

# An Informed Vote Requires Knowing Both – The Questions and the Answers

Michigan Senate Insurance Committee  
Hearings on SB's 1115 – 1118 July 18, 2012

Chair Joseph Hune and Senators Jim Marleau, Jack Brandenburg,  
Geoff Hansen, David B Robertson, Virgil Smith, Steven M Bieda

**Question: Is there a medical malpractice lawsuit crisis in Michigan?**

**Facts:** Michigan malpractice filings have plummeted by over 80% since the 3600 plus cases filed in 1986.<sup>1</sup> In 2009 there were 707 malpractice cases filed;<sup>2</sup> in 2010 there were 808.<sup>3</sup> Further, of these cases many were dismissed after filing which has resulted in an average of 450 cases per year since 2004.<sup>4</sup> Is having the number of medical malpractice cases in Michigan fall from 3600 to approximately 450 per year a crisis that must be fixed?

**Answer:** NO.

**Question: Is Michigan's compensation to injured patients too high?**

**Facts:** Compensation to injured patients fell by 60% between 1991 and 2006, and these continue to fall as fewer cases are being filed.<sup>5</sup> Michigan ranks 7<sup>th</sup> in the nation for the lowest average settlement per injury at \$181,198; the national average is \$334,559.<sup>6</sup> Michigan's patients and/or their families receive less than half the national average for their injuries. Is this too high?

**Answer:** NO.

**Question: Are physicians leaving the state?**

**Facts:** Some repeatedly cite a 2006 study using 2003 numbers projecting that Michigan may have a shortage in certain physician practice areas by 2020.<sup>7</sup> This study in no way correlated the projected physician supply shortage to malpractice law, but was part of a larger national

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<sup>1</sup> T. Berg, Medical Malpractice Reform Analysis, *Michigan Medical Law Report*, Fall 2007, Vol. 3, No. 3; and Michigan Lawyers Weekly, July 2007.

<sup>2</sup> <http://courts.michigan.gov/scao/resources/publications/statistics/2009/circuitcaseloadreport2009.pdf>

<sup>3</sup> <http://courts.michigan.gov/scao/resources/publications/statistics/2010/circuitcaseloadreport2010.pdf>

<sup>4</sup> Michigan Supreme Court Annual New Filings Report

<http://courts.michigan.gov/scao/resources/publications/reports/summaries.htm#annual>. See "Dismissed by Party" under medical malpractice case (NH). A case can only be dismissed by one party, the plaintiff; the defendant cannot dismiss the case.

<sup>5</sup> Berg.

<sup>6</sup> Kaiser Family Foundation, State Health Facts.

<http://www.statehealthfacts.org/comparemabletable.jsp?ind=437&cat=8&sort=a&gsa=2>

<sup>7</sup> Center for Health Workforce Studies, Un of NY at Albany, Physician Supply and Demand in Michigan Through 2020, Feb 2006.

study analyzing projected population growth and demand for medical care. The projections are incorrect as Michigan's population was over projected by almost 1 million people.

In fact, Michigan is rapidly adding far more physicians per capita than was predicted in 2006. As of May 2012, Michigan ranks 7<sup>th</sup> in the nation for primary care physicians with 14,397, trailing only much larger states by population: California, Florida, Illinois, New York, Ohio and Texas.<sup>8</sup> For total physicians, Michigan ranks 8<sup>th</sup> nationally with 29,827, again after the above larger states, plus Pennsylvania.<sup>9</sup> While some asserted a dangerous shortage in OB/GYN physicians, Michigan also ranks 7<sup>th</sup> in the nation<sup>10</sup> and 5<sup>th</sup> nationally for practicing ER physicians.<sup>11</sup> And not to leave out cardiologists, they were forecast to contract by 6% between 2005 and 2020, from 736 in 2005 to 693 in 2020.<sup>12</sup> Wrong again: as of May 2012 Michigan had 847 actively practicing cardiologist.<sup>13</sup> The predictions of a shortage were incorrect but some continue to cite these incorrect numbers to justify their claim that Michigan is a bad state for our doctors to practice medicine. .

There is not one empirical study in the world that suggests that physicians locate in a state because of medical malpractice conditions. Are Michigan's doctors leaving Michigan to find a better litigation climate than they already enjoy?

**Answer:** NO

**Question:** Are med mal premiums increasing?

**Facts:** Per the latest report of the Michigan Insurance Commissioner at the end of 2009,<sup>14</sup> annual average premium discounts averaged 19.8% for the 5 years of 2003 to 2007, including an average discount in 2007 of 24.9%.<sup>15</sup> Mike Reynolds of ProAssurance verified the above numbers in his testimony before the Senate Insurance Committee on May 22, and the fact that this trend continues with his company and others in Michigan.<sup>16</sup>

**Answer:** NO

**Question:** Will more tort reform cause the defendant insurer's litigation costs to fall?

**Facts:** While filings fell by 80% and patient's compensation fell by 60%, between 1991 (3 years before tort reform) and 2006, defense litigation costs rose by 109%.<sup>17</sup> Per Commissioner Ross' 2009 report, in 2000 about 5% of claims were resolved by trial; by 2007 that figure had almost

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<sup>8</sup> Kaiser Foundation Statehealthfacts.org May 2012.

<http://www.statehealthfacts.org/comparemaptable.jsp?ind=934&cat=8>

<sup>9</sup> <http://www.statehealthfacts.org/comparemaptable.jsp?ind=934&cat=8>

<sup>10</sup> <http://www.statehealthfacts.org/comparemaptable.jsp?ind=433&cat=8>

<sup>11</sup> <http://www.statehealthfacts.org/comparemaptable.jsp?ind=933&cat=8>

<sup>12</sup> Center for Health Workforce Studies, page 7.

<sup>13</sup> <http://www.statehealthfacts.org/comparemaptable.jsp?ind=933&cat=8>

<sup>14</sup> Ken Ross, Evaluation of the Michigan Medical Professional Liability Insurance Market, State of Michigan, Office of Financial and Insurance Regulation, October 2009.

<sup>15</sup> Annual average premium discounts are defined as the percentage of how much lower are the actual premiums charged by the insurance carrier relative to the manual rates. Ross, page 27.

<sup>16</sup> Mike Reynolds testimony, Senate Insurance Hearing, Lansing, MI. May 22, 2012 transcript page 4.

<sup>17</sup> Berg.

quadrupled to 18%.<sup>18</sup> Caps and legal defenses created by tort reform have encouraged more trials as the defendant's losses are capped.

Nationally, the ratio of defense costs to patient compensation payments is 55%.<sup>19</sup> In Michigan the ratio is 164%. Tort reform drives up litigation costs. That is why after eliminating 80% of the cases, and after paying 60% less on patient's claims, the Michigan reforms of 1994 have only reduced defense costs only 15%.<sup>20</sup>

**Answer:** NO

**Question:** Will Michigan's patients and families be better protected by these bills?

**Facts:** The cost of preventable medical errors per year was \$17 billion in 2006 dollars;<sup>21</sup> that figure is estimated to be over \$22-25 billion today. The social costs are estimated to be between \$393 billion and \$958 billion, amounts equivalent to 18 percent and 45 percent of total US health care spending in 2006.<sup>22</sup> When the lawsuits go away, the bills do not – these are still paid by the injured patients, or passed on to the taxpayers through Medicaid, Medicare or higher insurance premiums. The MSMS mantra is "Patient's First", but there is absolutely nothing in these bills about protecting patients. These bills are all about insurance profits and eliminating lawsuits against doctors – "Patients Are Dead Last".

**Answer:** NO

**Question:** Are there currently frivolous med mal lawsuits in Michigan?

**Facts:** A frivolous lawsuit is one without legal or factual merit.<sup>23</sup> Michigan's laws already prevent any frivolous claims from being filed. Before a lawsuit alleging medical malpractice can be filed, a patient or their attorney must file a Notice of Intent (NOI) that explains precisely what the physician or hospital did wrong and how the patient was injured. This document is often 20 to 40 pages with attachments.<sup>24</sup> Thereafter, when the lawsuit is filed, the complaint must be accompanied with Affidavits of Merit (AOM) signed by specialists of the same qualifications as each defendant certifying that malpractice occurred and caused the patient's injuries or death.<sup>25</sup> Without both of the above, the case is dismissed.

By design, Michigan's 1994 malpractice legislation already prevents many meritorious claims from being filed. Due to the high cost of litigation and limitations on recovery, only cases with egregious negligence and severe injuries can be pursued. An attorney cannot take a case if the potential losses are limited to the lower noneconomic cap – presently \$424,800. Defendants try more and more of these cases as demonstrated by the Ross figures above. For the simplest

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<sup>18</sup> Ross 17, Figure 9.

<sup>19</sup> M. Mello, National Costs of the Medical Liability System, *Health Affairs* 29, NO. 9 (2010): 1569–1577.

<sup>20</sup> Berg.

<sup>21</sup> J. Van Den Bos, The \$17.1 Billion Problem: The Annual Cost Of Measurable Medical Errors, *Health Affairs*, 30, no.4 (2011):596-603.

<sup>22</sup> J. Goodman, The Social Cost Of Adverse Medical Events, And What We Can Do About It. *Health Affairs*, 30, no.4 (2011):590-595.

<sup>23</sup> MCR 2.114(F), MCR 2.625(A)(2), or MCL 600.2591

<sup>24</sup> MCL 600.2912b

<sup>25</sup> MCL 600.2912d.

case, the out of pocket cost an attorney would need to spend to prepare the case for 4 years, and then try it, would be around \$100,000. The business analysis is: should I spend and risk \$100,000 on a case, to work on it for 4 years, and then try it, to make a net fee of \$100,000, and hopefully get back the \$100,000 in costs. The market analysis is – bad business decision.

Defendants recognize the economic dilemma of plaintiffs pursuing valid claims with caps on noneconomic damages. What is the reason that Michigan's average payment to settle cases is so far below the national average at \$181,198? Attorneys and their clients either take pennies on the dollar to settle their case or try the case with the above risks of losing even more. Trials are up, defense costs are up, payments are down and only the most severely injured with egregious medical care have any legal rights. There are already too many meritorious cases that cannot be filed. "Patients Are Dead Last."

The recent letter of Laura Kline, marketing VP for The Doctors Insurance Co., to the lobbyist for MSMS, will no doubt be offered as evidence that there are too many nonmeritorious lawsuits.<sup>26</sup> That letter was obviously drafted for the hearings of July 18. Although offered from a clearly biased perspective, it contains some insights to better solutions to handling injured patient's claims.

Ms. Kline first cites the number of "claims made" against their insured. The footnote to the 1200 claims with no payment between 2007 and 2011 states that these were not formal claims, but the numbers are lumped with "requests for payment of damages and NOI's". Everyone knows these numbers of "non suit claims" are large with all insurance companies as they are obliged to open a claims file with the first hint of a potential claim. In addition, there are economic advantages of opening claims and setting reserves on claims that will never materialize.

A high percentage of this "claims" never become lawsuits. Presumably this non suit number is substantial or we would have been given the specific numbers on filed claims. Of course, those could then be compared with the Michigan Supreme Court's numbers on actual filings as well as the Insurance Commissioner's data. Determining the calculations on the cost factor would add nothing to these issues, but would only be interesting as it is usually a compilation of a percentage of every expense incurred by the company applied pro rata to all such "claims" This would include executive bonuses.

From there, she produces numbers for the 4 years 2008-2011 where the plaintiff allegedly voluntarily dismissed 45 cases without payment within 30 days of trial, or of all the cases filed, about 10 per year. The sources are undisclosed and are presumably inside and confidential documents.

She then proceeds to claim that these cases were dismissed because:

Plaintiff attorney was hoping for a settlement offer prior to trial and dropped the case when the plaintiff realized the company had no intention of settling.

Anyone listening to her testimony should demand documentation for such a wild assertion. Did she personally speak with each plaintiff's attorney? Does she have letters confessing that this was their motivation? This is obviously a biased allegation and demonstrates a total lack of

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<sup>26</sup> Laura A. Kline, Regional Vice President, Business Development for the Doctors Ins. Co to Colin Ford of MSMS, with stamp of the office of Senator Roger Kahn's office (upper right) dated July 6, 2012 is available for review upon request.

understanding of the litigation process. Both plaintiff and defense attorneys know there are a long list of reasons why plaintiffs dismiss cases in the weeks before trial: experts back out or are now not available to testify, plaintiffs do not want to go through the emotional trauma of a trial, the decedent's spouse has recently remarried and a trial would adversely affect this new relationship, or the plaintiffs simply could not afford the additional expense of a trial. This list is virtually endless. It is absurd to suggest that anyone would spend thousands of dollars and 4 years of work in the hope of intimidating such sophisticated opposition.

The above logic would justify the plaintiff's claim that all doctors that settle cases within 30 days before trial do so because they know they are guilty of medical malpractice, but refuse to admit it hoping the plaintiff would cave and settle for pennies on the dollar to avoid the risk of trial.

She then attempts to blame the defense cost of cases dismissed or lost without payment on the patients, or their attorneys. This should prompt the question of why Michigan insurance companies' cost of defense went up by 109% between 1991 and 2006, while institutions like the University of Michigan cut their defense costs by 61%.<sup>27</sup> The obvious problem is not the claims, but how the insurance companies handle their claims.

In the 1993 discussions of tort reform, insurance companies pushed the Notice of Intent (NOI) concept, which became the law April 1, 1994. The argument was early notice would permit a thorough discuss of the potential claim before a lawsuit was filed: cases with merit would be settled, cases without merit would not be filed as there would be full disclosure of the issues before suit. It is a valid concept and has worked with results that have gained national attention and implementation at such prestigious institutions as the University of Michigan, Beth Israel Hospital, and 6 other hospitals in the Boston area.<sup>28</sup>

After implementing honest early disclosure, early discussions and settlement if the claim was valid, the UM decreased their overall liability costs by 40%, had far fewer cases filed, compensated patients injured by negligent care, and used the experience to make future care safer.<sup>29</sup> Michigan insurance companies reduced the total savings by 15%, eliminated 80% of cases filed, reduced injured patient's compensation by 60%, and now they need more favorable tort reform to make their approach work. Maybe it is time to admit that 37 years of tort reform has not worked and Michigan needs to implement an early disclosure resolution approach.

The courthouse needs to be part of the equation, but as UM has proven, it should be a last resort, not the first. Reform is needed – in the insurance industries approach to claims.

**Answer:** NO

**Question:** Are medical costs up due to fear of litigation, or defensive medicine?

**Facts:** Some Michigan physicians still assert that fear of lawsuits results in defensive medicine, which increases the cost of health care in Michigan. In support of this contention they cite the

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<sup>27</sup> A Kachalia, MD, JD; S Kaufman, MA; R Boothman, Liability Claims and Costs Before and After Implementation of a Medical Error Disclosure Program, *Ann Intern Med.* (2010); 153:213-221.

<sup>28</sup> Massachusetts Medical Society, Physicians, Hospitals, Health Groups Announce Initiative to Improve the Medical Liability Environment in Massachusetts, April 18, 2012.

<sup>29</sup> A Kachalia, MD, 219-220.

only study that came to this conclusion – 20 years ago.<sup>30</sup> The problem with using, or misusing, this study is the reforms that Kessler said would eliminate defensive medicine were passed in Michigan 18 years ago.

Kessler attempted to draw nationwide conclusions based on a small, elderly group of cardiac patients. No one to date has been able to duplicate his findings, but to the contrary have found the assertions to be without any basis. More recent studies in Texas where severe malpractice reform was passed in 2003 found that not only did such legislation not reduce medical spending, but it increased.<sup>31</sup>

Surveys, dressed up as research, are often the most cited justification for the concept of defensive medicine; 90% plus of physicians blame the tort system. For those who study the issue, the real problem with overutilization is our fee for services method of compensation. The physician creates the demand by telling the patient what they need, the same physician supplies the medical services, and then bills a third party – a great system for one party. The most recent analysis of the medicine cost problem (demand, supply and payment system) is addressed by Arnold Relman MD, Professor of Medicine at the Harvard Medical School. He summed up the problem in his review of Dr. John E. Wennberg's study, *Tracking Medicine: A Researcher's Quest to Understand Health Care*:<sup>32</sup>

Expenditures are largely driven by the supply of services... doctors and other providers have a vested interest in continually increasing the amount of medical services they provide... savings would be about 30 to 40 percent of the total now being spent on health care services.

It is ironic that so much time has been spent blaming the legal system and taking away the rights of patients in the hope of saving pennies, when it is the medical system and incentives for compensation that account for more than 30 to 40% of unnecessary costs.

**Answer:** NO

**Question: If new claims have fallen by 80% and compensation to patients by 60%, should insurance premiums have fallen by the same amount?**

**Facts:** It is tempting to argue that with an 80% drop in filings and a 60% drop in patient compensation that the above referred to premium discounts should be far more than 20%, but that is not the reality of malpractice premium pricings. A concise summary of the reasons behind setting professional insurance premiums is summarized in Richard Boothman's analysis of the state of medical malpractice problems today.<sup>33</sup>

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<sup>30</sup> D. Kessler, M. McClellan, Do Doctors Practice Defensive Medicine? *National Bureau of Economic Research*, Feb. 1996, and D. Kessler, M. McClellan, The Effects Of Malpractice Pressure And Liability Reforms On Physicians' Perceptions Of Medical Care. *Law And Contemporary Problems* (2007) Vol. 60: No. 1.

<sup>31</sup> M. Paik, B. Black, Will Tort Reform Bend the Cost Curve? Evidence from Texas. *Journal of Empirical Legal Studies*. June 2012, Vol 9, Issue 2, 173–216, p 175.

<sup>32</sup> A. Relman, Health Care: The Disquieting Truth, *The New York Review of Books*, September 2010.

<sup>33</sup> R. Boothman, A Better Approach to Medical Malpractice Claims? The University of Michigan Experience. *Journal of Health & Life Sciences Law*, (2009) Vol. 2 No 2, 131.

AIR has consistently found that total payouts have been stable, tracking the rate of medical inflation, but premiums have not. Rather, premiums that doctors pay rise and fall in sync with the state of the economy, reflecting profitability of the insurance industry, including gains or losses experienced by the insurance industry's bond and stock market investments.

People may ask why patient compensation has fallen by more than 60%, but premiums by less than 1/3<sup>rd</sup> this number. Contrary to popular belief, there is little to no connection.

**Answer:** NO

**Question:** If the answer to all the above are “no”, what is the real reason for SB’s 1115-1118?

**Facts:** Supporters of these bills are seeking one goal: legal and economic immunity from the consequences of the harms they cause their patients and the health system.

SB 1116 will provide absolute legal immunity for all medical mistakes. It is not a “medical judgment” rule as it has been called; it is an “individual belief” rule. Michigan has a “physician judgment rule”, but the judgment has to comply with the standard of care, or what the specialty agrees is acceptable care. Under the proposed rule, good care is defined by what the individual physician “believed” to be well founded in medicine and in the patient’s best interest. It is a state of mind test, not a conduct test. Some get confused because the proposed language makes reference to the “standard of care”. The problem is the bill defines the standard of care – one’s belief. No one can prove the doctor’s state of mind – it would result in immunity.

A classic example of how this would work is the testimony of Katie Dama on May 22, 2012 before the Senate Insurance Committee. Katie was an aspiring national gymnast with multiple scholarship offers, including MSU. She had a tendon injury in her elbow. “Well founded in medicine” was a repair using a ligament from her wrist; that was “reasonable and in her best interest”. The MSU surgeon “believed” he was removing the ligament, although it was actually the median nerve, from her wrist to her elbow. He testified that he really “believed” he was removing the ligament. The case was dismissed because at the time the “gross negligence” standard applied to MSU physicians. The Michigan Court of Appeals said she had to prove that her doctor “intended” to injury her – his state of mind was the test, just like it will be if the test is his “belief”.

This is why no other state, or country in the world, defines the standard of care as proposed by SB 1116.

Proponents of this bill state it should be the law as it is the test for lawyer’s conduct. They argued this position in the Michigan Court of Appeals – they lost; it is not the law or the test for lawyers. Even ProNational Insurance Company and the Insurance Institute of Michigan formally filed briefs stating this is not the test or the law for lawyers.<sup>34</sup>

The remaining bills all continue the trend of providing economic immunity to physicians and hospitals because each:

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<sup>34</sup> See written submission of Norman Tucker on SB 1116 for the Senate Insurance Com Hearing of May 22, 2012 for further explanation. The ProNational Insurance Company and Insurance Institute of Michigan brief is available if anyone would like to review it.

1. Increases the cost of litigation for injured patients, and
2. Decreases the recovery for injured patients and their families.

As explained above, cases have dropped drastically because of the economics of litigation. Raise the cost by requiring experts against lay hospital personnel, and the cost goes up (SB 1117) Decrease the recovery by calling money paid to replace household services an noneconomic loss subject to the noneconomic cap (SB 1115) and the recovery goes down. The same happens by compounding present value reduction (SB 1115, Section 6306(2)), eliminating future medical bill recovery if there is insurance (SB 1115, Section 6306(A)(1)(D)) or apply set offs against the noneconomic cap for settlements (SB 1115 Section 600.6306(A)(3)). The goal is the same. Limiting recovery while increasing the cost of litigation has drastically driven down claims, so more of the same will have the same effect until we arrive at – economic immunity.

**Answer: The Real Reason for these bills: Legal and Economic Immunity – these have absolutely nothing to do with Patient Safety.**