



**THE FALSE CHOICE:  
DOCTORS OR ACCOUNTABILITY**  
*The Real Impact of So-Called Tort "Reform" in Texas*

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**[www.TexasWatch.org](http://www.TexasWatch.org)**

## Introduction

Texas voters were given a false choice in 2003: lose their doctors or lose access to their courts. As Texans were going to the polls to vote on an amendment to the state constitution known as Proposition 12, which placed severe and arbitrary restrictions that make it nearly impossible for those devastated by medical negligence to seek justice through our courts, they were inundated by an insurance industry-funded onslaught of slick advertising designed to scare them into thinking that their health care system would collapse if they didn't give up their constitutional right to seek justice in our courts.

The reality is that we do not have to settle for this false choice. We can – and should – have both strong legal protections, as well as access to quality, affordable health care. Citizens should not be forced to choose between the courts, our most important and effective forum for ensuring accountability, and a quality health care system.

As is often the case in political campaigns, however, the facts gave way to overblown assertions about a so-called medical liability “crisis” that simply did not exist. In fact, a landmark study by legal scholars from three major universities found that the number of large medical liability payments (over \$25,000) in Texas were stable between 1991 and 2002 while the number of small claims dropped significantly. Additionally, the number of claims per 100 Texas doctors fell 28.12% (from 6.4 to 4.6) between 1990 and 2002.<sup>1</sup>

As a result of the heated rhetoric and efforts to keep turnout low by manipulating the election date and ballot language,<sup>2</sup> Texas voters issued a split decision (51.13%-48.86%),<sup>3</sup> narrowly stripping away the right to legal accountability through our courts.

Patients were told to expect significant improvements in health care across the state, as well as dramatically lower medical liability insurance premiums for their family doctors.

Well, where are we today? The sad reality is that little has changed to improve health care for those who most need it and doctors continue to pay too much for their liability insurance coverage. Underserved areas remain underserved and insurance profits continue to rise. What has changed is that patients are less safe and the leveling foundation of our courts has crumbled.

In this brief review, we will discuss the real impact of Proposition 12 in Texas: rural and indigent areas still struggling to meet their health care needs, insurance companies continuing long trends of overcharges, and families devastated by medical negligence climbing an impossibly steep hill to hold those who cause death or injury accountable.

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<sup>1</sup> Bernard S. Black, Charles M. Silver, David A. Hyman and William M. Sage, *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, UNIVERSITY OF TEXAS LAW & ECONOMICS RESEARCH PAPER NO. 30; COLUMBIA LAW & ECON RESEARCH PAPER NO. 270; UNIVERSITY OF ILLINOIS LAW & ECONOMICS RESEARCH PAPER NO. LE05-002, March 2005. See <http://ssrn.com/abstract=678601>.

<sup>2</sup> Mimi Swartz, *Hurt? Injured? Need a Lawyer? Too Bad!*, TEXAS MONTHLY, November 2005.

<sup>3</sup> Proposition 12 passed by a margin of 51.13% in favor to 48.86% against. Out of 1,470,443 ballots cast, Proposition 12 prevailed by a margin of just 33,349 votes. The average margin of victory for measures on the 2003 Texas Constitutional Amendment ballot was 64.95%. See <http://elections.sos.state.tx.us/elchist.exe>.

## Where are all the doctors?

Before the passage of Proposition 12, proponents of so-called tort “reform” claimed that doctors were fleeing our state and that with the passage of radical changes to our legal accountability system, we would see a marked increase in the number of doctors serving every corner of Texas. This was a carefully crafted formula that has been used in numerous states. The reality, however, is that doctors were never really leaving.

Statistics from the Texas Medical Board (TMB), the state agency responsible for licensing doctors, show that since 1997, Texas has seen a steady *increase* in the number of doctors licensed to practice medicine. Between 1997 and 2003, Texas had an average annual rate of increase in medical licensees of 3.5%. Not only was there not a decrease in the number of doctors obtaining licenses, but there was a dramatic jump in the rate of new licensees the year *before* Proposition 12 was debated and passed. In 2002, the rate of increase jumped to 5.11% – well above the average rate of growth.

Moreover, there is no evidence that Proposition 12 has improved overall access to care. Indeed, Texas Department of Health statistics show that in 2006, Texas gained only 639 direct care physicians – those that are actually practicing medicine – a paltry increase of just 1.8%, which is slower than it was pre-Proposition 12.<sup>4</sup>

When we look at particular regions of the state, we see that underserved areas remain underserved. In 2006 – three years after Proposition 12’s enactment – rural, remote, and indigent parts of our state continue to struggle with rates of physician growth far below the statewide average of 3.54% over the last decade. Rural West Texas has actually experienced negative growth in each of the last three years.

**Number of Doctors Licensed to Practice in Rural and Underserved Regions of Texas (1997-2006)<sup>5</sup>**

REGION	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Panhandle and South Plains	1289	1308	1331	1341	1379	1418	1475	1522	1527	1519
<i>Rate of Growth</i>		1.47%	1.76%	0.75%	2.83%	2.83%	4.02%	3.19%	0.33%	-0.52%
North Texas (exc. DFW area)	673	688	726	726	759	765	774	785	796	791
<i>Rate of Growth</i>		2.23%	5.52%	0.00%	4.55%	0.79%	1.18%	1.42%	1.40%	-0.63%
Northeast Texas	1376	1430	1483	1530	1579	1660	1717	1799	1818	1803
<i>Rate of Growth</i>		3.92%	3.71%	3.17%	3.20%	5.13%	3.43%	4.78%	1.06%	-0.83%
Deep East & Southeast Texas	815	861	887	906	900	986	987	1004	999	1020
<i>Rate of Growth</i>		5.64%	3.02%	2.14%	-0.66%	9.56%	0.10%	1.72%	-0.50%	2.10%
Rural West Texas	639	678	696	697	708	724	752	740	738	737
<i>Rate of Growth</i>		6.10%	2.65%	0.14%	1.58%	2.26%	3.87%	-1.60%	-0.27%	-0.14%
South Texas	1718	1854	1938	2003	2053	2164	2224	2280	2361	2420
<i>Rate of Growth</i>		7.92%	4.53%	3.35%	2.50%	5.41%	2.77%	2.52%	3.55%	2.5%

<sup>4</sup> Charles Silver, *Did Texas Lose Physicians in 2006? Is Tort Reform to Blame?*, TORTDEFORM.COM, November 30, 2006. See [http://www.tortdeform.com/archives/2006/11/did\\_texas\\_lose\\_physicians\\_in\\_2.html](http://www.tortdeform.com/archives/2006/11/did_texas_lose_physicians_in_2.html).

<sup>5</sup> Texas Medical Board; regions based on Texas Department of Health state health regions.

As the chart below illustrates, underserved regions have not been helped by Proposition 12's promise of new doctors. Every underserved region in our state has seen lower average growth in the rate of new doctors in the three years since Proposition 12 passed (2004-2006), than in the three years before (2001-2003). The trend leaves only one conclusion: Proposition 12 has failed to produce the results that were promised to Texans living in underserved parts of our state.

**Average Rate of Change in Number of Doctors in Rural and Underserved Regions of Texas<sup>6</sup>**

REGION	2001-2003 (Pre-Proposition 12)	2004-2006 (Post-Proposition 12)
Panhandle and South Plains	3.23%	1.00%
North Texas (exc. DFW area)	2.17%	0.73%
Northeast Texas	3.92%	1.67%
Deep East & Southeast Texas	3.00%	1.11%
Rural West Texas	2.57%	-0.67%
South Texas	3.56%	2.86%

During the debate on Proposition 12, proponents of the measure also bemoaned the lack of specialists – especially obstetricians – in counties all across Texas. In fact, they noted that 60% of Texas counties did not have a practicing obstetrician. According to TMB statistics, 152 of Texas' 254 counties (59.8%) did not have an obstetrician in May 2003. What they fail to mention, however, is that three years later, that trend persists. In fact, fewer Texas counties have an obstetrician today than before Proposition 12. In May 2006, 156 counties (or 61.4%) reported no obstetrician licensed to practice in their county.<sup>7</sup>

Using the medical and insurance industry's own measures, Proposition 12 has had no impact on our state's supply of doctors nor has it improved access to health care for those who most need it.

### **What about medical malpractice insurance premiums?**

The long and short of the story about medical malpractice insurance rates in Texas is that insurance companies will stop at nothing to overcharge policyholders. By their own admission, non-economic damages are only a small percentage of total losses paid.<sup>8</sup> Only after intense political pressure and market forces began to force downward pressure on the market did rates begin to fall marginally.

In the run-up to the debate on Proposition 12, insurance companies increased premiums on doctors as much as 147.6%.<sup>9</sup> While rates have dropped somewhat overall, the reductions do not come close to making up for the overcharges doctors faced prior to Proposition 12. Through March 2006, medical liability premiums have fallen just 13.5% market wide.<sup>10</sup> Astonishingly, many companies have not lowered their premiums at all, and one, Preferred Professional Insurance Company, has increased its premiums a staggering 33.5%.<sup>11</sup>

<sup>6</sup> *Id.*

<sup>7</sup> See [www.tmb.state.tx.us](http://www.tmb.state.tx.us).

<sup>8</sup> The Medical Protective rate filing to the Texas Department of Insurance, October 30, 2003. See <http://www.consumerwatchdog.org/malpractice/rp/2059.pdf>.

<sup>9</sup> Texas Department of Insurance, *Medical Malpractice Insurance: Overview and Discussion (Table 1: Estimated Physician and Surgeon Medical Malpractice Rate Changes)*, February 12, 2003.

<sup>10</sup> Texas Department of Insurance, *Texas Medical Professional Liability: Physicians, Surgeons and Osteopaths (chart)*, March 15, 2006.

<sup>11</sup> *Id.*

In the period just after Proposition 12 passed, insurance companies refused to reduce their premiums and many of the major carriers sought rate increases:

- The Medical Protective, the nation's largest medical liability insurance provider, asked for a 19% rate increase one month after Proposition 12 passed. In its filing to Texas insurance regulators, the company wrote, "Non-economic damages are a small percentage of total losses paid. Capping non-economic damages will show loss savings of 1.0%."<sup>12</sup>
- The Medical Liability Insurance Association (JUA), which covers 12.3% of Texas doctors, asked for a 35.2% rate increase immediately after Proposition 12's passage.<sup>13</sup>
- American Physicians Insurance Exchange, the state's third largest medical malpractice insurance company with 15.0%, requested a 16.6% rate increase in September 2003.<sup>14</sup>

When lawmakers saw companies continuing to seek rate hikes despite promised reductions, they put political pressure on state insurance regulators to produce results. In a heated committee hearing that took place six months after Proposition 12's enactment, a bipartisan group of lawmakers who had supported the legislation berated then-Insurance Commissioner Jose Montemayor for not doing enough to lower premiums.<sup>15</sup> Only then did rates begin to decline marginally.

Additionally, a market correction was already due for the Texas medical liability market. Prior to Proposition 12's passage, the national average medical liability insurance payout was 81 cents for every dollar they collected in premiums.<sup>16</sup> Meanwhile, the largest medical liability providers in Texas were paying out much less than this average.<sup>17</sup> In short, the market was already dictating a significant rate decrease for Texas doctors even before Prop 12's passage.

The bottom line is that Texas' so-called medical liability "crisis" was more a function of existing market forces and overblown rhetoric. The moderate dip in premiums came as a result of downward pressure on the market by the standard insurance cycle and political pressure put on state regulators to produce results.

Until we see comprehensive insurance reform that forces companies to charge fair and reasonable premiums, doctors will continue to pay too much. This was certainly the case in California where thirteen years after limits on damages were enacted, medical liability premiums had risen 450% to an all-time high. It was not until insurance reform was passed that premiums started to decline. Since insurance reform was enacted in California rates in that state have come down and stabilized.<sup>18</sup>

### **What about the patients?**

The people who too often get lost in the debate about so-called medical liability "reform" are the patients who have the most at stake when legal protections are lost. Are patients seeing any of the

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<sup>12</sup> See Footnote 8.

<sup>13</sup> The Medical Liability Insurance Association (JUA) rate filing to the Texas Department of Insurance, October 2003.

<sup>14</sup> American Physicians Insurance Exchange rate filing to the Texas Department of Insurance, September 2003.

<sup>15</sup> David Pasztor, *House wants results on doctor premiums*, AUSTIN AMERICAN-STATESMAN, April 23, 2004.

<sup>16</sup> *Best's Aggregates and Averages - Property/Casualty, United States & Canada*, AM BEST, 2005 Edition.

<sup>17</sup> *Id.*

<sup>18</sup> Foundation for Taxpayer and Consumer Rights, *How Insurance Reform Lowered Doctors' Medical Malpractice Rates in California*, March 7, 2003. See <http://www.consumerwatchdog.org/malpractice/rp/1008.pdf>.

promised improvements in the access and cost of their health care? Are they any safer from deadly and disabling medical errors? What about those who have been devastated by medical negligence and no longer have an avenue for accountability?

Access to care is directly tied to the ability of patients to get health insurance. According to a recent report issued by the Texas Department of Insurance, 25% of all Texans do not have access to health insurance – that is 5.6 million Texans without health insurance.<sup>19</sup> Despite claims that Texans have greater access to health care, Texas continues to have the highest rate of uninsured adults among the 20 largest states.<sup>20</sup>

The cost of health care continues to rise nationwide. A recent study by the American Medical Association (AMA) found that 50 million Americans under the age of 65 spend 10% of their income on health care expenditures, a 20% increase in the number of families spending a larger chunk of their paychecks on health care.<sup>21</sup> Additionally, rising health care costs have reached a record breaking 16% of our nation's overall economy.<sup>22</sup> Texans are feeling this same trend. As Beaumont pharmacist Doug McMakin told the *Beaumont Enterprise*: "It [health care cost] just keeps going up. It's getting out of hand."<sup>23</sup>

Additionally, medical errors continue unabated. There is no evidence to suggest that the rate of medical errors has dropped at all since the passage of Proposition 12, but there is cause to believe that patients may be at greater risk. Without the threat of real accountability, oversight of the medical community falls entirely on the state medical board. While we believe the staff of the Texas Medical Board has improved its overall effort, it is clear from recent events that the physician-dominated board is willing to allow incompetent doctors into our state.

Recently, Dr. Pamela Johnson was granted a license to practice medicine in Texas despite her long and well chronicled history of negligence.<sup>24</sup> Dr. Johnson has had her license suspended in two states and was fired by Duke University after colleagues questioned her skills.<sup>25</sup> The fact that TMB – armed with this information – insisted on approving her to practice medicine tarnishes the licenses of all Texas doctors and raises serious concerns for patients. If oversight is lax at the medical board and accountability measures are no longer available to patients, then there is little guarantee for patients that they will be protected from negligent or careless health care providers.

The most significant result of legal changes like Proposition 12 is the impact they have on individuals and families who have been forced to endure unspeakable medical errors only to find that they have no way to hold those who harmed them responsible. What follows are a few profiles of the untold numbers of Texans who have been devastated by the impact of Proposition 12:

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<sup>19</sup> Texas Department of Insurance, *Biennial Report of the Texas Department of Insurance to the 80<sup>th</sup> Legislature*, December 2006. See <http://www.tdi.state.tx.us/reports/documents/finalbic07.pdf>.

<sup>20</sup> Robert T. Garrett, *Texas again tops bigger states in level of uninsured adults*, DALLAS MORNING NEWS, June 22, 2006.

<sup>21</sup> Jessica S. Banthin, PhD and Didem M. Bernard, PhD, *Changes in Financial Burdens for Health Care: National Estimates for the Population Younger Than 65 Years, 1996 to 2003*, JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, December 13, 2006. See <http://jama.ama-assn.org/cgi/content/abstract/296/22/2712>.

<sup>22</sup> Marc Kaufman and Rob Stein, *Record Share Of Economy Is Spent on Health Care*, WASHINGTON POST, January 10, 2006.

<sup>23</sup> Kristina Herdobbler, *Health care eating away at income; cost exceeds 10 percent of household budget for scores of Americans under 65*, BEAUMONT ENTERPRISE, December 13, 2006.

<sup>24</sup> See <http://www.texaswatch.org/TW/index.cfm?event=showPage&pg=DoctorsRun12052005>.

<sup>25</sup> Cheryl W. Thompson, *Doctor Formerly in Va. Applies for Tex License*, WASHINGTON POST, July 15, 2005.

- **Alvin Berry; Copperas Cove, Texas.** In 2003, 71 year-old Alvin Berry had a routine test to check his prostate specific antigen (PSA) level. His test showed an elevated PSA, which is often an early indicator of prostate cancer. His family doctor referred Alvin to a urologist who told him there was nothing to worry about. Seven months later, Alvin's PSA had risen from an elevated 12.6 to a staggering 166. By then it was too late. He had developed prostate cancer which had spread to his bones. Alvin was given just five years to live. Alvin Berry, who had voted for Proposition 12 because he believed it would block so-called "frivolous lawsuits," found that he was unable to pursue justice because of the constitutional amendment he had once supported. About the campaign to pass Proposition 12 he says: "We'd voted on something, and we really didn't know what the facts were."<sup>26</sup>
- **Monica Meza; Pflugerville, Texas.** Angie Meza took her four year-old daughter Monica to the pediatrician with flu-like symptoms. Monica was prescribed an antiviral with some cough medicine and sent home. It was clear the next day that she needed more attention. Her blood-oxygen was dangerously low and she was admitted to the hospital. While inserting a central line to administer medications, healthcare workers punctured a vein, which led to bleeding in her right lung. The trauma led to multiple organ failure and Monica rapidly deteriorated because her immune system had shut down. Two weeks later, Monica Meza died. It remains unclear how or why Monica Meza died. Her mother has spent the years since trying to find out what led to her daughter's death. Because of Proposition 12, she has been unable to get the answers she needs. As she told the *Austin American-Statesman*: "I wasn't looking to get money or to get rich. I wanted answers."<sup>27</sup>
- **Noe Martinez, Sr.; McAllen, Texas.** After years of caring for their 77 year-old father in their Edinburg, Texas home, Noe Martinez, Jr. and his sister Leticia, decided it was time to get help and they turned to the McAllen Nursing Center. One night, Noe Sr., who suffered from Alzheimer's disease, told an attendant at the nursing home that he was hungry. Without checking his records which showed that Mr. Martinez was on a diet of only pureed food, the vocational nurse got him a peanut butter sandwich. Noe Sr. choked on his food, which led to multiple heart attacks. By the time Noe Jr. and Leticia arrived, their father did not have any brain function. He died two weeks later. Because measures like Proposition 12 arbitrarily impact the aged and disabled more harshly than the rest of the population, the Martinez family has been unable to hold the nursing home accountable.<sup>28</sup>

To learn more about some of the men, women, and children who have had to face the reality of a system that allows wrongdoers to escape accountability, please visit our website.<sup>29</sup>

## What should we do?

Instead of improving health care for Texas patients, Proposition 12 has exacerbated existing problems by diverting attention away from the need for legal and insurance reforms which include real penalties for bad doctors, stronger patient safety standards, and an avenue for accountability through our courts. In Texas, we have clearly misdiagnosed this problem.

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<sup>26</sup> See Footnote 2.

<sup>27</sup> Eric Dexheimer, *Medical lawsuit caps shutting some out of courthouse*, AUSTIN AMERICAN-STATESMAN, March 26, 2006.

<sup>28</sup> Dave Mann, *A Death in McAllen*, THE TEXAS OBSERVER, September 23, 2005.

<sup>29</sup> See <http://www.texaswatch.org/TW/index.cfm?event=showPage&pg=MedMalProfiles>.

Lawmakers should consider common sense patient protection measures that will lower the likelihood of a medical error:

- **Crack Down on Bad Doctors.** We know that a small number of doctors commit most of the malpractice. In fact, just 5.9% of doctors are responsible for 57.8% of all medical malpractice payments.<sup>30</sup> Instead of protecting the few bad doctors who are the bulk of the problem, we should be beefing up licensure and oversight requirements to ensure that all Texas doctors meet the highest standard.
- **Improve Nurse to Patient Ratios.** Nurses are grossly overworked with staffing ratios that put patients in danger. Reducing the nurse to patient ratio would improve patient care and lessen the possibility of patient death or injury.<sup>31</sup>
- **Reduce Hospital Infections.** Hospitals should be required to report infection rates and take action to ensure a clean and sterile environment. Recent studies show that infections continue to plague hospitals across the country.<sup>32</sup> Beefing up reporting and taking action to clean up health care facilities could significantly reduce patient infections.

Additionally, insurance companies must be brought in line through comprehensive reform. As we have seen in Texas, the insurance industry is more than willing to keep premiums high until pressure is brought to bear by lawmakers and regulators. Sadly, once that pressure was applied, it was short-lived. Once political leaders could declare victory and move on, they stopped keeping track of the problem, and insurance companies have been allowed to keep premiums artificially high. Without real insurance reform that includes strict oversight and vigilant efforts to keep rates in check, the industry will continue to overcharge doctors and patients.

Finally, instead of punishing patients by limiting their legal rights, we need open and fair access to our courts so that patients are able to hold the wrongdoer who harmed them accountable in a court of law.

### **What is the bottom line?**

States looking to Texas for guidance should beware. Millions of dollars were spent by the insurance and medical industries, as well as their special interest groups, to convince Texans that the only way out of our state's health care mess was to trample our constitution. As is too often the case, the only beneficiaries have been the groups and industries that funded the campaign to shred our legal rights.

The false choice between health care and accountability has failed Texas patients. Until we have real legal reforms that protect patients and stiffen accountability measures for wrongdoers, Texans will continue to struggle with a system that favors those who commit medical errors over those who are harmed by them.

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<sup>30</sup> Public Citizen, *The Great Medical Malpractice Hoax*, January 2007. See [http://www.citizen.org/documents/NPDB%20Report\\_Final.pdf](http://www.citizen.org/documents/NPDB%20Report_Final.pdf) (at PDF p. 16).

<sup>31</sup> National Nurses Organizing Committee, *RN-to-Patient Staffing Ratios & Patient Safety* (Fact Sheet). See [http://www.calnurses.org/assets/pdf/ratios/ratios\\_patient\\_saftey.pdf](http://www.calnurses.org/assets/pdf/ratios/ratios_patient_saftey.pdf).

<sup>32</sup> Christopher Lee, *Studies: Hospitals Could Do More to Reduce Infections*, WASHINGTON POST, November 21, 2006.