass product liability, personal injury and medical malpractice, made up 8,581 cases out of a total of 256,596 civil case filings, including uncontested small claims, in 2001, or 3 percent of civil case filings.
- ?? Tort filings have decreased over the last ten years both in absolute numbers and as they relate to Wisconsin’s population. In 1991, there were 10,785 tort cases filed compared to 8,581 in 2001, a 20% decrease.
- ?? Civil cases comprise less of the workload of the circuit courts than 10 years ago while the number of criminal cases have increased.
- ?? Tort filings have decreased, while the number of contract filings have increased.



<sup>8</sup> Judicial Facts and Figures, Table 2.2, Administrative Office of the U.S. Courts.

<sup>9</sup> Federal Judicial Caseload Statistics, Judicial Caseload Indicators, 2002 & 2003, Administrative Office of the U.S. Courts.

<sup>10</sup> For a full discussion of Wisconsin court statistics, See, Ruth Simpson, “We’re Not Seeing You in Court,” *The Verdict*, p. 12, Spring 2003.

# MYTH 2:

*We're being flooded with "frivolous lawsuits."*

## **REALITY:**

*Lawyers who file "frivolous" lawsuits can be sanctioned and it is a money-losing proposition.*

## **EVIDENCE:**

Corporate spokesmen and their political allies make frequent claims that the nation is being flooded with "frivolous" lawsuits and one might understandably believe that such meritless cases are common.

Thus, it is highly revealing to contrast these sweeping claims against the testimony of the top medical-industry advocate in Florida. Florida is listed by the AMA as being in a "malpractice-premium crisis, yet the top Medical Association official called into serious question whether frivolous lawsuits are even a minor factor in her state. Sandra Mortham, the chief executive of the Florida Medical Association admitted under oath, "**I don't feel that I have the information to say whether or not there are frivolous lawsuits in the state of Florida.**"<sup>11</sup>

Data in this briefing paper illustrates decisively that the number of tort cases (medical malpractice, product liability and auto and property damage) has actually fallen significantly. But this data somehow captures little attention, perhaps because dry-sounding statistics are much less interesting to media outlets than anecdotes that purport to show human stupidity and greed. Along with recognizing the data's implications that there is no "lawsuit explosion" or "flood of frivolous lawsuits," it is also vital to understand several other elements of the "frivolous" claim:

**A legal defeat does not prove a case is "frivolous."** There is a common assumption that a loss at trial decisively signifies that a case is indeed "frivolous." If that were the case, the prosecution of O.J. Simpson was "frivolous." Frivolous means legally worthless or without merit. But the realities of pursuing a lawsuit suggest a widespread lack of understanding of what goes into such a case. First, the plaintiff must hold a firm conviction that he or another family member has been severely harmed and that they are willing to pursue the case. This means being willing to relive the psychological trauma of a disabling injury or death and bearing the knowledge that the case may not be resolved in their favor.

For the attorney, the decision to pursue a case means researching the facts, finding experts who are willing to testify that negligence occurred and concluding that a case is both credible and potentially understandable to juries. The attorney must also consider the financial implications. If an attorney loses they receive nothing — money for experts and for the many hours invested in the case go uncompensated. For example, let us review medical malpractice cases. Medical malpractice cases are difficult to pursue because they often may involve several doctors and a multiplicity of medical experts offering their testimony on complex issues. Juries are understandably hesitant to impose a finding of wrongdoing on doctors, who are often respected

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<sup>11</sup> Bob Herbert, "Medical Malpractice Lawsuits: Do we have a crisis or an industry sham?" *New York Times*, June 25, 2004.

community members.<sup>12</sup> Moreover, data shows that the public has been deeply persuaded by the advertising and PR efforts of those promoting tort “reform.” When serving as jurors, those exposed to such persuasion are much more reluctant to decide in favor of the plaintiffs.<sup>13</sup> As a consequence, it is not surprising that juries in recent years have been ruling in support of the doctors about 73% of the time.<sup>14</sup>

Still, data indicate that there is a huge volume of deaths and serious injuries caused by medical errors. A recent HealthGrades study estimated that up to 195,000 Americans die each year due to hospital errors.<sup>15</sup> However, only one in eight injured patients take any legal action and only 1 in 16 are ever compensated for the harm.<sup>16</sup> The evidence clearly suggests that medical malpractice claims are rarely filed despite a large number of avoidable injuries and deaths; that most claims are actually closed without payment to the claimant; that the small number of cases that reach jury trial stage do not result in a judgment for the plaintiff; that the amount of any compensation received is strongly tied to the severity of the injury suffered; and that the compensation received often falls short of economic losses.<sup>17</sup>

Filing frivolous lawsuits raises the potential for legal sanctions of an attorney at both the state and federal level.<sup>18</sup> Attorneys already face serious penalties for filing cases utterly lacking in merit. They can be required to pay the legal costs and attorney fees to the wronged party.

When businesses blame personal injury lawsuits for bringing “frivolous” cases, perhaps they ought to be holding up a mirror to themselves. Businesses often file truly ridiculous lawsuits against each other. For example:

?? In 1998, Kellogg Co. sued Exxon Corp., claiming that Exxon’s “whimsical tiger” logo, which had been in existence for over 30 years, would confuse consumers who associate the tiger logo with Kellogg’s Frosted Flakes mascot, “Tony the Tiger.” A federal judge in Memphis threw out the suit, saying that Kellogg was “grossly remiss in failing to assert its rights” sooner. This didn’t stop Kellogg, which further clogged the courts by appealing the verdict to the Sixth U.S. Circuit Court of Appeals in Cincinnati. In its brief, Kellogg argued that the Exxon tiger, like Tony, “walks or runs on his two hind legs and acts in a friendly manner.”

?? In November 1995, Hormel Foods, the maker of the luncheon meat SPAM, sued Jim Henson Productions to stop the creator of the Muppets from calling a character in a new movie Spa’am, claiming that the character was unclean and grotesque and would call into question the purity and quality of its meats. A federal court rejected Hormel’s claims, and Hormel also lost on appeal.

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<sup>12</sup> Neil Vidmar, **Medical Malpractice and the American Jury: Confronting the Myths about Jury Incompetence, Deep Pockets, and Outrageous Damage Awards**, p. 265, The University of Michigan Press (1996).

<sup>13</sup> Mencimer, *op cit*. Mencimer cites a 1979 study by University of California psychologist Elizabeth Loftus who found that potential jurors who were exposed to even a single insurance advertisement using fictional cases of excessive awards were willing to award much less for pain and suffering than those who did not see the ads. See also “Juror Perceptions About Lawsuits and Tort Reform,” 2003, published by The Advocates Trial and Advocacy Services, available at [www.theadvocates.com](http://www.theadvocates.com) and Brooke Tassoni, Daniel O’Fallon and Bruce Finzen, “Tort Reform: Perception Versus Reality,” *Minnesota Trial Lawyer*, available at [www.rkmc.com](http://www.rkmc.com).

<sup>14</sup> Bureau of Justice Statistics, *Medical Malpractice Trials and Verdicts in Large Counties, 2001*, April 2004.

<sup>15</sup> HealthGrades report July 2003. See *Milwaukee-Journal-Sentinel* article, 1A July 28, 2003.

<sup>16</sup> HARVARD MEDICAL PRACTICE STUDY, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK, Boston: 1990.

<sup>17</sup> Daniels and Martin, *Persistence is not always a virtue: Tort Reform, Civil Liability for Health Care, and the Lack of Empirical Evidence*, 15 BEHAV. SCI. LAW, 3 (1997).

<sup>18</sup> F.R.C.P. 11 and Wis. Stats. §§ 802.05 & 814.025.

# The McDonald's coffee spill: a case study in the PR campaign to distort the truth on civil justice

A simple paper coffee cup symbolizes a central weapon in the effort to undermine public faith in the civil justice system.

The incessantly-told anecdote of a woman winning a multi-million lawsuit against McDonald's for spilling coffee in her lap is cited as Exhibit A in "proving" that the legal system is "out of control" and easily perverted by "frivolous lawsuits."

But the conventional version of this case conceals a rather gruesome story that reflects corporate arrogance, not the greed of an opportunistic, litigious consumer.

The story begins in Albuquerque, NM in 1994, where 79-year-old, Stella Liebeck visits a McDonald's drive-through with her grandson at the wheel of the car. After purchasing her coffee, her grandson pulls over and stops the car. When Liebeck opens the coffee, it spills and burns her. No big deal, hardly meriting a multi-million penalty for the clumsiness of the alleged victim, right?

But there are crucial elements left out of the conventional version:<sup>19</sup>

- 1) **SEVERE INJURIES** Stella Liebeck suffered grievous injuries from the scalding-hot coffee. She sustained third-degree burns to her inner thighs and genitals so severe that they necessitated skin grafts.
- 2) **CORPORATE POLICY, DESPITE INJURIES** McDonald's maintained a corporate policy of serving exceptionally-hot coffee. Prior to Mrs. Liebeck's injuries, McDonald's had previously fielded over 700 complaints over the excessive heat of their coffee, with many coffee drinkers winding up in emergency rooms with severe burns. Even after all

the complaints, McDonald's continued its policy of serving coffee at about 190 degrees, compared with the 130-140 degrees found in most restaurants

- 3) **REFUSED TO COVER MEDICAL COSTS** McDonald's refused to pay Stella Liebeck's medical bills. The corporation offered only a small settlement of \$800 that was far less than her medical bills of about \$20,000.
- 4) **REFUSED TO SETTLE** Only days before the trial, a retired judge recommended McDonald's settle for \$225,000, saying a jury would likely recommend that amount. The company refused.
- 5) **JURY OUTRAGED BY INTRANSIGENCE** According to media accounts, the jury was outraged by McDonald's executives proclaiming their intransigent intention to continue their policy of serving ultra-hot coffee even in the face of widespread injuries like Mrs. Liebeck's.
- 6) **BASIS FOR PUNITIVE DAMAGES** The jury awarded Mrs. Liebeck \$200,000 for her injuries, which was reduced to \$160,000 when the jury found Mrs. Liebeck 20% at fault. It then determined that McDonald's had engaged in willful and reckless conduct, the basis for awarding punitive damages, and awarded \$2.7 million, amounting to two days' sales of coffee by McDonald's. The trial judge reduced the amount to \$480,000.

The vital facts just outline have case has rarely been heard by most Americans, although the *Wall Street Journal* presented a detailed news story on the case, apparently as a cautionary tale to corporate executives who expect to face no accountability in court.<sup>20</sup> Instead, the case has been

endlessly distorted and repeated as a minor accident being exploited by a litigious plaintiff and greedy lawyer.

Stella Liebeck's excruciating injuries and the documented acts haven't kept spin-meisters from handing out Stella Awards for other cases. To top things off, the other cases—popularized via anonymous e-mails—appear to be utterly and totally fabricated. The Snopes.com website, which is widely recognized for its accuracy in sifting through urban legends, has branded the Stella Award cases as "false."

Nonetheless, these false anecdotes make for amusing story-telling and continue to spread through national columnists. Moreover, when confronted with proof that the stories are fabrications, two journalists argued that the fabricated cases they presented were plausible and thus actually proved the need for tort "reform."<sup>21</sup> In this view, admittedly-false evidence somehow makes the case for drastic limits upon Americans' constitutional Rights. Thus, even false anecdotes keep feeding into the distorted picture of our civil justice system created by corporate PR teams.

<sup>19</sup> Center for Justice and Democracy, [www.cjd.org](http://www.cjd.org), provides a thorough explanation of the facts in the Stella Liebeck case.

<sup>20</sup> Andrea Gerlin, *Wall St. Journal*, page 1, Sept. 1, 1994.

<sup>21</sup> Mencimer op cit., Walter Williams, "An urban legend," posted Dec. 31, 2003 and "Some Things I Wonder About," posted Jan. 7, 2004, at [www.wnd.com/ews/articles](http://www.wnd.com/ews/articles).

# MYTH 3:

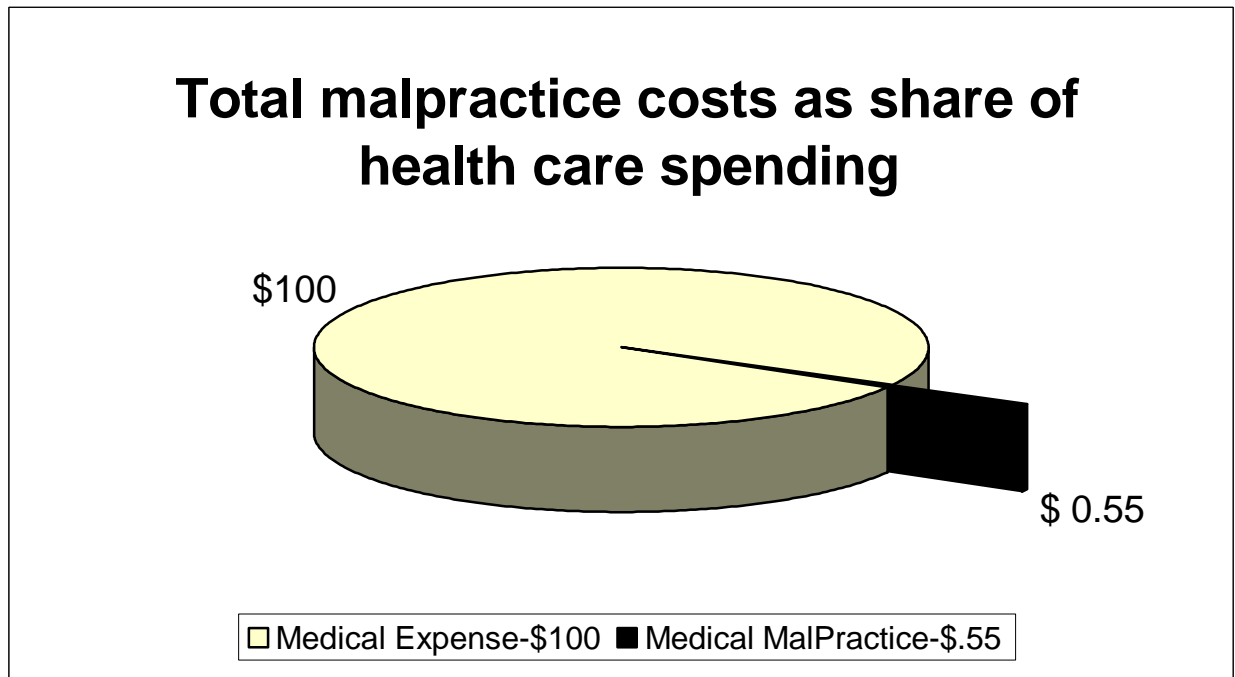
*Medical malpractice costs are a substantial factor in driving up health costs.*

## REALITY:

*Medical malpractice expenses are a tiny part — about 1/2 of 1%— of total health care spending. The extent and nature of “defensive medicine” is being grossly distorted.*

## EVIDENCE

**Medical malpractice costs account for a small percentage of national health care costs.** According to the Consumer Federation, medical malpractice insurance costs are 0.55 percent as a percentage of national health care expenditures.<sup>22</sup> According to the CBO, malpractice expenses were approximately \$24 million in 2002.<sup>23</sup> Even a reduction of 25 percent to 30 percent in malpractice costs would lower health care costs by only about 0.4 percent to 0.5 percent, and the likely effect on health insurance premiums would be virtually nonexistent.



<sup>22</sup> Center of Justice & Democracy Memo with attached spreadsheet prepared by J. Robert Hunter, Director of Insurance, Consumer Federation of America, November 14, 2001.

<sup>23</sup> *Limiting Tort Liability for Medical Malpractice*, U.S. Congressional Budget Office, January 8, 2004. The 2 percent figure is a CBO calculation based on data from Tillinghast-Towers Perrin (an actuarial and management consulting firm) and the Office of the Actuary at the Centers for Medicare and Medicaid Services.

**So-called “defensive medicine” is a red herring.** Only a small percentage of diagnostic procedures — “certainly less than 8 percent” — are performed because of a concern about malpractice liability.<sup>24</sup> The General Accounting Office (GAO) found that (1) some defensive medicine is good medicine, (2) managed care discourages needless defensive medicine, and (3) to the extent doctors conduct defensive medicine, it is because they make money from additional procedures.<sup>25</sup>

**Overall tort expenditures are a fraction of the cost of medical injuries.** Total national costs (lost income, lost household production, disability and health care costs) of negligence in hospitals are estimated to be between \$17 billion and \$29 billion each year.<sup>26</sup> By contrast, the National Association of Insurance Commissioners reports that the total amount spent on medical malpractice insurance in 2000 was \$6.4 billion.<sup>27</sup> This is at least three to five times less than the cost of medical negligence to society.

**Malpractice insurance costs amount to only 3.2 percent of the average physician's revenues.** According to experts at the Medicare Payment Advisory Commission (MedPAC), liability insurance premiums make up just a tiny part of a physician’s expenses and have increased by only 4.4 percent over the past year.<sup>28</sup> The increase in this expense is noticeable primarily because of the decreases in reimbursements that doctors are receiving from HMOs and government health programs.

**Malpractice insurance costs have risen at half the rate of medical inflation, debunking the myth of “out-of-control juries.”** While medical costs have increased by 113 percent since 1987, the total amount spent on medical malpractice insurance has increased by just 52 percent over that time—less than half of medical services inflation.<sup>29</sup>

**Government data shows that medical malpractice awards have increased at a slower pace than either malpractice premiums for doctors or health insurance premiums for consumers.** According to the federal government’s National Practitioner Data Bank, the median medical malpractice payment by a physician to a patient rose 35 percent from 1997 to 2000, from \$100,000 to \$135,000.<sup>30</sup> But during the same time, the average premium for single health insurance coverage has increased by 39 percent.<sup>31</sup> Payments for health care costs, which directly affect health insurance premiums, make up the lion’s share of most medical malpractice awards.

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<sup>24</sup> Office of Technology Assessment, *Defensive Medicine and Medical Malpractice*, OTA-H602 pg. 74 (July 1994).

<sup>25</sup> GAO-03-836, “Medical Malpractice and Access to Health Care,” pgs. 26-27, August 2003.

<sup>26</sup> *To Err is Human; Building a Safer Health System*, Institute of Medicine, National Academy of Science 1999.

<sup>27</sup> NAIC, Statistical Compilation of Annual Statement Information for Property/Casualty Insurance Companies in 2000 (2001).

<sup>28</sup> Official Transcript, Medicare Payment Advisory Commission, Public Meeting, December 12, 2002.

<sup>29</sup> Office of the West Virginia Insurance Commissioner, *Medical Malpractice: Report on Insurers with over 5% Market Share* (November 2002)

<sup>30</sup> National Practitioner Data Bank Annual Reports, 1997 through 2001.

<sup>31</sup> Kaiser Family Foundation and Health Research and Educational Trust, Employer Health Benefits Surveys, 1998-2002; National Practitioner Data Bank Annual Reports, 1997 through 2001.

# MYTH 4:

*Wisconsin's high health costs are caused by numerous medical malpractice claims.*

## REALITY:

*There is no medical malpractice crisis in Wisconsin.*

## EVIDENCE

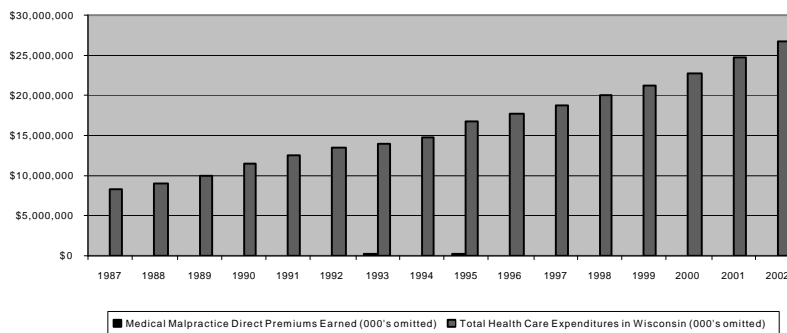
- ?? In Wisconsin, a state with 5.5 million people, only 247 medical negligence claims were filed in 2003 with the Medical Mediation Panels. That is one claim for every 22,257 Wisconsin citizen.<sup>32</sup>
- ?? Wisconsin's malpractice costs are lower than the national average. They account for just 40 cents out of each \$100 spent on health care.<sup>33</sup>
- ?? Medical malpractice costs are a drop in the bucket compared to health care costs in Wisconsin. Wisconsinites spend \$26.8 billion on health care compared with \$107.9 million for medical malpractice costs in 2002, .04% of health care spending.<sup>34</sup>
- ?? If you compare the actual dollars, in 2002 Wisconsin doctors were spending less money on medical malpractice insurance than they did in 1989 — \$118 to \$107.9 million.<sup>35</sup>

## **49th in US**

The frequency of awards in Wisconsin rank 49th lowest out of the 50 states on a per-capita basis, with only the state of Alabama lower.

Source: National Practitioners Databank Reports 1992 -2002.

Medical Malpractice Costs Versus Health Care Costs in Wisconsin



<sup>32</sup> Randy Sproule, Medical Mediation Panels.

<sup>33</sup> From the Wisconsin Insurance Report, Office of the Commissioner of Insurance, Years 1987-2002.

<sup>34</sup> U.S. Census Bureau, STATISTICAL ABSTRACT OF THE UNITED STATES: 2003. pages 104 & 107. Years 1999-2002 are also estimated based on annual percent changes of 6.1% in 1999, 7.4% in 2000 and 8.7% in 2002.

<sup>35</sup> From the Wisconsin Insurance Report, Office of the Commissioner of Insurance, Years 1989 & 2002.

# MYTH 5:

*Rising medical malpractice costs are forcing good doctors to quit practicing or leave their states.*

## **REALITY:**

*Doctors are not fleeing states in droves, despite increasingly frantic and unsupported claims from the American Medical Association, the insurance industry and their allies.*

## **EVIDENCE**

**Doctors not Leaving.** In 2003 the *Washington Post* reported at least 1,000 doctors had left Pennsylvania in recent years because of rising malpractice premiums caused by lawsuits. That was not true. This past April, the head of the state medical society said Pennsylvania had gained 800 more doctors the past two years. In addition, the insurance commissioner's office reported that malpractice payouts had fallen for the second year in a row and lawsuit filings were declining.<sup>36</sup>

Independent assessments by state officials and the media have found that the number of doctors in many states including Florida, Ohio, Pennsylvania and Washington, has remained stable and in most cases, has actually increased.<sup>37</sup>

**Doctors wildly overstating claims.** In 2003, the Government Accounting Office (GAO) reviewed claims by physicians that high medical malpractice premiums were causing doctors to flee states with high malpractice fees. Its review of five states concluded that the doctors have wildly overstated their case. E.g. "We also determined that many of the reported physician actions and hospital-based service reductions were not substantiated or did not widely affect access to health care" (p. 12). "Although some reports have received extensive media coverage, in each of the five states we found that actual numbers of physician departures were sometimes inaccurate or involved relatively few physicians" (p. 17). "Contrary to reports of reductions in mammograms in Florida and Pennsylvania, our analysis showed that utilization of these services among Medicare beneficiaries is higher than the national average in both [states]." (p. 21)<sup>38</sup>

**Effect on OB/GYNs.** UW Law School Professor Marc Galanter reviewed two Office of Technology Assessment studies that also fail to confirm the existence of a linkage between high malpractice premiums and doctors leaving the profession. The first study examined whether New York obstetrician/gynecologists (OB/GYNs) and family practitioners (FPs) who experienced high absolute increases in malpractice insurance premiums were more likely than physicians with lower premium increases to withdraw from obstetrics practice. The researchers found that "[m]edical malpractice insurance premium increases were not associated with physician withdrawal from

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<sup>36</sup> Stephanie Mencimer, "Trial and Error," *Mother Jones*, September/October 2004.

<sup>37</sup> FL, *Palm Beach Post* Editorial, 7/16/03; OH, *Toledo Blade*, 7/17/04; PA, *Allentown Morning Call*, 4/24/04; WA, *Seattle Times*, 2/23/04

<sup>38</sup> GAO-03-836 "Medical Malpractice and Access to Health Care," pgs. 26-27, August 2003.

obstetrics practice for either OB/GYNs or FPs.” The second study looked at whether state premium levels and personal malpractice claims history accounted for whether OB/GYNs were practicing obstetrics at all. “The study found that OB/GYNs in states with greater liability threats and who reported higher personal malpractice exposure were more likely to be practicing obstetrics and had higher volumes of obstetric care than their counterparts.”<sup>39</sup>

**Effect on Rural Areas.** A 1995 article reviewed a trend of worsening access to obstetrical care in some rural areas. The study concluded, “Contrary to what family physicians often claim, we found malpractice premium costs and Medicaid reimbursement rates were not associated with family physicians’ likelihood of providing maternity care.”<sup>40</sup>

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<sup>39</sup> Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1144-45 (1996).

<sup>40</sup> D. Pathman & S. Tropman, *Obstetrical Practice Among New Rural Family Physicians*, 40 JOURNAL OF FAMILY PRACTICE, No. 5, pp. 457, 463 (May 1995).

# MYTH 6:

*Huge jury verdicts are the main cause for rising medical malpractice premiums.*

## REALITY:

*Declining investment income has been a bigger contributor to the spike in medical malpractice premiums than jury verdicts.*

## EVIDENCE

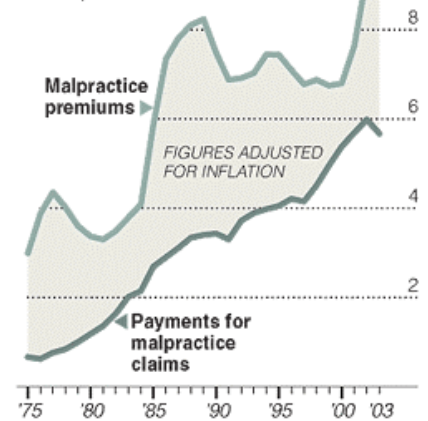
### Premiums Rise when Investment Earnings Slow for Insurance Companies

Lawsuits are just one factor in determining malpractice rates. Lately, the more important factor appears to be the declining investment earnings of insurance companies. “Data compiled by both the federal government and by insurance organizations show costs climbing steadily over the last decade at an average annual rate of about 3 percent, after adjusting for inflation. Over most of that period, premiums for doctors rose modestly and sometimes even dropped as the insurance companies battled for market share in a scramble to collect more money to invest in strong bond and stock markets. *But when the markets turned sour and the reserves of companies shriveled, companies began to double and triple the costs for doctors.*”<sup>41</sup>

This has resulted in soaring malpractice premiums for doctors far outpacing payments for medical malpractice claims. In 2003, doctors paid more than \$10 billion in malpractice premiums, but the insurance industry paid out less than \$6 billion in claims.

#### Ahead of the Curve

Medical malpractice premiums have soared in recent years, outpacing the rise in payments for malpractice claims.



Source: A.M. Best

The New York Times

The highly-conservative *Wall St. Journal* confirmed this analysis in its investigation of the malpractice premium crisis. It concluded in a front-page June 24, 2002 article:

*“A price war that began in the early 1990’s led insurers to sell malpractice coverage to obstetrician-gynecologists at rates that proved inadequate to cover claims...An accounting practice widely used in the industry made the area seem more profitable in the early 1990’s than it really was. A decade of short-sighted price slashing led to industry losses of \$3 billion last year.”*<sup>42</sup>

<sup>41</sup> Joseph B. Treaster & Joel Brinkley, “Behind Those Medical Malpractice Rates,” *The New York Times*, page 1C. February 22, 2005.

<sup>42</sup> Rachel Zimmerman & Christopher Oster, “Insurers Missteps Helped Provoke Malpractice ‘Crisis,’” *Wall Street Journal*, p. 1, June 24, 2002.

The GAO also found that one cause of the malpractice premium spike was that malpractice insurance firms artificially held down premiums while the stock and bond markets boomed in the late 1990s, and then got caught short when the market went sour in 2001. To make up for the shortfall, the industry jacked up rates severely in many states.<sup>43</sup>

A recent closed claim study of medical malpractice claims in Texas also concluded that while malpractice premiums had risen sharply in Texas, the total cost of malpractice claims was stable. The authors concluded that there was no “crisis” and that the sharp spikes in insurance prices, reflect forces operating outside the tort system.<sup>44</sup>

Instead of a frantic, ill-considered rush toward more restrictions on citizen’s legal rights like caps, all the major players must seriously examine the roots of the recent epidemic of rate increases in many states. Most recently, a doctor in Connecticut signed a letter along with the state trial lawyer association and two patient groups challenging a recent rate increase of a medical malpractice insurer. The letter prompted the Commissioner to hire an outside actuary to review the rate hike.<sup>45</sup>

### **Insurer Greed Can Also Contribute to Problem**

In Illinois, one of the states listed as having a malpractice “crisis, the state’s largest ... hiked rates by 35 percent last year while handing big pay raises to top executives....Last year, ISMIE Mutual Insurance Co. gave its chief operating and financial operators raises of 12 percent to 18 percent, hiking their salaries to more than \$600,000. ISMIE also paid out \$4.9 million to senior executive Donald Udstuen when he left the company, two months before pleading guilty to taking kickbacks on state contracts.”<sup>46</sup>

In Pennsylvania, another state that is on the list of “crisis” states, one malpractice insurer’s aggressive pricing crossed the line into fraud. Philco, a Pennsylvania malpractice insurer, filed for bankruptcy after state insurance regulators filed suit alleging company executives misled the its Board on the adequacy of premiums and funds set aside to pay claims.<sup>47</sup>

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<sup>43</sup> GAO-03-702, “Medical Malpractice Insurance: Multiple Factors Have Contributed to Premium Increases,” June 2003.

<sup>44</sup> Bernard Black, Charles Silver, David Hyman & William Sage, “Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=678601](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=678601). See also, and op ed by the authors in the *New York Times* on March 10, 2005.

<sup>45</sup> Tanya Albert, “Physicians try fresh approaches to combat liability premium hikes,” *AMNews* Oct. 18, 2004.

<sup>46</sup> *Chicago Sun-Times* “State doctors, malpractice insurer battle over rate hike, board raises,” 4/21/2004.

<sup>47</sup> See, *supra* note 42.

# MYTH 7:

*Tort “reform” and caps on damages have succeeded in holding down health care costs and medical malpractice premiums in states that have adopted it.*

## REALITY:

*Caps on damages discriminate against the most severely injured and have not lowered health care cost costs.*

## EVIDENCE

**Medical Malpractice Insurance Rates Not Reduced with Caps.** The 2003 Weiss Report found that despite caps on economic damages in 19 states, “most insurers continued to increase premiums (for doctors) at a rapid pace, regardless of caps.” The report found that insurers failed to pass along any savings to physicians in states with caps by refusing to lower their insurance premiums, and that caps only slowed the increase in the amount of damages insurers were required to pay out.<sup>48</sup>

*Insurance execs admit that Caps don’t lower malpractice insurance premiums*

*“We wouldn’t tell you or anyone that the reason to pass tort reform would be to reduce insurance rates.” Sherman Joyce, President of the American Tort Reform Association*

*“Insurers never promised that tort reform would achieve specific premium savings . . .” American Insurance Association (AIA.)*

Ironically, the Weiss study also found premiums are actually higher in states with caps than in those without. The average malpractice premium in states without caps was \$35,016 in 2003. The average premium in states with caps was \$40,381.<sup>49</sup> But despite this well-documented differential, many doctors have been stampeded into clamoring for caps as a “solution” to their sharply-rising premiums.

In recent years, at least 40 states have enacted some sort of “tort reform”; since 2002 alone, Florida, Mississippi, Nevada, Ohio, Oklahoma, and Texas have done so. Interestingly, in each state, immediately after the legislation passed, insurers sought rate increases — ranging from a minimum of 20 percent all the way up to 93 percent.

**Capping Noneconomic Damages No Panacea.** A recent insurance company memo explains how little noneconomic damages have to do with medical malpractice insurance. The insurer was asking for a rate increase of 27% to 41% in Texas after the passage of the Proposition 12, capping noneconomic damages in medical malpractice cases. The memo states: **“Noneconomic damages are a small percentage of total losses paid. Capping noneconomic damages will show loss savings of 1.0%.”**<sup>50</sup>

<sup>48</sup> Martin D. Weiss, Ph.D., et al., *Medical Malpractice Caps: The Impact of Non-Economic Damage Caps on Physician Premiums, Claims Payout Levels, and Availability of Coverage*, Weiss Ratings, Inc., June 2003.

<sup>49</sup> *Medical Liability Monitor*, October 2003.

<sup>50</sup> The Medical Protective Company, Texas Physician and Surgeons Actuarial Tort Reform Memorandum, found at [www.aisrc.com/caps.pdf](http://www.aisrc.com/caps.pdf).

**A One-Size Cap is Unfair.** The caps have an immense impact on the most severely injured or disfigured victims. The caps come into play only after the case was found to have merit, a jury has heard all the evidence, and ruled in favor of the injured victim.

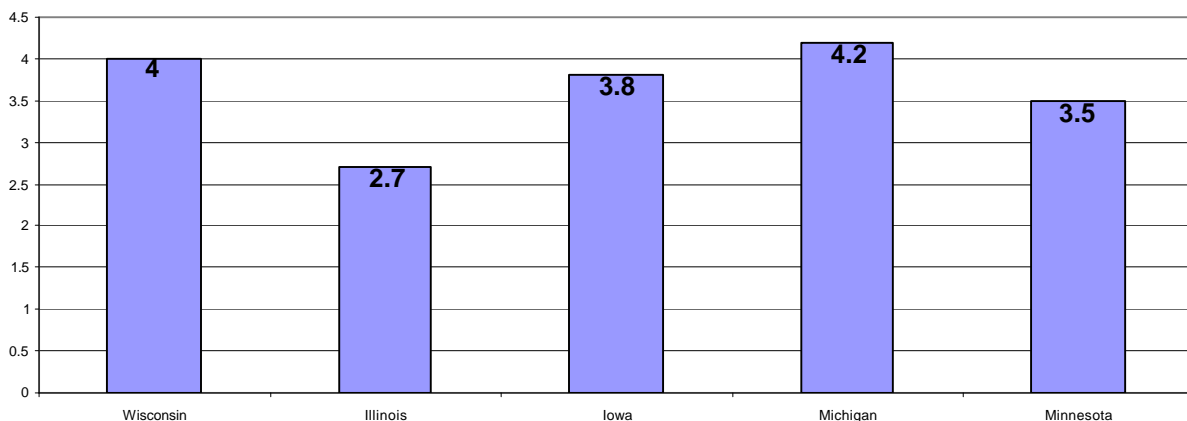
A study from the Harvard School of Public Health indicates that caps on non-economic damages results in inequitable payouts across different types of injuries and limits patients' ability to be fairly compensated for their pain and suffering.<sup>51</sup> The study analyzed a sample of jury verdicts in California that were subjected to the state's \$250,000 cap on non-economic damages. They found that reductions imposed on grave injuries were seven times larger than those for minor injuries. People suffering from pain and disfigurement had particularly large reductions in their awards.

**Despite caps, Wisconsin has not seen lower health care costs.** In 1995 Wisconsin adopted an indexed \$350,000 noneconomic damage cap in medical malpractice cases. It has now grown to just over \$432,000.<sup>52</sup>

A Feb. 14, 2005 article in *Expansion Management* magazine reported that Wisconsin citizens have witnessed health costs exploding to the second highest in the nation, while malpractice costs—a negligible factor anyway—stand as the least expensive of any state.<sup>53</sup> It is impossible to imagine an outcome farther from the results predicted by the advocates of caps in 1995.

Since 2000, Wisconsin workers have been hit with their share of premiums rising 4 times as fast as wages, climbing 49% while average wages have crept up by only 12.2%.<sup>54</sup> The premium increases, as a multiple of worker wage growth, were higher in Wisconsin than Illinois, Iowa and Minnesota, states without noneconomic damage caps.<sup>55</sup>

### Premium Increases as Multiple of Worker Wage Growth, 2000 to 2004



<sup>51</sup> David Studdert, Michelle Mello and Y. Tony Yang, *Journal Health Affairs*, July/August 2004, <http://www.insurancejournal.com/news/national/2004/07/08/43841.htm>.

<sup>52</sup> Wis. Stats. § 893.55(4)(d).

<sup>53</sup> Michael Keating, "Health Care Expenses Are a Key Site Location Factor," *Expansion Management*, Feb. 14, 2005.

<sup>54</sup> Families USA, "Health Care: Are You Better Off Today Than You Were Four Years Ago?" September 2004.

<sup>55</sup> Michigan also has caps on noneconomic damages in medical malpractice cases. Mich. Comp. Laws Ann. § 600.1483 (1) & (4).

# MYTH 8:

*US companies face an onerous “tort tax.”*

## **REALITY:**

*The concept of describing a business’s normal operating expenses as a “tax” has been widely discounted as pure spin.*

## **EVIDENCE**

The misguided idea that every American pays a “tort tax” to fund a lawsuit industry that is economically counterproductive has been derided by legal scholars as misleading, shaky and riddled with errors.<sup>56</sup>

At the most elemental level, it is improper to view the costs associated with securing all Americans access to the courts as “tax.” Successful lawsuits in personal injury cases do not “create” liability costs; it merely shifts the costs from injured consumers to persons causing the harm. After all, it is the persons causing the accidents who “create” liability costs when they injure someone.<sup>57</sup>

The discussion of a “tort tax” appears to be nothing more than an attempt by businesses to transfer liability costs to injured consumers. This unprecedented shift would leave many injured consumers bearing the personal cost of uncompensated injury. It would also mean manufacturers — who have the means to prevent the harm from occurring — would not be held accountable for the harm caused.

Most recently, the Tillinghast-Towers Perrin (TTP) accounting firm estimated U.S. tort costs at \$205 billion a year. This amount includes general insurance industry overhead, premiums that fund the industry and which it invests for considerable profit, and real damages to people and property. What is not revealed is that all these expenses would exist with or without the tort system. Hurricanes occur, whether the tort system exists or not. By the logic of those fighting the purported “tort tax,” imposing caps on the damages a hurricane or tornado is permitted to inflict would result in reducing this oppressive “tax.”

The TTP study originally found a decrease in the ratio of tort cost to GDP for the 13<sup>th</sup> straight year, suggesting strongly that tort costs were unrelated to economic growth. But the TTP study was then re-released with additional “significant upward reassessment of liabilities,” presumably because the collection of tort reform interest groups and insurance companies<sup>58</sup> that paid for the study didn’t like what they got. Even once revised to show an increase in tort costs, the authors of the study suggested that the ruinous effect of corporate accounting scandals, to which the SEC

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<sup>56</sup> See, e.g. Kenneth J. Chesboro, “Galileo’s Retort: Peter Huber’s Junk Scholarship,” 42 AM. L. REV. 1637, 1655-58 (1993), Marc Galanter, “Pick a Number, Any Number,” AM LAW, p. 84 Apr. 1992.

<sup>57</sup> Richard L. Abel, “The Real Tort Crisis — Too Few Claims,” 48 OHIO ST. L.J. 443, 446 (1987).

<sup>58</sup> Including the American Tort Reform Foundation, NORCAL Mutual Insurance Company, the Physician Insurers Association of America and the HealthCare Liability Alliance (which includes the American Medical Association).

attributed \$5 trillion in market losses, may have been partly to blame for a change in the ratio of tort costs to GDP<sup>59</sup>.

In finding a consistent decline in tort costs relative to GDP for the last 13 years, TTP's conclusions were consistent with those of other actuarial firms. Ernst & Young and the Risk & Insurance Management Society's annual survey of business liability costs found costs to be the lowest in a decade. The study, which calculates annual insurance and claims costs for U.S. businesses including property damage, workers compensation and all other liability and lawsuit costs, found liability costs to be in steep decline — only \$5.20 for every \$1000 in revenue in 1999, down 37 percent from 1992 levels.<sup>60</sup>

TTP wildly overstate the actual cost of lawsuits by including many insurance costs that would exist even without the legal system, such as the value of claims paid when no lawsuit has been filed, and claim handling costs and insurance company overhead. At the same time it fails to account for the substantial profits that insurers reap by investing premiums in stocks and bonds, particularly when the stock market is booming. This past year property and casualty insurers posted a 1000% increase in profit over 2002, to \$29.9 billion.<sup>61</sup> The insurance industry is typically among the most profitable sectors in the economy.

But, putting aside questions about the figure itself, let's look at where insurance money goes<sup>62</sup>:

?? The insurance companies *invest* this money for about a 10% gain, or about \$20 billion.

?? \$140 billion goes to Plaintiffs

?? \$23 billion goes to Commissions and Brokerage Fees.

?? \$13.5 billion goes to general expenses, including everything from the costs of buildings to the fat salaries of insurance company executives.

?? Over \$50 billion goes to “underwriting expenses” that go to support a bloated and inefficient insurance industry.

Judgments in lawsuits pay to cover real costs that people incur when they are injured by the irresponsible behavior of others – costs they wouldn't face if they never had been hurt. These costs include such things as medical bills and lost wages. The TTP report implies that such costs wouldn't exist without lawsuits. That is not true. The legal system simply assures that those who caused the injuries are held accountable and pay the injured parties' costs.

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<sup>59</sup> Commissioner Paul S. Atkins, U.S. Securities and Exchange Commission, Washington, D.C., 11-14- 2002

<sup>60</sup> *2000 RIMS Benchmark Survey*, Produced jointly by Ernst & Young LLP and RIMS, 2001.

<sup>61</sup> Insurance Services Office, [http://iso.com/press\\_releases/2004/04\\_14\\_04.html](http://iso.com/press_releases/2004/04_14_04.html).

<sup>62</sup> A.M. Best. “Aggregate and Averages.”

# MYTH 9:

*“Junk” and “frivolous” lawsuits are driving jobs overseas*

## **REALITY:**

*There has been no evidence offered for this oft-repeated assertion. The shift of US jobs to overseas locations is related chiefly to extremely low wages and lack of protection for democratic labor rights.*

## **EVIDENCE:**

- ?? The US has the top-rated climate for business competitiveness. Americans seem to prefer reforming business conduct through legal action rather than direct government regulation.<sup>63</sup>
- ?? As noted in the discussion of Myth 7, growth in the Gross Domestic Product is unrelated to tort costs.
- ?? To the extent many corporations have chosen to relocate production and service centers, the primary motivation seems to be low wages and lack of union organizing rights in nations like Mexico (where wages typically run 60 cents to \$1 per hour), China (30 cents is a common wage) or India (call center workers make about \$200 per month.).<sup>64</sup>
- ?? Business publications covering the outsourcing issue constantly stress the allure of low wages, with mentions of US litigation non-existent.<sup>65</sup>
- ?? Malpractice costs remain a tiny part of overall health costs, as demonstrated elsewhere in this paper.<sup>66</sup>
- ?? A new report by Public Citizen states, “American businesses file four times as many lawsuits as do individuals represented by trial attorneys, and they are penalized by judges much more often for pursuing frivolous litigation.” A survey in parts of four different states found that in 2001, businesses were 3.3 to 5.8 times more likely to file lawsuits than were individuals. The findings come as “businesses and politicians are campaigning to limit citizens’ rights to sue over everything from medical malpractice damages to defective products. By way of comparison, the number of American consumers (281 million) outnumbers the number of businesses in America (7 million) by 40 times.”<sup>67</sup>

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<sup>63</sup> Comments by Northwestern University Law Prof. Frank Cross, interviewed on National Public Radio’s All Things Considered, Sept. 25, 2004

<sup>64</sup> A *Wall Street Journal* headline of Sept. 24, 1992 makes crystal-clear the attraction of Mexico to US firms: “US Companies Pour Into Mexico, Drawn Primarily by One Factor: Low Wages.” China’s main drawing-card is also its vast army of even cheaper labor. See Roger Bybee, “Now It Can Be Told: Belated Barking on China Trade Deal,” *Extra!* Oct.-Nov. 2000. Available at [www.fair.org](http://www.fair.org).

<sup>65</sup> See for example *Business Week*’s Feb. 3, 2003 cover story and lengthy feature on job outsourcing called “Is Your Job Next?” and Nov. 6, 2000’s special report on “Global Capitalism.” Both are devoid of any mention of litigation as a possible factor animating the rapid outflow of US jobs.

<sup>66</sup> Testimony by Travis Plunkett, Consumer Federation of America, Testimony to Congress, July 17, 2002.

<sup>67</sup> *Frequent Filers: Corporate Hypocrisy in Accessing the Courts*, report published by Public Citizen, available at <http://www.citizen.org/congress/civjus/tort/myths/articles.cfm?ID=12369>

?? The one supposedly-tangible example of litigation-driven outsourcing offered by the Bush administration—that the entire US ladder industry was pushed overseas by fear of lawsuits—was withdrawn when it was proven false.<sup>68</sup>

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<sup>68</sup> Jonathan Nicholson, March 30, 2004, Reuters.

# MYTH 10:

*Excessive litigation has made Wisconsin hostile to business and job development*

## **REALITY:**

*Even attorneys for the nation's largest corporations rank Wisconsin judicial system fair and competent.*

## **EVIDENCE**

There is a constant refrain from businesses that Wisconsin's legal system is somehow harming businesses. As a reality check, why not ask corporate attorneys themselves. Well the U.S. Chamber has done precisely that. In April 2004 the Chamber released the results in a report "2004 US Chamber of Commerce State Liability Systems Ranking Study."<sup>69</sup>

No one can accuse the Chamber study of lacking a pro-business slant. It is based on state-by-state surveys of senior corporate attorneys at companies with revenues of at least \$100 million.

### **US Chamber of Commerce 2004 of corporate attorneys on Wisconsin's liability system**

|   |  |
|---|--|
| Wisconsin's overall ranking   | 10 <sup>th</sup> most favorable of 50 states |
| Wisconsin's Ranking on Tort & Contract litigation                     | 9 <sup>th</sup> most favorable               |
| Discovery practices   | 5 <sup>th</sup> most favorable               |
| Wisconsin juries' fairness  | 15 <sup>th</sup> most favorable              |
| Wisconsin juries' predictability                                      | 13 <sup>th</sup> most favorable              |
| Wisconsin judges' competence  | 7 <sup>th</sup> most favorable               |
| Wisconsin's appropriate handling of scientific and technical evidence | 9 <sup>th</sup> most favorable               |

Given the highly favorable ratings by corporate attorneys with a strong self-interest in shielding their clients from liability lawsuits, Wisconsin civil justice system should not be considered "anti-business."

In addition, "fairness" is in the eye of the beholder. Conveniently, the study did not ask consumers what they thought. The only people polled were senior corporate lawyers, or the private lawyers who serve them. Their view of fairness is surely not the same as that of the shareholders or employees of Enron, Worldcom, Tyco and other companies who have lost their savings or their jobs due to corporate mismanagement. And it is surely not the same as that of the victims of flammable children's pajamas or faulty lighters or other defective products.

<sup>69</sup> US Chamber of Commerce survey of corporate counsel, with 44% of those working for corporations with more than \$100 million in annual revenues. Available at [www.litigationfairness.org](http://www.litigationfairness.org).

**Product liability situation**: Out of some 256,596 civil legal actions filed in Wisconsin for 2001, a grand total of **85** related to product liability. That's **.0003 percent** of all cases filed. A top corporate advocate testifying on Wisconsin's product-liability situation was forced to admit, **"We don't have a crisis, I don't think we have a crisis."**<sup>70</sup>

**Motor Vehicle Crashes**. The largest number of tort cases result from motor vehicle crashes. There were 5,013 "personal injury, auto" cases filed in 2001. Compare that low number with the 58,279 persons injured and 764 killed in motor vehicle crashes in 2001.<sup>71</sup> That means approximately 1 person out of every 12 injured or killed in a motor vehicle crash filed a lawsuit as a result.<sup>72</sup> Despite the fact that 58 percent of all tort cases filed are automobile-related, no one has claimed there was an automobile insurance "crisis" in Wisconsin. In fact, Wisconsin consumers pay almost 30 percent less per year for automobile insurance than consumers nationwide, ranking fifth lowest in the nation for automobile insurance rates.<sup>73</sup> Wisconsin's comparatively low cost of auto insurance shows how effective Wisconsin's current civil system is in compensating injured consumers while leaving insurance premiums affordable.

The true growth in litigation has been contract actions, with rises in money judgments and foreclosure actions. No one is rushing to say we need to stop these claims from being heard in the courts.

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<sup>70</sup> Testimony of James Mathie before Assembly Judiciary Committee hearing on Sept. 11, 2003, representing the Civil Trial Counsel. The Civil Trial Counsel is an association of attorneys representing corporations and large institutions in civil cases.

<sup>71</sup> Wisconsin Department of Transportation (DOT), "2001 Wisconsin Traffic Crash Facts" pg. 2 (September, 2001).

<sup>72</sup> Not all crashes that result in lawsuits are filed in the same year as the crash. Comparing the data from other years, however, shows a similar 1 in 12 ratio of lawsuits to injuries and deaths.

<sup>73</sup> National Association of Insurance Commissioners (NAIC) 2001 Report. The report examined automobile insurance rates for 1999.



# Glossary of Legal Terms

## Trial by Jury

The right to be judged by a jury of one's peers is a fundamental right guaranteed by the U.S. and Wisconsin Constitutions. Throughout history juries have served as the conscience of the community; they are expected to use their common sense as triers of fact to judge the credibility of witnesses and apply the law to the community's values of right and wrong.

## Civil Actions

Every lawsuit not involving a criminal act is a *civil action*. This encompasses a broad group of subjects; including, real estate, contract, probate, *tort* and family law. The lawsuit is brought by *one person against another* to enforce a right or gain payment for a wrong.

## Tort

A civil wrong done to another person. A tort occurs when a person's act (or failure to act) injures the person, property or reputation of another. It is based on the *duty* one person owes to another to act reasonably and is imposed by law regardless of whether there is an agreement between the parties. In torts, the civil justice system allows an individual, who's been injured or who's suffered because of careless actions by others, to hold the wrongdoer accountable.

Persons who commit crimes can be also be sued for civil damages. For example, O.J. Simpson was acquitted of the murders of Nicole Brown Simpson and Ron Goldman, but he was found liable by a civil jury for their deaths. The following table compares the major elements of tort actions and criminal actions.

|                        | <b>Plaintiff</b> | <b>Defendant</b>                         | <b>Burden of Proof</b>         | <b>Damages</b>             |
|------------------------|------------------|--|--------------------------------|----------------------------|
| <b>Tort Action</b>     | Injured party    | Person charged with committing the wrong | Greater weight of the evidence | Money damages              |
| <b>Criminal Action</b> | State            | Person charged with the crime            | Beyond a reasonable doubt      | Imprisonment and/or a fine |

## **Liability**

A broad word for legal *obligation, responsibility or debt*. The concept of liability arises in many types of civil actions. In the area of tort law, there are three basic types of liability:

### **Negligence**

The failure to exercise a *reasonable or ordinary amount of care* in a situation that causes harm to someone or something. It can involve doing something carelessly or failing to do something that should have been done.

### **Intentional Torts**

The *voluntary* violation of another's rights by an *act* committed (or omitted) with the *full awareness* of its nature or consequences. Examples include assault, battery, false imprisonment, trespass, libel or slander.

### **Strict Liability**

The legal responsibility for damages or injury even if you are not at fault or negligent. Strict liability most often comes into play in cases involving injuries due to products, in which the injured person must prove the product was *unreasonably dangerous*. The focus is on the dangerousness of the product rather than the actions of the product manufacturer.

## **Elements that must be proven**

(As described by Justice David Prosser in *Morden v. Continental AG*, 2000 WI 51)

### **Negligence**

(1) A duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury.

### **Strict Liability**

(1) The product was in defective condition when it left the possession or control of the seller; (2) It was unreasonably dangerous to the user or consumer; (3) The defect was a cause (a substantial factor) of the plaintiff's injuries or damages; (4) The seller engaged in the business of selling the product or, put negatively, that this is not an isolated or infrequent transaction not related to the principal business of the seller; and (5) The product was one which the seller expected to and did reach the user or consumer without substantial change in the condition it was in when sold.

### **Malpractice**

Negligence committed by professionals such as doctors, lawyers, and architects. Professionals are required to use the degree of care, skill, and judgment which *reasonable professionals* should exercise in similar circumstances.

## **Damages**

The remedy for a tort is usually an action to receive money damages. The law of torts is concerned with *compensating* private individuals for any loss suffered when their legally protected rights and interests have been violated by the socially unreasonable conduct of others. Damages may be:

### **Compensatory**

Damages directly related to the amount of the loss. Damages are either (1) *economic*, monies intended to pay for out-of-pocket expenses like past or future medical expenses, past or future wage loss, or property damages; or (2) *noneconomic*, monies intended to pay for pain, suffering, disfigurement, humiliation, embarrassment, mental distress, or loss of society and companionship.

### **Punitive**

Monies awarded for *outrageous conduct* intended to *punish* the party who committed the outrageous act and *prevent* the act from happening again.

### **Nominal**

A small sum awarded when the loss suffered is very small.

## **Joint and Several Liability**

When a person suffers a *single, indivisible injury* as the result of misconduct by more than one wrongdoer, that person may *fully recover* from any one of the wrongdoers. The injury would not have happened except for the misconduct of any of the wrongdoers. Joint and several liability has been recognized in the English common law since the 1600's.

The underlying principle attempts to protect the party least at fault who has suffered a wrongful injury and deserves full and prompt compensation. After the injured party is compensated, the wrongdoers can decide how to apportion the liability. If one of the wrongdoers cannot pay, it is fairer that the other wrongdoers make up the difference than the injured person be left without full compensation.

## **Contributory Negligence**

The failure of injured persons to be careful that is a part of the cause of their injuries and contributes to their own damages.

## **Comparative Negligence**

The negligence of each party is compared and measured for purposes of determining whether money damages are awarded and what percentage each party must pay. Plaintiffs may recover from defendants if their negligence was a smaller percentage than defendants' percentage. The plaintiff's percentage of fault is subtracted from any damages awarded. A defendant less at fault than the plaintiff pays nothing.

## **Caps on Damage Awards**

Caps set an arbitrary *pre-determined limit* of monetary damages an injured party can recover from wrongdoers. Caps on damage awards (usually legislatively mandated) eliminate the right of a jury or judge to determine *appropriate compensation* based on the facts of an injury case and the impact of those harmed.

## **Immunity**

Freedom from liability. An exemption from a duty which the law usually requires. There are several common immunities including sovereign immunity which is based on the English rule, "the King can do no wrong." Today, the government cannot be sued for damages unless it has consented to be sued.

## **Contingency Fees**

Fees earned by attorneys which are based on a percentage of their clients' compensation. The attorney earns nothing unless the case is won. The contingency fee system allows any person, regardless of financial resources, the chance to go to court and seek recovery for a wrongful injury. The contingency fee system also means lawyers look carefully at the merits of a case before taking it; that keeps frivolous lawsuits out of our courts.

## **Tort "Reform"**

Seeks to "reform" the civil justice system by reducing the rights of injured individuals to hold wrongdoers accountable. Product manufacturers, the insurance industry, the medical establishment, and other corporate interests have attempted to change legal rules to benefit themselves at the expense of individuals they have injured.

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*The Wisconsin Academy of Trial Lawyers (WATL), is a voluntary trial bar and a non-profit corporation under the laws of Wisconsin. Members of the Academy are attorneys who represent consumers seeking to hold wrongdoers accountable for injuries arising from unsafe products or procedures. The Academy's objectives are to promote continuing legal education for the betterment of the trial bar profession and to preserve Wisconsin's civil jury trial system by working with the state legislature and other governmental bodies as an advocate for the legal rights of all Wisconsin citizens.*



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