The Myths and Reality of Tort Reform

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Charles Silver, David A. Hyman, & Bernard Black, *Fictions and Facts: Medical Malpractice Litigation, Physician Supply, and Health Care Spending in Texas Before and After HB 4*, __ **Tex. Tech. L. Rev.** __ (forthcoming), available at SSRN .

It is difficult to convene a discussion of cost containment in health care without someone calling for tort reform. In the view of many in the medical community and the general public, malpractice suits play a key role in driving up health care costs. Litigation is expensive, and the threat of being sued causes doctors to order lots of unnecessary tests—the defensive medicine problem. Tort reform also is popular with elected officials. Most states have caps on damages; pre-trial medical review panels are common too.

But the gap between the theory and reality of malpractice reform is large. Confirming findings from earlier studies, Silver, Hyman, and Black report in their careful analysis of Texas data that tort reform fails to deliver on its promises. Moreover, it may be causing significant harm.

In 2003, Texas passed HB4, a major tort reform bill that included a range of procedural and substantive provisions and featured a $250,000 cap on non-economic damages. Proponents of HB4 said the legislation was necessary to stem a surging tide of malpractice lawsuits, reverse an exodus of physicians from the state, and bring down health care spending by relieving the pressure for defensive medicine. It turns out that none of those assertions was accurate. Moreover, it appears that the tort reform law may have worsened things for patients by weakening the deterrence of liability.

In enacting its statute, the Texas legislature cited an inordinate increase in malpractice claims during the previous eight years. The data set used by Silver, Hyman, and Black included malpractice claims for which a payment was made to the plaintiff. While such claims had increased over the eight-year period that worried legislators, increases also occurred in the number of Texans and the number of physicians. Once the claims data were adjusted for the changes in population and practicing physicians, the data actually showed a decline in paid claims before tort reform was enacted. There also had not been an increase in the size of payments made to plaintiffs.

Texas tort reform also was supposed to address a physician-shortage problem. According to advocates of reform, liability concerns were driving physicians out of Texas in general, and particularly from high-risk specialties or rural parts of the state. In fact, both before and after enactment of tort reform, there was steady growth in the number of physicians practicing in the state, with no discernible effect on the rate of growth from the reform legislation. There also was no effect on trends for physicians in high-risk specialties or rural areas.

What about tort reform and health care costs? Did Texans see a reduction in spending because physicians did not have to order unnecessary laboratory tests or imaging studies to protect against the risk of liability? No. As with data elsewhere, the Texas data showed no decline in health care spending from tort reform. Indeed, if there was an effect, it went in the other direction. Tort reform might actually have led to an increase in spending, perhaps because physicians were more willing to provide care to high-risk patients.

All in all, Texas tort reform was based on faulty premises and mostly faulty predictions about its benefits. It did deliver on one promise—it led to decreases in paid claims and malpractice premiums, though more of the savings in premiums went to the insurance companies than physicians. Of course, the decrease in malpractice payments could reflect

undercompensation of injured patients rather than correction of overcompensation.

The most troubling impact of Texas tort reform was on patient safety. A key reason for tort liability is to deter negligent practices, and relaxing tort liability might make physicians less likely to take steps that would protect patients from harm. Unfortunately, the Texas data alone, and in combination with that of other tort reform states, suggest that tort reform may weaken the deterrence of malpractice liability. After tort reform was enacted, patient safety scores deteriorated in tort reform states such as Texas.

As policymakers develop their proposals for cost containment in health care, they can be confident that tort reform should not play a role. There are important measures needed to slow spending, and they are elsewhere than in the tort system.

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