LIABILITY CAPS SPECIAL REPORT

Since Texas enacted comprehensive medical liability reform in 2003, including a constitutional amendment ratifying limitations on non-economic damages in medical liability lawsuits against health care providers, Texas has seen significant improvements in access to critical health care services across the state. Opponents of these reforms, most recently Public Citizen, claim that liability reforms have not produced the promised results. This claim is simply false and rests on a deliberate misrepresentation of the purpose of the 2003 legislation. This report seeks to set the record straight on the success of the Texas medical liability reforms in achieving the Legislature's intent.

I. Prior to the 2003 reforms, the excessive cost of medical liability insurance and the high risk of medical liability claims against physicians and providers created a severe crisis in the availability of critical health care services across the state.

The best evidence for the effectiveness of medical liability reform is to compare the legislative objectives of Texas medical liability reform to the documented results since its enactment in 2003. In 2002, Governor Rick Perry articulated these objectives:

"Every Texan deserves access to medical care. Today, in many parts of the state, access to quality care is increasingly threatened by a medical lawsuit abuse crisis. Skyrocketing malpractice insurance rates are forcing many physicians to curtail or abandon their practices, leaving patients with limited access to medical care. As Governor, I am firmly committed to doing whatever it takes to end this crisis—including reigning in abusive lawsuits, improving patient protections and reforming insurance regulations—to ensure patients have access to the best care possible."

The Governor based his comments on survey data collected and published by the Texas Department of Insurance (TDI), which found that between 1999 and 2002, medical malpractice premiums increased by an average of 64% for commercial insurers. For the Texas Medical Liability Trust (TMLT), a non-profit organization that underwrites malpractice policies for more than 10,000 physicians, premiums more than doubled during the same period. At the same time, insurers' average

claim costs statewide grew by more than 11%, while claim costs in some Texas counties, such as Hidalgo County in the Rio Grande Valley, skyrocketed by more than 60%. Claims frequency in the Rio Grande Valley as a whole ran 211% above the statewide average.

As a consequence of dramatically rising claims frequency and severity, medical liability insurers filed substantial rate increases between 1999 and 2003. According to the TDI data, rate increases by commercial insurers ranged from a low of 22.5% to a high of 101.5%, with the vast majority of the increases occurring in 2001 and 2002. TMLT increased rates during this period by more than 147%, including a 41.9% increase in 2000, a 32.6% hike in 2001, and another 18.7% in 2002. While these average rate changes reflect physician costs across the board, increases within specific medical specialists practicing in certain regions of the state proved far more dramatic. For example, in 2002 an obstetrician/gynecologist in McAllen, Texas, a major regional medical center in the Rio Grande Valley, paid up to $131,000 for the same liability coverage that cost an ob/gyn in Austin $93,000. The same was true for anesthesiologists, neurosurgeons, and even family physicians who performed no surgery. Other Texas cities that suffered from extreme rate spikes included Brownsville in the Rio Grande Valley, Beaumont in southeast Texas, El Paso in far West Texas, and Houston.

A state-by-state comparison of medical malpractice rates further revealed that Texas physicians in these regions paid higher rates than physicians in other states. The TDI survey found, for example, that liability insurance rates paid by Texas neurosurgeons, obstetricians/gynecologists, and family practice physicians were matched or exceeded only by those in Chicago, Detroit, Tallahassee, Ft. Lauderdale, and Miami. Despite higher rates and increased premium dollars, medical liability underwriters in Texas faced mounting losses and began leaving the state in record numbers at the end of the 1990s. A 2000 study conducted by the National Association of Insurance Commissioners discovered that Texas was the least profitable of the top fifteen states in the nation over the ten-year period from 1991-2000. The study noted that in two measures of profitability, return on net worth and underwriting profit, Texas insurers lagged far behind their counterparts in other major states. Based on this data, TDI bluntly concluded: "Under these market conditions, it will be very difficult for Texas to retain or attract medical malpractice insurers."

This proved to be the case. By the fall of 2002, as many as 13 medical malpractice carriers had announced their withdrawal from the Texas market or plans not to issue, renew, or issue new policies, leaving only four carriers to cover more than 35,000 physicians. On April 8, 2002, 300 physicians and more than 1,500 associated medical personnel closed their offices and protested rising malpractice costs from the steps of the Hidalgo County courthouse. Later that year the Spring Branch Medical Center in Houston announced the closure of its obstetrics ward because it could not afford the doubling and tripling of premiums for individual obstetricians and a two-thirds increase in hospital malpractice rates.

All over Texas physicians shuttered their practices, restricted services, or stopped accepting new or high-risk patients. Hillcrest Baptist Medical Center in Waco reported that six of fourteen obstetrician-gynecologists with hospital privileges had terminated hospital practice altogether. The American College of Obstetricians

and Gynecologists warned that in key populous states across the country, including Texas and Florida, rising liability insurance cost and exposure to litigation resulted in a 17% reduction in the amount of high-risk obstetric care, with almost 9% of obstetricians closing their practices. After conducting a series of hearings in the affected regions, a subcommittee of the Texas Senate Finance Committee found that the lack of trauma physicians constituted a severe problem in the Rio Grande Valley and along the lower Texas coast. One Texas state senator, a family physician from a rural community east of Dallas, put it this way:

"Physicians are dramatically changing the way they practice medicine in the State of Texas, and it's affecting patient care. Most of the physicians, where I practice medicine in Greenville, are not doing nursing home work anymore. This is happening all over the state. You're losing continuity of care from the office to a hospital. Physicians are less likely to take what are considered risky cases. They're referring out more, which increases the cost of medicine. Most physicians can't afford to even buy two hundred and fifty thousand dollars' worth of malpractice insurance now.. Many physicians are retiring early, or they're not in a position to provide charity care."

A series of exhaustive interim legislative studies leading up to the 2003 Texas legislative session confirmed the acuity of the crisis. After taking three days of testimony from more than 80 witnesses, the Senate Finance Committee concluded that substantial spikes in the frequency of medical malpractice lawsuits and the severity of awards were the primary cause of skyrocketing insurance rates and declining access to physician services.

The crisis affected access to hospital care just as severely. According to a statewide survey conducted by the Texas Hospital Association, average hospital malpractice premiums more than doubled between 2000 and 2003, accompanied by increasing difficulty in obtaining physician on-call coverage for emergency rooms, trauma centers, surgery, and obstetrics. Nursing homes witnessed similar problems. In 2001, three of the top ten Texas jury verdicts, totaling more than $400 million, arose from care delivered in a long-term facility. During this period the average claim against a nursing home reached a staggering $400,0000, second only to Florida, and by 2003 only three carriers, including the state-backed Joint Underwriting Association, were even writing liability insurance for nursing homes. Ironically, between 1995 and 2001 a ten-fold increase in claims costs for nursing home care, which is financed largely through the federal Medicare and federal-state Medicaid programs, was borne by taxpayers. Similarly, malpractice premium increases for doctors and hospitals are ultimately paid by increasing health care costs for individual citizens and businesses.

This brief recitation of some of the salient facts cannot convey the full scope and seriousness of the medical liability crisis that Texas faced in the early 2000s. This crisis was so severe that when the 78th Regular Session of the Texas Legislature convened in January of 2003, the Governor issued an emergency proclamation allowing the Legislature to consider medical liability reform despite Texas' constitutional rule that prohibits debate on non-appropriations bills in the first 60 days of the Regular Session. The comprehensive tort reform legislation, H.B. 4, that was introduced and ultimately enacted during that session explicitly stated legislative findings describing the scope and severity of the crisis. Among the key

legislative findings were an inordinate increase in the frequency and severity of liability claims since 1995, a serious public crisis in the availability and affordability of adequate medical professional liability insurance, and a material adverse effect on the delivery of medical care in Texas, including significant reductions of availability of medical and health care services to the people of Texas and a likelihood of further reductions in the future. The findings also declared that the adoption of certain modifications in the medical, insurance, and legal systems, including a cap on noneconomic damages, would have a positive effect on the rates charged by insurers for medical liability insurance.

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Public Citizen's claims regarding the growth of the Medicare population, rising health care insurance costs, and a burgeoning uninsured population tells us much about population growth and demographic change in the state, but it has nothing to do with the Legislature's 2003 findings that the medical liability crisis impeded patient access to health care by diminishing the number of practitioners and available services. Its allegation that "medical malpractice litigation is significantly, or even chiefly, to blame for our country's skyrocketing health care costs" may make good political rhetoric, but it is irrelevant to the legislative intent of the 2003 reforms.

II. The Legislature voted to limit non-economic damages in medical liability claims, along with related measures, specifically to address the access to care crisis by reducing the excessive cost of medical liability insurance. Subsequently the voters of Texas approved a constitutional amendment authorizing the Legislature to take such actions. Overwhelming evidence indicates that these reforms have achieved this objective.

In response to the overwhelming nature of the crisis, the Legislature adopted a wide array of reforms, the centerpiece of which is a limitation on the amount of noneconomic damages recoverable in a health care liability action. Specifically, H.B. 4 established a non-indexed $250,000 cap on noneconomic damages in a health care liability claim arising from medical negligence that applies to all physicians and health care providers (other than health care institutions) on a per case or occurrence basis. For a health care institution, a separate $250,000 cap applies on a per case or occurrence basis, with an aggregate cap of $500,000 for any single case or occurrence against all health care institutions. While Texas voters subsequently adopted a constitutional amendment specifically authorizing the Legislature to cap noneconomic damages in health care liability actions, H.B. 4 likewise contained a statutory cap that did not depend on voter approval of a constitutional amendment.

Have caps on noneconomic damages in health care liability claims ameliorated the crisis identified by the Texas Legislature in 2003? The answer is an unqualified yes. According to a recent study published by the American College of Surgeons, medical liability reforms in Texas have resulted in a five-fold decrease in the risk of a malpractice lawsuit being filed against a health care provider. In most Texas counties, claims against health care providers have dropped by more than half. In Texas' most populous county, Harris, a typical year would see 450 to 550 medical liability claims filed in state trial courts; that number has shrunk to an average of between 200 to 250. This dramatic decline in the risk of claims has been followed by an equally dramatic and sustained decline in medical liability

insurance losses, which has translated directly into reduced insurance premiums for Texas health care practitioners and enhanced access to care for Texas citizens.

The evidence of the impact of limiting noneconomic damages on liability costs is likewise striking. Between 2003, the year in which H.B. 4 was enacted, and 2010, medical liability insurance premiums have declined by more than 50%, from an average of close to $18,000 per year in 2003 to about $9,000 in 2010. Rate declines have also been continuous in each year since the adoption of the cap. The Texas Medical Liability Trust, the physician-owned non-profit association that covers more than 30% of Texas physicians, cut its rates twice for a total of 17% in 2004, and again in 2005 (5%), 2006 (7.5%), 2007 (6.5%), 2008 (4.7%), and 2009 (1%). In addition to rate cuts, TMLT recommenced paying dividends to its physician members, the equivalent of further rate cuts. In 2005, TMLT returned $10 million to Texas physicians, $35 million in 2006, a further 22% in both 2007 and 2008, and 24% in 2009.

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Private insurers followed suit. Medical Protective has slashed rates seven times since 2004. American Physicians Insurance Company cut rates six times in five years; the Doctors Company three times; and, the Joint Underwriting Association three times in three years (2005-2007). In 2009, one company, Medicus Insurance, announced an 11% rate reduction after only three years in the Texas market. Since 2004, four admitted rate-regulated carriers have begun underwriting in Texas (there are now 14 commercial carriers in the Texas market vs. three in 2003), in addition to 26 risk retention groups, captives, surplus lines, and other unregulated carriers. More than one in ten Texas physicians are now insured by commercial entities that entered the Texas market following adoption of liability reforms. All told, in the past seven years Texas physicians have seen total premium costs for liability insurance plummet by $879 million, and about half the state's physicians are paying lower premiums today than they were in 2001.

Public Citizen's allegation that medical liability insurers are reaping the profits of reform at the expense of Texas physicians is patently false. The fact that the state's largest insurer of physicians is a non-profit association of physicians (and thus has no profit motive apart from the physicians it serves), and that its premium reductions mirror those of private insurers, belies this claim.

III. Falling medical liability insurance costs and increased competition in the liability insurance market have not only encouraged more physicians to seek licensing in Texas, but they also have allowed physicians at risk of closing their practices to keep their doors open.

There is little question that this combination of malpractice insurance rate reductions and increased competition in the Texas liability insurance market has encouraged physicians to continue practicing and has made Texas a more attractive place to practice medicine. In 2001 Texas issued new licenses to just over 2,000 physicians, the lowest number in the prior ten years. By contrast, in 2008 Texas licensed more than 3,600—the highest number in its history—and since passage of the medical liability reforms in 2003, more than 21,640 new physicians have successfully sought and received licenses to practice in the state. In just the past three years, Texas has witnessed a 62% rise in the number of

newly-licensed physicians compared to the three years prior to the liability reforms. More importantly, however, the Texas Medical Association estimates that without the 2003 reforms and cap on noneconomic damages, more than six million patient visits per year would not have occurred. The social and individual benefits associated with this greatly enhanced access to qualified medical care cannot be calculated.

Though dramatic improvements to health care access have occurred across the board, patients of specialists most endangered by excessive litigation and premium costs prior to 2003 have benefited the most since the reforms were adopted. In just the past six years, 218 new obstetricians have joined the ranks of Texas practitioners, and medically underserved rural areas have experienced a 27% increase in available obstetrical care. Ten rural counties that had no obstetrician at all prior to 2003 now have at least one, 22 rural counties have added obstetricians, and 52 counties—more than one in five—have witnessed a net gain in obstetrical specialization. Forty-four of these counties had previously been rated as medically underserved or partially underserved.

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The same is true of neurosurgeons, emergency medicine physicians, cardiologists, cardiovascular surgeons, general surgeons, orthopedists, orthopedic surgeons, pediatricians, and geriatricians. At least six important rural and suburban counties in Texas— Brazoria, Hays, Montgomery, Lamar, Medina, and Randall— that had no neurosurgeon prior to the passage of H.B. 4's cap on noneconomic damages have added at least one, and 38 counties in all have gained access to neurosurgical care. As a result of reform, 18 rural counties have been able to attract their first emergency medicine physician to their communities, and 22 rural counties in all have added at least one ER doctor. For cardiologists and cardiovascular surgeons, the numbers are equally striking: 11 counties gained their first heart specialists and 15 added at least one. Similar figures hold for general surgeons (11 counties with a first surgeon, 24 with the addition of at least one) and orthopedists (46 counties with a net gain, 26 medically underserved counties added at least one).

As noted above, medically underserved areas of Texas have generally benefited the most from the adoption of the limitation on noneconomic damages. In the Rio Grande Valley, where physicians and health care workers protested in 2002 over excessive litigation and medical liability insurance costs, more than 220 new physicians have opened practices, many in critical medical specialties hardest hit by the liability crisis. Doctors are also flocking back to counties such as Victoria, Nueces, and Jefferson along the Texas coast, each of which experienced a rapid decline in the number of physicians in 2001 and 2002.

Public Citizen's claim that the number of new physicians licensed to practice in Texas since 2003 lags population growth is grossly misleading with respect to the effectiveness of medical liability reform. First, it ignores the significant number of physicians who remained in, expanded, or returned to their practice as a result of the reforms. Second, it assumes that medical schools, themselves facing enormous funding challenges, produce new physicians in proportion to overall population growth. This assumption is pure fantasy and distorts the reality of medical education. Third, its reliance on Politifact as an authoritative source of information about access to medical care in Texas is misplaced. Politifact

evaluates the relative truth of specific claims made by politicians. It did not purport to study (nor should it have) physician practice patterns, physician retention, or trends in physician education. It did not survey physicians and hospitals. Politifact's findings have no relevance whatsoever to the question of whether the legislative intent of medical liability reforms has in fact been achieved.

IV. Texas hospitals have reinvested millions of dollars in savings from medical liability costs to expand and enhance critical health care services, including the provision of charity care.

Texas hospitals have reaped more than $100 million per year in savings on liability insurance, which they are using to hire medical staff, improve and expand facilities, enhance efficiency and patient safety, and deliver more charity care (up about $500 million per year since 2003). Specifically, a 2008 Texas Hospital Association survey of 109 hospitals found that hospitals used savings from lower liability insurance costs in the following ways:

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✦ 58% to expand patient safety programs;

✦ 51% to maintain and expand coverage or services for uninsured and underinsured patients;

✦ 46% to subsidize shortfalls in government payments, such as Medicaid;

✦ 41% to raise salaries for nurses, maintain or increase nurse staffing levels, or maintain or expand staff educational opportunities;

✦ 39% to maintain, improve, or add new medical equipment; and

✦ 37% to establish or increase payments to on-call physicians or improve the hospital's physical plant.

All told more than eight in ten Texas hospitals reported that it was easier to recruit medical specialists and subspecialists in the wake of liability reform, and more than two-thirds said that they had maintained or expanded services because of savings in medical liability costs. This expansion of access included critical care specialties in previously underserved areas of the state. For example, a College Station hospital opened the first neo-natal intensive care unit within 100 miles, allowing newborns and their parents rapid access to care instead of having to make a two- or three-hour drive to the nearest facility in Houston. Reform enabled a rural hospital in Victoria to maintain its certification as a Level III trauma center and to expand emergency room services. It also allowed the West Texas town of Abilene to recruit a neurosurgeon to deliver critically needed major trauma care in a vast rural area of the state.

In addition to improving and expanding the level and quality of hospital services, liability insurance cost savings resulting from the reforms made it possible for hospitals to provide more charity and indigent care. Some examples of these programs, which would not have been possible without a cap on noneconomic damages, include CHRISTUS Spohns' Westside Corpus Christi Clinic's Diabetes Excellence Program along the lower Texas coast; Driscoll Children's Hospital's

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satellite Clinics in Brownsville and McAllen in the Rio Grande Valley; and Houston-based Kelsey-Seybold's Clinic's electronic medical record program (shown to reduce medical errors and improve monitoring of medication allergies and drug interactions).

CONCLUSION

The great weight of the evidence in Texas demonstrates that medical liability reform, and specifically the cap on noneconomic damages, has delivered on each promise made by the Legislature when it enacted H.B.4. Since 2003, medical liability insurance premium rates have dropped precipitately and continue to fall, with savings to Texas physicians and hospitals now approaching $1 billion.

The number of commercial carriers writing liability coverage for Texas physicians has increased more than three-fold, making the Texas marketplace more competitive and liability insurance both more accessible and affordable. Physicians, including practitioners with badly-needed specializations, have maintained and expanded their practices. Hospitals have taken the money saved by lowering liability insurance costs and put it to good use, improving patient safety and outcomes and expanding access to care for all Texans. In Texas, medical liability reform has exceeded expectations of policymakers.

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