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Committee on Oversight and Government Reform
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The Failure to Address the Costs of Defensive Medicine in Health Care Legislation

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I. Introduction

The sweeping health care reform proposals recently approved by the U.S. House of Representatives and Senate garnered only a single Republican vote, making health care perhaps the most partisan major policy initiative to win passage in both chambers. Both pieces of legislation contain extremely controversial provisions, which are divisive even within the Democratic caucus. However, tort reform, or any provision to mitigate the costs of malpractice lawsuits and defensive medicine, is absent from both the House and Senate versions of the legislation. This exclusion has been a significant source of partisan divide over the direction of health care reform, and if included, could have rendered health care reform more palatable to Republicans.

The practice of defensive medicine – the unnecessary tests and procedures physicians perform to protect against malpractice suits – is both costly and harmful to the doctor-patient relationship. Defensive medicine wastes as much as $210 billion annually, contributing to the high cost of health care and driving up insurance premiums, which are already unaffordable for many Americans. Additionally, excessive malpractice litigation and defensive medicine lead to physician shortages, especially among obstetricians, neurosurgeons and emergency room physicians. Access to care is also jeopardized, as increasingly, doctors' concerns about potential lawsuits trump patient care.

Fortunately, clear and proven solutions exist to address the problem of excessive malpractice litigation and to reign in the costs of defensive medicine. Unfortunately, and despite Republicans' repeated demands, the recently passed health care legislation does not contain the tort reform provisions to effect these solutions.

As the future of health care reform hangs in the balance, if Congressional leaders are serious about creating bipartisan support for what has so far been a highly partisan initiative, addressing the cost of defensive medicine through tort reform may offer a way forward. In addition, it would lower the cost of coverage for all Americans. Real efforts to curb the practice of defensive medicine will require Congressional leaders to put the interests of patients and cost reduction ahead of the trial lawyers lobby which benefits enormously from malpractice lawsuits.

The benefits of tort reform are clear and offer the opportunity to help Americans who cannot afford health insurance obtain it, for those who have health insurance to pay lower premiums, and for all Americans to be treated by health professionals who are focused on patients instead of potential lawsuits.

II. Our Current Medical Malpractice System: A Huge Tax on Americans

The costs of health care are already staggering, yet they are only expected to increase in the next decade. Health care spending currently exceeds $2.5 trillion per year,

which is more than 17% of the gross domestic product (GDP).[1] By 2019, health care expenditures are expected to top $4.7 trillion per year.[2] Waste, fraud and abuse in the health care system, ranging from fraud in Medicare to wasteful spending on defensive medicine[3] and frivolous lawsuits, continue to drive up costs.

The "tort tax," or added cost of excessive litigation, figures prominently in increasing health care costs. Medical malpractice litigation and defensive medicine account for large portions of overall health care spending. A 2008 study by PriceWaterHouseCoopers found defensive medicine is the top area of wasteful spending in health care, accounting for $210 billion annually.[4] It is estimated that these additional liability-based medical care costs adds at least 3.4 million Americans to the rolls of the uninsured.[5] Nearly half of all medical malpractice claims do not involve injury or medical error.[6] Less than 15 cents of every litigation-related dollar goes to those injured from medical negligence.[7] Likewise, the Manhattan Institute concluded that about ten cents of every dollar paid for health care services goes to cover malpractice premiums, defensive medicine and other costs associated with excessive litigation.[8]

In 2003, the Department of Health and Human Services (HHS) found that the federal government spends between $33.7 billion and $56.2 billion per year for malpractice coverage and the costs of defensive medicine.[9] Committee staff inquired of HHS whether they had an updated figure, but staff was told by personnel in the Office of the Assistant Secretary Planning and Evaluation that the report in question involved medical malpractice litigation which "is not a priority with this Administration [the Obama Administration]" so there is no further information on the topic.[10] If Congress would take steps to place "reasonable limits on non-economic damages [it] would reduce

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[1] Cong. Research Service, Health Care Reform: An Introduction, July 29, 2009.
[2] Centers for Medicare and Medicaid Services, Updated and Extended National Health Expenditure Projections, 2010-2019 (June 29, 2009).
http://www.cms.hhs.gov/NationalHealthExpendData/Downloads/NHE_Extended_Projections.pdf
[3] Defensive medicine is the practice of conducting excessive, unnecessary, tests and procedures to limit tort, or making unnecessary referrals in order to avoid tort liability.
[4] PriceWaterHouseCoopers' Health Research Institute, The Price of Excess: Identifying waste in healthcare spending (2008).
[5] Lawrence J. McQuillan , Hovannes Abramyan and Anthony P. Archie, *Jackpot Justice: The True Cost of America's Tort System*, Pacific Research Institute (Mar. 2007).
[6] David M. Studdert, et al., Claims, Errors, and Compensation Payments in Medical Malpractice Litigation, New England Journal of Medicine, May 11, 2006.
[7] Newt Gingrich and Wayne Oliver, Healthcare Fix Must Encompass Litigation, *The Hill*, Aug. 5, 2009.
[8] Diana Furchtgott-Roth, *The High Cost of Medical Malpractice*, REAL CLEAR MARKETS (Aug. 6, 2009).
[9] U.S. Dep't of Health & Human Serv., Assistant Sec'y for Planning & Evaluation, Office of Disability, Aging, & Long-Term Care Policy, *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care* (Mar. 2003).
[10] Notes from phone conversation between Minority Staff of the Committee on Oversight & Gov't Reform and personnel in the Office of the Assistant Secretary for Planning & Evaluation, HHS, Dec. 17, 2009; Committee staff subsequently emailed HHS Congressional Affairs on Dec. 19, 2009 and Jan. 19, 2010, but received no response.

the amount of taxpayers' money the federal government spends by $28.1-$50.6 billion per year."[11]

Despite evidence that a malpractice crisis has led to increased costs in health care, the Obama Administration and Democratic Congressional leadership offer little in the way of medical malpractice reform. In his September 2009 address to a Joint Session of Congress, President Barack Obama acknowledged that defensive medicine taxes the health care system, saying "I've talked to enough doctors to know that defensive medicine may be contributing to unnecessary costs."[12] However, instead of calling on Congress to include medical malpractice liability reform in broader health care reform legislation, President Obama directed HHS Secretary Kathleen Sebelius to implement demonstration projects in individual states to "let doctors focus on practicing medicine."[13] The types of reforms the demonstration projects may encourage are yet to be determined, as is the time frame it will take to implement, but President Obama has already emphatically signaled his opposition to limiting malpractice awards.[14]

III. Why Does Defensive Medicine Occur?

Aside from the pharmaceutical manufacturers, doctors shoulder the bulk of the liability burden. An internist in Buffalo, New York was recently quoted as saying:

> I think we've all done it [practiced defensive medicine]. It's a balance. But sometimes doctors will say: If I'm a little fearful that I'm going to get sued, then I'm going to order another exam or test or procedure to cover myself.[15]

A 2005 survey conducted by the American Medical Association (AMA) revealed that 93% of doctors said they have practiced defensive medicine and 92% said they made unnecessary referrals to specialists and/or ordered unnecessary tests or procedures.[16] One physician admitted he "order[s] some X-rays as unnecessary protection," something he never did until he was forced to defend against lawsuits.[17]

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[11] U.S. Dep't of Health & Human Serv., Assistant Sec'y for Planning & Evaluation, Office of Disability, Aging, & Long-Term Care Policy, *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care* (Mar. 2003).

[12] President Barack Obama, address to a Joint Session of Congress, Sept. 9, 2009.

[13] President Barack Obama, address to a Joint Session of Congress, Sept. 9, 2009.

[14] Speaking to the American Medical Ass'n, President Obama stated, "I'm NOT advocating caps on malpractice awards."[14] (President Barack Obama, speech at the Annual Conference of the American Medical Ass'n, June 15, 2009.)

[15] Jerry Zremski, *Health Care Reform Silent on Malpractice*, BUFFALO NEWS (Aug. 22, 2009).

[16] David M. Studdert, Michelle M. Mello, William M. Sage, Catherine M. DesRoches, Jordan Peugh, Kinga Zapert, Troyen A. Brennan, *Defensive Medicine: Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 J. AM. MED. ASS'N 2609 (2005).

[17] Jerry Zremski, *Health Care Reform Silent on Malpractice*, BUFFALO NEWS (Aug. 22, 2009)(citing statistics from the Am. Med. Ass'n).

Doctors do this because the price tag on defending one's reputation as a doctor can be exorbitant and emotionally taxing. Lawsuits take at least three years to resolve, all the while distracting the doctor from his day-to-day practice.[18] According to the AMA, 60% of malpractice cases are dropped or dismissed by the court, but it costs a doctor an average of $18,000 to defend against a lawsuit, according to 2007 figures.[19] Doctors are found *not* negligent in 90% of the cases that go to trial, but each of these cases cost an average of $100,000 to defend.[20]

When cases go to trial and plaintiffs are victorious, the awards are huge. In 2000, the median jury award in a malpractice case was $1 million, an increase of 43% from previous years.[21] In 2001, 52% of all jury awards exceeded $1 million.[22] Not surprisingly, given the trend, in 2002, three of the top ten verdicts in the U.S. were rendered in medical malpractice cases. These awards--$94.5 million, $91 million, and $80 million--were returned in the metropolitan New York City area.[23]

Even salaried doctors practicing in public hospitals understand the problem of defensive medicine. One hospitalist, whose salary is fixed, sympathized when he conceded he "would be tempted to order that extra test if he thought a patient might otherwise sue."[24] Specifically, he said: "Perception in this case is reality…If doctors perceive that every patient is a possible liability…they're going to practice medicine in a way that is excessive."[25]

AMA President, J. James Rohack, recently stated:

> We are willing to have best practices, but unless we have protection in a court room for not ordering a test, we are going to order the tests. Doctors need a "safe harbor." That will cut unnecessary cost, including defensive medicine.[26]

Studies reveal that health care costs increase when the risks of medical malpractice claims are higher.[27] Similarly, studies done on the California reforms show the effectiveness of medical malpractice reforms. A 2009 study by Lakdawalla and

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[18] Diana Furchtgott-Roth, *The High Cost of Medical Malpractice*, REAL CLEAR MARKETS (Aug. 6, 2009).
[19] Jerry Zremski, *Health Care Reform Silent on Malpractice*, BUFFALO NEWS (Aug. 22, 2009)(citing statistics from the Am. Med. Ass'n).
[20] *Id.*
[21] Trial Lawyers Inc., *An Unhealthy System: Doctors Flee as Skyrocketing Malpractice Claims Drive Up Insurance Costs*, found at http://www.triallawyersinc.com/html/print06.html (last visited Oct. 15, 2009).
[22] *Id.*
[23] *Id.*
[24] Jerry Zremski, *Health Care Reform Silent on Malpractice*, BUFFALO NEWS (Aug. 22, 2009)(citing statistics from the Am. Med. Ass'n).
[25] *Id.*
[26] Sarah Rubenstein, *Live Blog: AMA Responds to Obama Speech*, WALL ST. J (June 15, 2009).
[27] U.S. Dep't of Health & Human Serv., Assistant Sec'y for Planning & Evaluation, Office of Disability, Aging, & Long-Term Care Policy, *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care* (Mar. 2003).

Seabury demonstrated that "malpractice risk increases medical spending in the aggregate."[28]

A 2007 study "shed some light on the magnitude of the relationship between malpractice liability and the use of medical services."[29] The study focused on Medicare, a taxpayer funded program, and found that higher malpractice awards and payments in a state resulted in higher Medicare spending in a state.[30] More simply, as liability increased medical services used increased, driving up costs to taxpayers. These increases in costs were driven by an increase in imaging services being ordered by doctors fearing lawsuits.[31] The study found that the spike in liability premiums doctors paid between 2000 and 2003 resulted in an increase in total Medicare spending of more than $15 billion.[32]

IV. Litigation Drives Up Malpractice Insurance Premiums

In 2008, doctors paid $10.888 billion in medical malpractice liability insurance premiums.[33] This number represented .46% of total health care expenditures.[34] Although this is only a sliver of the total health care bill created by the practice of defensive medicine, it can be a large chunk of a rural physician's operating expenses.[35] In 2009, insurance premiums varied depending on specialty and region. For example, in Florida, OB-GYNs pay $201,808 for their malpractice coverage, but in Wisconsin, OB-GYNs pay $18,154.[36] According to news articles, certain specialists pay as much as $400,000 per year for malpractice insurance.[37] The premiums are not assessed according to each individual physician's history as a practitioner. Instead the premium rates depend on the propensity of juries in a given state to award high damages in malpractice cases.[38]

A number of studies in 2006 showed that in states where medical malpractice caps were enacted, doctors paid lower premiums. For example, one investigation by Kilgore, Morrisey, and Nelson revealed that premiums for certain specialties were

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[28] Darius N. Lakdawalla and Seth A. Seabury, *The Welfare Effects of Medical Malpractice Liability*, found at http://ww.nber.org/paper/w15383 (last visited Oct. 2009).
[29] Katherine Baicker, Elliot S. Fisher, Amitabh Chandra, *Malpractice Liability Costs and the Practice of Medicine in the Medicare Program*, Health Affairs, May-June 2007.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] Lawrence J. McQuillan and Hovannes Abramyan, *The Facts About Medical Malpractice Liability Costs*, Pacific Research Institute (Oct. 2009).
[34] *Id.*
[35] *Id.*
[36] Amy Lynn Sorrel, Liability Premiums Stay Stable, but Insurers Warn This Might Not Last, found at http://www.ama-assn.org/amednews/2009/11/23/prl21123.htm (last visited Dec. 18, 2009).
[37] Lawrence J. McQuillan and Hovannes Abramyan, *The Facts About Medical Malpractice Liability Costs*, Pacific Research Institute (Oct. 2009).
[38] American Medical Association, Medical Liability Reform – NOW! (Feb. 5, 2008).

considerably lower in states with caps on non-economic damages.[39] In the areas of internal medicine, premiums in states with caps were 17.3% lower, obstetrics and gynecology premiums were 25.5% lower, and general surgery premiums were 20.7% lower.[40] Additionally, the study showed that every $100,000 increase in the cap on damages resulted in premiums going up by 3.9%.[41] Presumably, placing a $250,000 cap on damages in states would result in a savings of $1.4 million.[42]

High malpractice liability premiums force doctors out of business or into different businesses. Many physicians' offices are essentially small businesses that must cope with, among other things, meeting payroll, costly equipment, administrative costs of dealing with insurance companies, and expensive malpractice insurance. According to the American College of Obstetricians and Gynecologists (ACOG), in 2006, 70% of OB-GYNs were forced to alter their practice in some way due to the lack of affordable medical malpractice insurance.[43] Astoundingly, the average OB-GYN has had 2.6 lawsuits filed against him or her and 90% of OB-GYNs have been sued at least once.[44] High jury awards in states drive up liability premiums for doctors and those costs inevitably get passed on to the patient or consumer.

In certain states, doctors struggle to find malpractice coverage because insurers have left the market. The U.S.'s top malpractice insurer, St. Paul Companies, no longer provides malpractice coverage after experiencing $1 billion in losses.[45] During the mid-2000's, the Pennsylvania market dwindled to two out of the previous ten malpractice insurers.[46] Since 1997, at least 15 insurers have left the market in Mississippi.[47] As will be discussed in the next section, the challenge of finding reasonably priced insurance or any insurance coverage at all causes physicians to take actions that ultimately negatively impact patients.

V. Litigation Reduces Access to Care

Pacific Research Institute commentators argue that "higher health care costs [also] reduce access to care for patients."[48] Researchers found "that the additional $124 billion in liability-based health care costs adds 3.4 million Americans to the rolls of the uninsured" and this vulnerable population is then denied access to care.[49]

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[39] *Id.*
[40] *Id*;(citing a 2006 study by Meredith L. Kilgore, Michael A. Morrisey, and Leonard J. Nelson).
[41] *Id.*
[42] *Id.*
[43] American Medical Association, Medical Liability Reform – NOW! (Feb. 5, 2008).
[44] *Id.*
[45] Trial Lawyers Inc., *An Unhealthy System: Doctors Flee as Skyrocketing Malpractice Claims Drive Up Insurance Costs*, found at http://www.triallawyersinc.com/html/print06.html (last visited Oct. 15, 2009).
[46] *Id.*
[47] *Id.*
[48] Lawrence J. McQuillan and Hovannes Abramyan, *The Tort Tax*, WALL ST. J. (Mar. 27, 2007).
[49] *Id.*

Legal scholar Professor Richard Epstein, in a piece advocating market-based approaches to health care reform, notes:

> The U.S. cannot ignore serious reform. To be sure medical malpractice premiums constitute well under 1% of the total U.S. health care bill. But defensive medicine adds perhaps as much as 10%. High malpractice costs can shut down clinics that serve vulnerable populations, leading to more patient harm than the occasional case of malpractice.[50]

In 2003, a U.S. Government Accountability Office (GAO) report found that rising premiums and malpractice concerns caused health care providers to take actions that reduced health care access in five states studied for the report.[51] Specifically, the services affected were emergency surgeries and newborn deliveries. In rural Mississippi pregnant women are forced to travel 65 miles to deliver their babies because the family practitioners in the local hospitals were forced to stop providing obstetrics services due to rising liability premiums.[52]

Along the same lines, a study published in the Journal of American Medical Association (JAMA) found:

> [L]arge numbers of respondents [physicians in six high-risk specialties] reported engaging in avoidance behavior, many reporting across-the-board reductions in their scope of practice to qualify for less expensive malpractice insurance. For example, obstetrician/gynecologists reported not interpreting mammograms, both of which may affect essential health services for women. Some surgeons appear to be limiting their practices to "bread-and-butter" operations, no longer performing more difficult procedures.[53]

These avoidance behaviors negatively impact patients in rural areas where there are few physicians at the outset. Additionally, the study found the most vulnerable, illness prone and those with previous complications are avoided by doctors.[54] Patients who most need care are shut out because our current malpractice liability system punishes the masses for the mistakes of a minority of doctors.

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[50] Richard A. Epstein, *How Other Countries Judge Malpractice*, WALL ST. J. (June 30, 2009).
[51] General Accounting Office (GAO), Medical Malpractice: Implications of Rising Premiums on Access to Health Care, GAO-03-836, Aug. 2003 (GAO was renamed Government Accountability Office in 2004).
[52] *Id.*
[53] Studdert et. al., *Defensive Medicine: Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 J. AM. MED. ASS'N 2609 (2005).
[54] *Id.*

VI. Litigation Inhibits Patient-Doctor Communication

In 2005, then-Senators Obama and Clinton authored a bill attempting to improve the medical malpractice system.[55] In a *New England Journal of Medicine* article touting their bill, Senators Obama and Clinton stated that doctors do not disclose errors to patients and are not candid with patients regarding their condition for fear of lawsuits being filed.[56] They noted that patient safety is compromised because the current malpractice system creates "an intimidating liability environment."[57]

The JAMA study confirmed this conclusion. Researchers found that "[D]efensive medicine takes a toll on interpersonal quality of care and the patient-physician relationship."[58] While some doctors provide more thorough explanations of risks and alternative treatments due to malpractice concerns, other doctors do just the opposite. Physicians fearing liability "react with suspicion, confrontation, and abandonment" if they perceive a patient to be "demanding, emotional, or unpredictable."[59]

The JAMA study also found that in either case, whether litigation fears elicit a positive and thorough response from a doctor or the negative suspicious response:

> Both behavioral responses entail considerable time and energy spent predicting patients' possible litigiousness, especially for new patients, reflecting a level of suspicion that itself is arguably detrimental to quality.[60]

Time spent by physicians mulling the litigation environment or the propensity of a patient to sue is time wasted. Rather than worrying about getting sued, the physician should be focused on research, diagnosis, and patient care. Policymakers are doing a disservice to science and technology when they perpetuate a tort system that forces physicians to worry about whether their next patient will equal their next litigation battle.

Lack of communication affects quality of care. According to a 2003 report by HHS, the current tort system "impedes efforts of physicians and researchers to improve the quality of care."[61] Like other research teams, HHS officials found that doctors' fears of litigation inhibit their discussion of medical errors and methods for reducing errors.[62]

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[55] Hillary Rodham Clinton and Barack Obama, *Making Patient Safety the Centerpiece of Medical Liability Reform*, 354 NEW ENG. J. MED. 2205 (May 25, 2006).
[56] *Id.*
[57] *Id.*
[58] Studdert et. al., *Defensive Medicine: Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 J. AM. MED. ASS'N 2609 (2005).
[59] *Id.*
[60] *Id.*
[61] U.S. Dep't of Health & Human Serv., Assistant Sec'y for Planning & Evaluation, Office of Disability, Aging, & Long-Term Care Policy, *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care* (Mar. 2003).
[62] *Id.*

Medical errors are prevalent and according to the Institute of Medicine, each year 98,000 people die because of medical errors.[63] Estimates of medical errors that go unreported are as much as 95%.[64] Reporting systems put in place to improve quality of care and patient safety are drastically underused or non-existent because doctors fear the information gathered in these systems will be used against them or their colleagues in litigation.[65] According to HHS, experts believe the number one barrier to improving health care quality tracking systems is the fear that the information gathered will be used to mount a negligence case.[66]

VII. Litigation Fears Affect Those Entering the Workforce

Decisions made by medical students and residents are affected by the liability climate and our current tort system. According to a 2003 AMA study, 62% of medical residents surveyed said their top concern was liability issues.[67] This was an increase from 2001 when only 15% of medical residents said liability was their top concern.[68] Fears of being sued are causing medical residents *not* to choose high risk specialties or states with draconian medical malpractice systems.[69] Students are also avoiding primary care because of the high costs and low earning potential.

In a *Wall Street Journal* op-ed warning of the impending shortage of physicians in the U.S., Dr. Herbert Pardes, Chief Executive Officer at New York Presbyterian Hospital, laid out the case for why medical students and residents are not choosing to become primary care doctors.[70] Basically, he says newly minted doctors cannot afford to be primary care physicians. According to Pardes:

> Medical-school tuition can cost a student as much as $50,000 a year. Some doctors start out owing hundreds of thousands of dollars before they are even able to open a practice....Once doctors do start treating patients, they are squeezed between what they earn from government programs [Medicare and Medicaid] and insurance companies on one side and *escalating malpractice insurance rates* on the other.[71]

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[63] *Id.*(citing Inst. of Med., *To Err is Human: Building a Safer Health System* (Nov. 1999)).
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] American Medical Association, Medical Liability Reform – NOW! (Feb. 5, 2008).
[68] *Id.*
[69] *Id.*
[70] Herbert Pardes, *The Coming Shortage of Doctors*, WALL ST. J. (Nov. 5, 2009).
[71] *Id*(emphasis added).

Students are choosing specialties with lower insurance premiums and therefore higher incomes. It is preferable for doctors to choose specialties most suited to their strengths, not specialties with the least likelihood of litigation.

VIII. Tort reform works

Analysis has shown that capping non-economic damages at $250,000 and punitive damages at the greater of twice the amount of economic damages or $250,000, can cut insurance premiums and overall health care costs. According to the Congressional Budget Office (CBO), legislation providing for caps on damages would "significantly lower premiums for medical malpractice insurance," in states that have not implemented medical malpractice reforms.[72] Moreover, "premiums for medical malpractice insurance ultimately would be an average of 25 percent to 30 percent below what they would be under current law."[73]

Additionally, enacting legislation to cap damages would reduce federal direct spending for federal health benefits programs including Medicare, Medicaid and the government's share of premiums paid under the Federal Employees Health Benefits (FEHB) program.[74] These savings, estimated by CBO to be $11.3 billion over an eight year period, are a result of a reduction in health insurance rates brought on by lower costs for health care procedures and services.[75]

Many states have already reacted to the liability crisis by introducing small reforms of the civil justice system relating to medical malpractice. The most common tort reform component implemented by states has been setting caps on noneconomic damages in medical malpractice lawsuits. The following sections will elaborate on state specific reforms that have shown positive results.

A. California

California was the first state to respond to the medical malpractice insurance crisis of the 1970s, when medical liability insurance premiums were so high that many physicians, particularly those practicing high-risk specialties, including OB-GYNs and neurosurgeons, were forced to close their doors. Abuse of the civil justice system, including malicious and frivolous malpractice litigation, had become so rampant that it was diminishing access to care. In 1975, California voters approved the Medical Injury Compensation Reform Act of 1975 (MICRA). MICRA caps noneconomic damages at

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[72] Cong. Budget Office, Cost Estimate for H.R. 4600, Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2002 (Sept. 24, 2002).
[73] *Id.*
[74] *Id.*
[75] *Id.*

$250,000, provides a statute of limitations on malpractice claims, and allows for binding arbitration for disputing claims.[76]

While medical malpractice premiums vary widely depending on location and specialty, rates in California are lower than in many other states. To illustrate, in Florida, premiums for OB/GYNs are as high as $214, 893, whereas in California the average is $89,953.[77] Premiums for other specialties including general surgery and internal medicine are also lower in California, sometimes as much as 50% less than in other states.[78] California's lower than average premiums have been directly attributed to MICRA.[79] MICRA has resulted in a stabilization of malpractice premiums, which have increased much more slowly than the national average. Since 1975, premiums nationwide have increased 420%, as opposed to just 168% in California.[80]

B. Texas

Prior to the passage of tort reform in Texas, one in four doctors faced a medical malpractice claim every year.[81] The liability crisis had grown such that in 2003, voters in Texas approved Proposition 12, which limited noneconomic damages in medical malpractice lawsuits to $250,000.[82] The caps have led to fewer lawsuits, lower liability insurance premiums for doctors, and less money spent on health care across the board.[83] The average malpractice award in Texas has decreased from $1.2 million to $880,000.[84] Texas's largest malpractice insurer, the Texas Medical Liability Trust, has lowered rates repeatedly, equaling a more than 50% decrease in rates since 2003.[85]

C. Georgia

In 2005, the Georgia legislature passed comprehensive medical liability reform that included $250,000 caps on punitive damages and $350,000 caps on noneconomic

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[76] Cal. Civ. Code 3333.1.
[77] Californians Allied for Patient Protection, MICRA Protecting Patients – Protecting Access, http://www.micra.org/about-micra/docs/micra_access_and_affordability.pdf (last visited Oct. 16, 2009).
[78] *Id.*
[79] William C. Hamm et al., MICRA, Not Proposition 103, Accounts for the Relatively Low Growth In Medical Malpractice Insurance Costs In California 2 (2003).
[80] American College of Surgeons Professional Association, Medical Liability Reform: The answer to soaring insurance premiums, http://www.qualifiedsurgeons.org/acspa/soaringinsur.html (last visited Oct. 15, 2009).
[81] Joseph M. Nixon, *Proposition 12 A Winner Five Years Later*, Ft. Worth Star-Telegram, Oct. 1, 2008.
[82] H.B. 4, 78th Leg. (Tex. 2003).
[83] ERIC TORBENSON and JASON ROBERSON, Tort Reform, Dallas Morning News, June 17, 2007 http://www.dallasnews.com/sharedcontent/dws/bus/stories/DN-medmal_17bus.ART0.State.Edition2.43983f4.html
[84] *Id.*
[85] *Id.*

damages.[86] The average number of medical malpractice claims has decreased by 39%, from over 1,128 in 2004 to 683 in 2008.[87] Additionally, professional liability insurance rates for physicians in the state have decreased 18% since the reforms were enacted.[88]

Through broader health care reform, Congress should use California, Texas, and Georgia as case studies in medical malpractice liability that works. At a federal level, government should incentivize states to take the necessary steps toward reforms that will impact overall health care spending.

IX. "Medical Liability Alternatives" in House and Senate Health Reform Bills are Not Real Tort Reform

Buried on page 1,441 of the 2,016 page of the House-passed "Affordable Health Care for America Act (H.R. 3962)," is Section 2531, Medical Liability Alternatives.[89] Purporting to be meaningful medical malpractice reform, Section 2531 actually serves to protect the interests of trial lawyers, while punishing states that have already enacted successful reforms and brought down the costs associated with malpractice lawsuits and liability insurance. Specifically, Section 2531 directs the Secretary of Health and Human Services[90] to make an incentive payment, of an amount determined by the Secretary, to each state that has an "alternative medical liability law in compliance with this section."[91]

H.R. 3962 only defines "medical liability alternatives" by what they *cannot* be, specifically, a liability alternative is in accordance if "the law does not limit attorney's fees or impose caps on damages."[92] By prohibiting caps on damages, the legislation discounts extensive evidence, from states where the reforms are working, that this type of tort reform is responsible for lowering medical liability insurance premiums and health care costs across the board.

Additionally, to be eligible for the incentive payments, a state must have enacted the law *after* H.R. 3962 is enacted.[93] Already, 39 states and the District of Columbia have caps on non-economic damages and/or limits on attorneys' fees, making these states ineligible to receive payments for reforms that have lowered medical liability insurance rates and reduced the practice of defensive medicine. It punishes states that acted to stop the medical malpractice litigation crisis. H.R. 3962's "medical liability alternatives" section does no more than to simply codify the existing Agency for Healthcare Research

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[86] Ctr. For Health Transformation, Health Justice Transformation – Georgia (2009), http://www.healthtransformation.net/cs/state_solutions/georgia_project/health_justice.
[87] Letter from Darrell O. Grimes, President, MAG Mutual Insurance Co., to David A. Cook, Executive Director, Medical Ass'n (May 12, 2009) (on file with author), *available at* http://www.mag.org/pdfs/magmutual_letter_051209.pdf.
[88] *Id.*
[89] H.R. 3962, 111th Cong. (1st Sess. 2009).
[90] Health and Human Services Secretary Kathleen Sebelius was president of the Kansas trial lawyers lobby
[91] H.R. 3962, 111th Cong. (1st Sess. 2009).
[92] *Id.*
[93] *Id.*

and Quality (AHRQ) demonstration projects, while spending more money to reward states for meaningless "reforms."

The Senate proposal is even more vague in addressing reform of what is sometimes referred to as the health justice system. The Senate Democratic leadership's health reform bill, the "Patient Protection and Affordable Care Act," includes language encouraging states to:

> [D]evelop and test alternatives to the existing civil litigation system as a way of improving patient safety, reducing medical errors, encouraging the efficient resolution of disputes, increasing the availability of prompt and fair resolution of disputes, and improving access to liability insurance, while preserving an individuals right to seek redress in court;

The bill suggests that "Congress should consider establishing a State demonstration program to evaluate alternatives to the civil litigation system with respect to the resolution of medical malpractice claims."[94] It is unclear how these demonstration projects would differ from the forthcoming AHRQ demonstration projects, and further, as this is "Sense of the Senate" language, it does not have the force of law.

X. Conclusion

Objective studies and research show that defensive medicine is driving up health care costs. Tort reform targeted at reducing frivolous lawsuits and outrageous jury awards are part of the solution to reduce wasteful health care spending. It costs the federal government at least $33.7 billion to cover liability and $210 billion in defensive medicine costs every year, and Americans pay six times or more this amount as part of obtaining health care services through the private sector. All of these monetary costs compounded together negatively impacts access to care and harms patients. However, it appears that the Democratic leadership in Congress will not take any steps toward real reform in the current legislation.

The bottom line is that it will take much more than codifying an existing program, or "encouraging" the states to evaluate alternatives to the current civil justice system. Caps on noneconomic damages have proven effective in lowering the number of lawsuits brought for medical malpractice, reducing medical liability insurance premiums, and decreasing the incidence of wasteful tests and treatments in the name of defensive medicine. The states that have implemented caps and other reforms have taken the first steps toward reducing health care spending, and it is up to Congress not to reverse the progress that has already been made.

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[94] H.R. 3590, 111th Cong. (1st Sess. 2009).

About the Committee

The Committee on Oversight and Government Reform is the main investigative committee in the U.S. House of Representatives. It has authority to investigate the subjects within the Committee's legislative jurisdiction as well as "any matter" within the jurisdiction of the other standing House Committees. The Committee's mandate is to investigate and expose waste, fraud and abuse.

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