

# Heritage Lectures

No. 1142

Delivered November 17, 2009



Published by The Heritage Foundation

January 28, 2010

## Health Care and Medical Malpractice Reform: The Necessity of Reform in the Current Debate

*The Honorable John Cornyn and Edwin Meese III*

**Abstract:** *All victims of medical malpractice should have access to the courts for the compensation that they are entitled to under our laws, but state laws have encouraged highly inefficient litigation that enriches trial lawyers at the expense of both doctors and patients. Our current medical liability system encourages the practice of defensive medicine, which causes doctors to order unnecessary tests and treatments, simply close their practices, or refuse to perform high-risk procedures. Medical liability reform cannot solve all problems, but no health care bill will ever be comprehensive without it. The goal of health care reform, rather than raising premiums, taxing the middle class, and cutting Medicare, ought to be to lower costs, increase access to care, and improve the quality of care. Medical liability reform can accomplish all three of those goals.*

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**EDWIN MEESE:** Medical malpractice is a crucial issue in the area of medical and health care reform. The costs of abusive tort litigation have added billions of dollars to the annual cost of medical care in the United States. There are basically three aspects of this. One is the litigation itself; second is the defensive medicine that is practiced to avoid the litigation; and third is the cost of malpractice insurance.

All of these have a tremendously adverse effect on the people of the United States, healthy or sick. In litigation, of course, you have “wheel of fortune justice,” as I call it, in which tremendous amounts of money are awarded sometimes by juries based not so much on

### Talking Points

- Our current medical liability system encourages the practice of defensive medicine. That is the reason this is such an important part of our discussion of comprehensive health care reform.
- Perhaps the greatest cost of excessive litigation is when doctors decide simply to close their practices or refuse to perform high-risk procedures.
- While we know that medical liability reform cannot solve all the problems, no health care bill will ever be comprehensive without it.
- The goal of health care reform—in case we have forgotten because of some of the proposals that seem to raise premiums, taxes on the middle class, and cut Medicare—ought to be to lower costs, increase access to care, and improve quality of care. Medical liability reform can accomplish all three of those goals.

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This paper, in its entirety, can be found at:  
[www.heritage.org/Research/HealthCare/hl1142.cfm](http://www.heritage.org/Research/HealthCare/hl1142.cfm)

Produced by the Center for Legal and Judicial Studies

Published by The Heritage Foundation  
214 Massachusetts Avenue, NE  
Washington, DC 20002-4999  
(202) 546-4400 • [heritage.org](http://heritage.org)

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the facts of the case, but on the histrionic abilities of particular lawyers.

In most cases, the doctors actually win these suits. On the other hand, just defending them costs, on average, more than \$100,000. This is a case where the doctors lose while winning.

The resulting steep rise in medical malpractice premiums is also an expense that increases the cost of delivering health care. Doctors can pay over \$400,000 a year in premiums in some parts of the country, and medical malpractice premiums can represent a very high percentage of the average doctor's operating expenses. As a result of this, many doctors leave the profession or stop the types of practice in the profession that have particular risk in terms of malpractice suits.

A survey by the *Journal of the American Medical Association* found that 93 percent of physicians practice what we call defensive medicine: that is, ordering tests, procedures, and referrals that are not medically necessary for the sole purpose of protecting the doctor or the hospital against medical malpractice claims. The estimated cost of defensive medicine ranges from \$191 billion to \$239 billion in the last year for which we have statistics, 2008. These higher costs are passed on to consumers in the form of higher health care insurance premiums, and that in turn squeezes an estimated 3.4 million people out of the ability to purchase health insurance.

These are the kinds of problems that we have in this country. Yet despite all of the serious problems now being debated in Congress, the legislation that has been introduced so far does not really do anything about abusive medical malpractice claims.

The bill that was passed by the House actually makes things worse. It does provide incentives for the states to reform their medical lawsuit rules, but on the other hand, it provides incentives only if the states do not implement any limits on either malpractice awards or attorneys' fees. You can guess who got that into the legislation. These are two of the most effective remedies for reducing abusive lawsuits and the costs that are related to the whole subject of malpractice premiums.

Today we are very fortunate in having here to discuss this whole matter, the Honorable John Cornyn. Senator Cornyn has represented Texas since 2002 and was overwhelmingly re-elected in 2008. He is uniquely qualified to discuss this and other public policy matters because of his extensive experience not just as a United States Senator, but also as a district judge, as a member of the Texas Supreme Court, and as the Attorney General of the State of Texas. Texas, by the way, is a state that has successfully implemented tort reform, including in the area of health care.

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Senator Cornyn is a native of Texas. He was raised in San Antonio. His father was a B-17 pilot in World War II who served for 31 years in the Air Force. The Senator is a graduate of Trinity University and St. Mary's School of Law, and he also has a Master of Law Degree from the University of Virginia.

He has won a number of awards including the Fighter for Free Enterprise Award of the Texas Association of Business and the National Federation of Independent Business's Guardian of Small Business Award. Senator Cornyn serves on several important committees: Finance, Judiciary, and Budget. He was also elected by his colleagues in 2008 to be Chairman of the National Republican Senatorial Committee.

Senator Cornyn has earned his reputation as an articulate and powerful voice for conservative views, and we are pleased to have him today to discuss this very important topic. Please join me in welcoming Senator Cornyn.

—Edwin Meese III is Ronald Reagan Distinguished Fellow in Public Policy in and Chairman of the Center for Legal and Judicial Studies at The Heritage Foundation.

**THE HONORABLE JOHN CORNYN:** General Meese, thank you very much. I want to thank you for your leadership in this important area, lawsuit reform, and particularly on medical liability reform, the subset of that larger category. You and your team here at The Heritage Foundation's Center for Legal and Judicial Studies have brought Heritage's world-renowned energy, intellectual rigor, and commitment to principle on these issues, so I thank you for all of that great work here at The Heritage Foundation.

I am always happy to come speak at Heritage because there are so many great scholars and leaders who have worked for freedom that actually contribute their efforts here at Heritage. They provide a great reservoir of ammunition, if you will, and information that we find—I find—useful on a day-to-day basis in my duties as a United States Senator. So thank you, Heritage Foundation, for the great contribution you make.

As you would expect, I am enormously proud to represent the 24 million people of the great state of Texas in the United States Senate. So you will not be surprised that I would like to share with you a Texas story. It is about lowering the costs of practicing medicine in our state. It is about increasing Texans' access to quality care. And, of course, it's the subject of medical liability reform.

The moral to this story is that medical liability reform has worked in Texas, one of our laboratories of democracy. And what has worked in Texas could be, and should be in my view, a model for the entire nation as we debate health care reform in the United States Senate.

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We all understand medical liability laws exist for a very important purpose: to provide just compensation to victims of negligence and other medical errors. And there is no question—let me just state this up front—that every victim of medical malpractice should have access to the courts for the com-

ensation that they are entitled to under our laws for their injuries.

But over the years, laws in many states have encouraged a wave of highly inefficient litigation that has enriched trial lawyers at the expense of both doctors and patients. According to *The New England Journal of Medicine*, 40 percent of medical liability lawsuits are without merit. Actually, my experience as a former medical malpractice defense lawyer and as a former district judge is that this number sounds way too low. The vast majority of medical liability cases are resolved, in my experience, without any judgment or any payment and settlement to the defendant.

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That same study, though, concluded that—and I think this is truer to my own experience—54 percent of the money paid by the defendant to the plaintiff actually went to the lawyer in terms of attorneys' fees and court costs. So actually, the patient, the one entitled to compensation, ends up receiving less in a medical malpractice lawsuit than the lawyer.

Cass Sunstein, whose name many of you will recognize, a liberal law professor now serving in the Obama Administration, put it this way. He said there is a stunningly poor fit between malpractice claims and injuries caused by medical negligence. He said most patients who are harmed by medical malpractice do not get any compensation, and many patients who do receive compensation were not harmed at all or treated negligently. That is what I mean when I say it is an extremely inefficient means of actually resolving these disputes.

Our current medical liability system, as General Meese pointed out, encourages the practice of defensive medicine. That is the reason this is such an important part of our discussion of comprehensive health care reform.

As you know, defensive medicine occurs when physicians decide to perform a procedure not

because their clinical judgment tells them it is necessary, but rather because they want to avoid adverse legal consequences if, two years from now, some patient they may have treated once in an emergency room serves them with papers and sues them in state or federal court. So what happens is that defensive medicine balloons the cost of unnecessary health care in our system.

Ninety-three percent of doctors under one survey performed by the *Journal of the American Medical Association* admit to practicing some defensive medicine, although this is a very difficult statistic to pin

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***Perhaps the greatest cost of excessive litigation is when doctors decide simply to close their practices or refuse to perform high-risk procedures.***

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down because, of course, doctors do not want to admit to performing unnecessary procedures. On the other hand, they feel they must do so in order to protect everything they have worked a lifetime to achieve and to support their family.

Defensive medicine, by one account, increased health care costs by up to 9 percent a year. That is according to Mark McClellan and Daniel Kessler, economists whose names you may recognize. Another study by PricewaterhouseCoopers put the annual cost of defensive medicine at \$230 billion a year. Even President Obama, while acknowledging that defensive medicine exists and should be dealt with, like the Pelosi bill, does not seem committed to trying to do much about it. At least we have not seen that commitment manifest itself in legislative language.

Yet perhaps the greatest cost of excessive litigation is when doctors decide simply to close their practices or refuse to perform high-risk procedures. This is the problem we saw in Texas during the early part of this decade. In early 2001, Texas had become the trial lawyer's dream and the doctor's nightmare. Our state had become a haven for medical malpractice lawsuits. As a result, physicians' medical malpractice insurance rose dramatically in cost—more than doubled.

Many insurers simply hung it up and decided they would no longer write medical malpractice insurance in the state. In fact, the number of physician liability insurers writing policies in Texas fell from 17 to four. Many doctors simply pulled up stakes in our state and moved somewhere else where they did not feel so endangered and so much under the gun. Many doctors who decided to stay in practice restricted the procedures they would perform because they wanted to avoid providing a large target for litigation.

I have three slides that I think you will find telling. The first illustrates the exodus of doctors from 2001 through 2003. Texas has 254 counties, and in 99 counties in our state, we lost at least one high-risk specialist during those years. Forty-seven of those counties were metropolitan areas where people might have another choice, but in 52 counties—and Texas has a huge rural population, as you probably know—they lost a high-risk specialist during those years, meaning that many patients in those areas lost access to the kind of quality health care that I know we would all hope for.

Yet many of these counties also loss access to care entirely:

- 40 counties lost a general surgeon, and five lost their one and only general surgeon;
- 26 counties lost an emergency room doctor, and 11 counties lost their only emergency room doctor;
- 26 counties lost an obstetrician, and six lost all of their OB/GYN doctors;
- 13 counties lost a thoracic surgeon;
- Five counties lost all of their thoracic surgeons; and
- Six counties lost a neurosurgeon, and one of them—Brazoria County, a large county right outside of Harris County in southeast Texas with a population of 300,000—lost the only neurosurgeon they had.

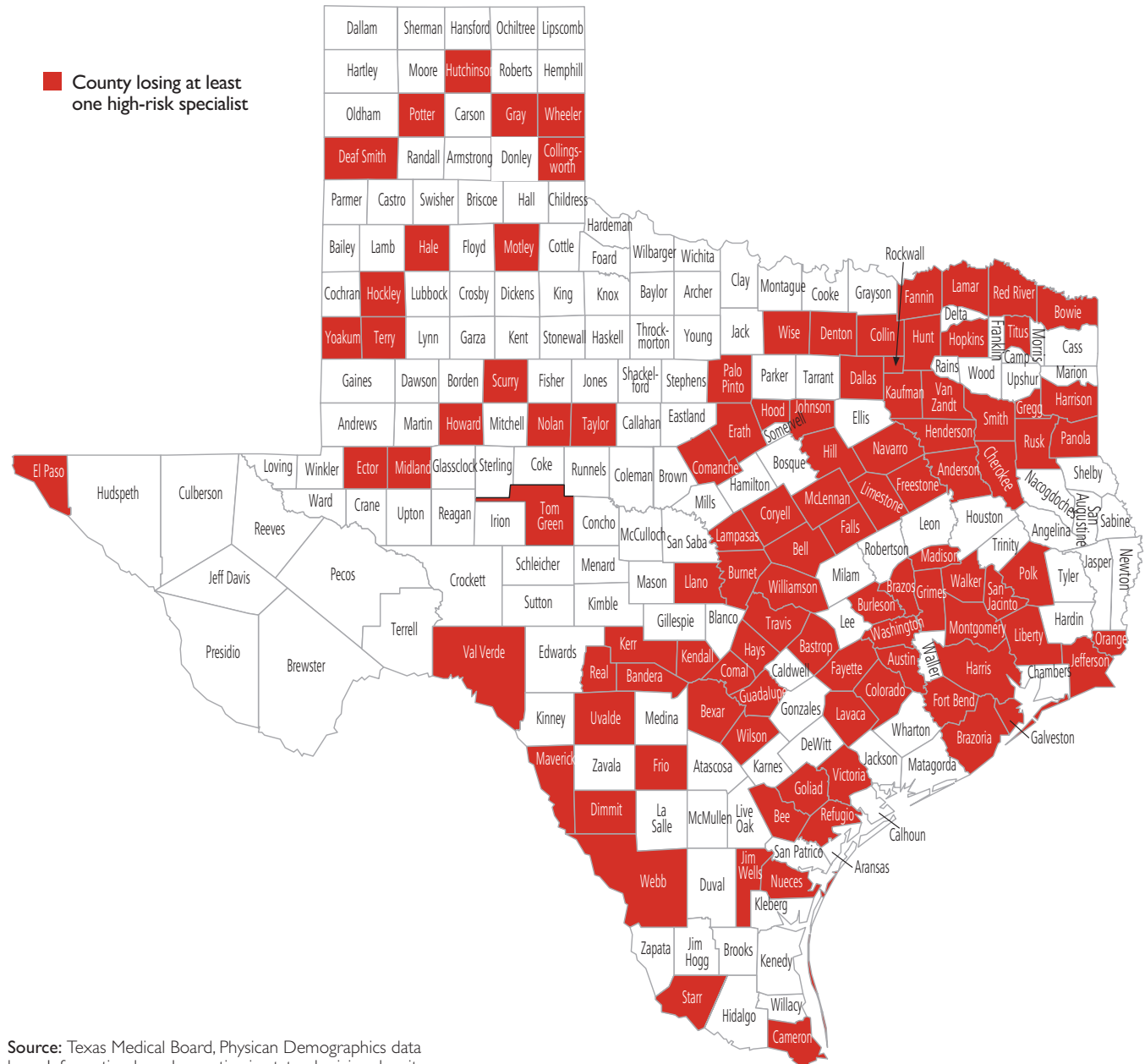
Obviously, losing access to high-risk specialists like neurosurgeons, OB/GYN doctors, and others means that people have to be transported either by car, air, or otherwise to seek the health care that they need and, of course, exposing them to greater morbidity if not mortality.

The Texas legislature saw the problem, and in 2003 they took action by passing comprehensive medical liability reform. They required some pretty simple, straightforward steps making sure that punitive damage awards—not compensation, but

punishment damages—be awarded by unanimous jury verdict. They imposed a firmer statute of limitations, the time period in which a lawsuit had to be brought.

## 99 Texas Counties Lost at Least One High-Risk Specialist

Pre-Reform: 2001–2003



Map 1 • HL 1142 heritage.org



They also set higher standards for expert witnesses. We used to say when I was practicing law that an expert is a person from out of town carrying a briefcase. Indeed, in the old days, there used to be a whole bunch of experts who would be happy to come testify for a price in a medical malpractice lawsuit, enough to tee up a jury question for the jury to decide. This raising of the standard makes sure that only duly qualified experts can render those opinions.

Most important, there was a cap placed on non-economic damages of \$750,000. Of course, non-economic damages are meant to compensate the plaintiff based on subjective concepts like pain and suffering and are ordinarily left to the discretion of the jury. A reasonable cap on non-economic damages ensures that juries can compensate victims of malpractice while removing the possibility of a windfall verdict, and it brought some predictability, some stability to our medical liability landscape.

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These and other reforms were designed to create an honest and predictable system of civil justice in which victims of malpractice could receive just and timely compensation, bad actors would be held to account, and doctors could afford to practice in our state.

These medical liability reforms had a major impact in Texas. Average premiums for medical liability insurance fell by 27 percent on average and in some cases more than 50 percent: a dramatic drop. Why should we care about lower premiums for providers? Because providers can invest those savings in higher-quality patient care, not to mention the fact it makes it more affordable for them to practice their profession in the state.

Let me give you two good examples of where lower premiums actually directly helped patients get a higher quality of health care.

CHRISTUS Health Systems is one of the top 10 Catholic health systems in the United States. It has more than 40 hospitals and other facilities in six U.S. states and the country of Mexico. They have a major presence in Texas. My hometown of San Antonio, Houston, and Corpus Christi is where they have major hospitals. They are a nonprofit and have seen a major decline in lawsuits since Texas reformed its medical liability laws.

But more to my point, they have actually been able to cut their medical liability costs by \$150 million a year since these medical liability reforms passed. They have been able to use those savings, \$150 million a year, to plow it back into more charitable care and improve the quality of care.

The Kelsey–Seybold Clinic in Houston, Texas, is another example that I visited recently. They are a multi-physician practice sort of modeled after the Mayo Clinic and have been a fixture in Houston for more than six decades. They have more than 50 physicians in 18 clinics located in the greater Houston area.

Five percent of their revenue used to go to pay for medical liability insurance, but after the medical liability reforms I have been discussing, they dropped to one-tenth of 1 percent. What they demonstrated to me is that they were able to plough those savings back into an electronic medical records system that cost them about \$25 million—here, again, directly affecting the quality of health care they were able to deliver as a result of these savings.

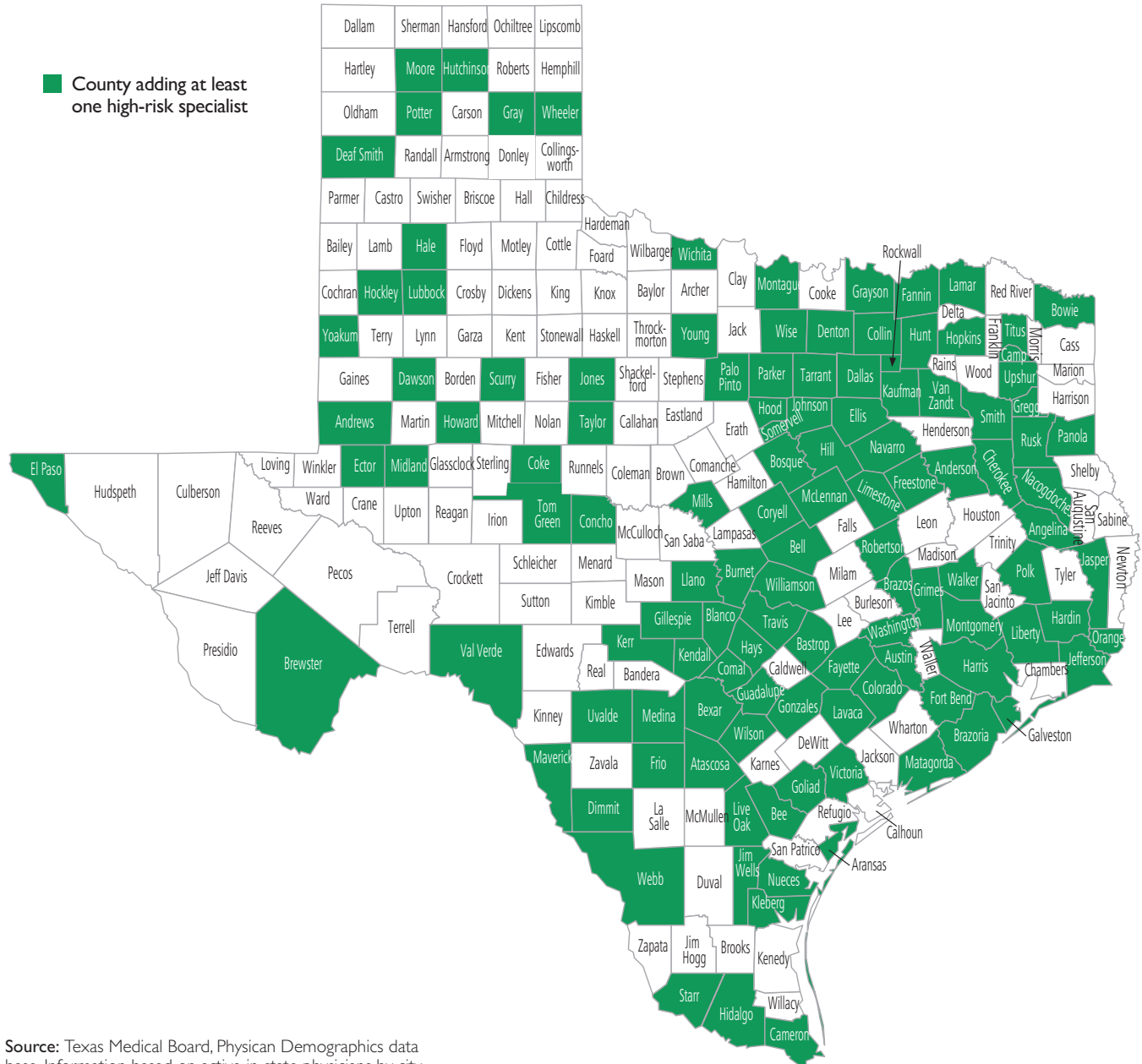
Lower liability premiums have improved patient care at existing facilities in Texas, as I have tried to demonstrate, but they have also had the added benefit of encouraging doctors to move back to our state. This next slide illustrates that point. We see that 125 counties added at least one high-risk specialist between 2004 and 2008. As I mentioned earlier, many of these counties had simply lost access to a doctor or never had it in the first place. For example:

- 70 counties added an emergency room doctor, 20 of which had not had one in 2003;

- 52 counties added an obstetrician, 10 of which had not had one at all;
- 50 added a general surgeon, 12 of which had not had one;
- 45 added an orthopedic surgeon, nine of which had not had one before; and
- 20 counties added a vascular surgeon, 11 of which had not had one before.

## 125 Texas Counties Added at Least One High-Risk Specialist

Post-Reform: 2004–2008

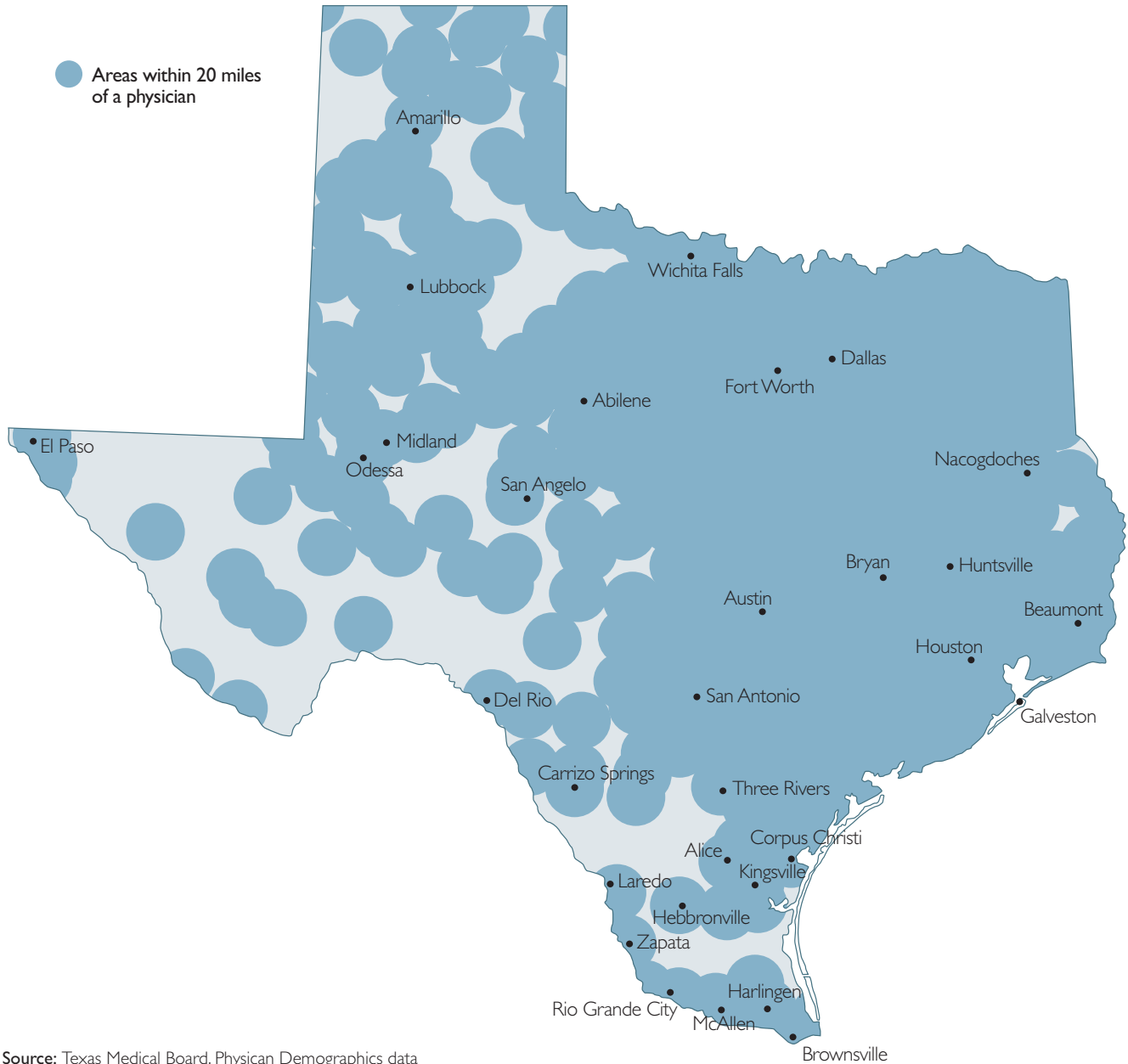


Map 2 • HL 1142 [heritage.org](http://heritage.org)

On my last slide, we see something dramatically different after these medical liability reforms passed. Today, 99.7 percent of the Texas population lives within 20 miles of a physician. And I don't have to tell you this is in a big state. That is

the big blue area in this map. Texas has the largest rural population in the country. So today, millions of Texans have access and shorter drive times and wait times, which means improved access to quality health care.

## 99.7 Percent of Texans Live Within 20 Miles of a Physician



Source: Texas Medical Board, Physician Demographics data base. Information based on active in-state physicians by city. Data analyzed by Texas Alliance for Patient Access.

Map 3 • HL 1142 [heritage.org](http://heritage.org)



As remarkable as I would like to claim these statistics are, Texas is not alone. Twenty-seven other states, both red and blue states, have reformed their medical liability laws in recent years. Some have set non-economic damage caps at \$500,000. You recall I said Texas set it at \$750,000. The former, at the \$500,000 level, include states like California, Massachusetts, and Michigan. I understand Governor Haley Barbour recently spoke here about the hard fight for medical liability reform in his state of Mississippi and the difference it has made there. All of these states have seen lower costs and greater access to health care when they have reformed their medical liability laws.

Of course, what works in the states and the hinterlands could also work in Washington if we just have the courage to do it. The nonpartisan Congressional Budget Office will bear out that conclusion. They took a look at the potential cost savings—and this is only to the federal government—if Washington adopted for the nation the kind of non-economic caps on damages, the unanimous verdict in punitive damage cases, and the like. They have estimated that a full package of reforms would directly save the federal government—in other words, we the taxpayers—\$54 billion over 10 years. Of course, that does not include the private-sector savings that the reforms would generate. CBO also concluded, as we found demonstrated in Texas, that these reforms would generate improved access to health care as well.

So why is medical liability reform not a major part of the health care bills running through Congress? I think all you need to do is to turn to Howard Dean, who explained this very clearly. He gave the game away when he said the reason why tort reform is not in the bill is because the people who wrote it did not want to take on the trial lawyers in addition to everybody else they were taking on, and that is the plain and simple truth. “Now, that is the truth,” he said.

We have seen leadership in the House and Senate take two different approaches. General Meese mentioned what Nancy Pelosi did in the House. She was not just neutral about it; she actually intended in the House bill to discriminate against states that had non-economic caps on damages like Texas and deny them benefits under the bill.

At the least, the Baucus bill in the Senate Finance Committee, the committee on which I serve, was a little more neutral about it, but, amazingly, it offered nothing more than a sense-of-the-Senate resolution. That resolution states that states should explore liability reform, and, of course, they do not need to wait for the Senate to tell them to do so. A number of them have already.

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So the Finance Committee bill took absolutely no concrete action at all on medical liability reform while providing perhaps the fig leaf that many were looking for, consistent with the President’s comments to the AMA and elsewhere, that this is something we ought to look at. We need to do more than look. We need to actually act, using the good example of a number of states.

I am discouraged from a policy standpoint on what we are seeing so far on this topic in the health care debate, but from a political standpoint—and General Meese mentioned the other hat I wear in my second full-time job as the Chairman of the National Republican Senatorial Committee—we see the Democrats and trial lawyers getting pretty nervous because they realize that medical liability reform is a winning issue across the country.

Frankly, that is one reason why I am also disappointed in the American Medical Association’s endorsement of the Pelosi bill. I think their endorsement—I do not know how to say it any more kindly or gently or directly—is a disservice to the members of the American Medical Association, the medical providers who labor day in and day out to provide good-quality health care to their patients.

Doctors across America want to use the best evidence-based treatments for their patients without being second-guessed by juries and trial lawyers seeking windfall awards. Yet the AMA has embraced a bill that undercuts the type of reforms that have encouraged their members to return to Texas and

other states and provide a little bit more of that predictability and certainty that I know professionals must seek in deciding where to open their practice.

So while we know that medical liability reform cannot solve all the problems, no health care bill will ever be comprehensive without it. The goal of health care reform—in case we have forgotten because of some of the proposals that seem to raise premiums, taxes on the middle class, and cut Medicare—ought to be to lower costs, increase access to care, and improve quality of care. Medical liability reform can accomplish all three of those goals.

I am an optimist by nature. Hope springs eternal. I hope that Senator Harry Reid's (D–NV) bill will include an effective provision for medical liability reform, but, of course, that bill was developed in

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***The goal of health care reform ought to be to lower costs, increase access to care, and improve quality of care. Medical liability reform can accomplish all three of those goals.***

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secret by a handful of people over the past months. We have not seen it yet. We are anxiously awaiting it, as are 300 million people whose lives will be directly affected by it.

But I want to assure you: We will do everything we can to keep the pressure on the policymakers here in Washington to do the right thing because, as I said, it is important in terms of quality, cost, and access to medical care for all 300 million Americans.