



Pennsylvania Trial Lawyers Association

## *Talking Points on: The Big Lie on Caps*

**Introduction.** The number of lawsuits filed is dramatically down across the nation and in Pennsylvania, as are the award amounts. That's on top of the procedural measures set by the Pennsylvania Supreme Court have already put in place, which seem to be working for health care providers. How then can big business, medical special interests and their insurers still seek legislation placing a cap on non-economic damages? It's a cynical and greedy effort to provide a virtual immunity for the most powerful at the expense of citizens at the lower rungs of the economic ladder, and close courthouse doors to them.

### Talking Points

- ❑ **The facts are that cases filed by attorneys are down, the number of trials are down, and the average amount of verdicts are also down.**
- ❑ **Why fix a problem that's not broken, but for unbridled greed?**
- ❑ **For example, in Philadelphia, supposedly one of the most sympathetic counties in the country for people filing lawsuits, medical malpractice cases filed are down by 60%.**
- ❑ **And the small number of cases where juries set punitive damages sends a message that companies can't put products on the market until they know they are safe, that we need patient safety reforms and that insurance companies cannot drag their feet in paying out valid claims.**
- ❑ **For someone who has suffered catastrophic injuries as a result of negligence or misconduct, a \$250,000 cap on non-economic damages would not begin to help them piece their lives back together.**
- ❑ **The people who would suffer the most would be children, senior citizens, minimum wage earners and non-wage earners such as mothers and housewives who lack a definable economic loss but have suffered all the same.**

#### Top Five Stats

1. Med Mal cases initiated in Philadelphia down 60%.
2. There was a 38 percent decline in med mal filings from the base years 2000-2002. In Philadelphia, the state's largest judicial district, the decline has been over 50 percent.
3. According to the Bush Administration, punitive damages were awarded in only 4.9 percent of cases in med mal cases.
4. Caps don't work. Thirteen years after California placed a \$250,000 cap on damages, doctors' premiums had increased by 450 percent and reached an all-time high in California.
5. In at least 14 states, caps on damages have been found unconstitutional.

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## The Statistics

### ***Payouts in Personal Injury Cases Way Down***

- In Pennsylvania, large awards in med mal cases are significantly down. Annualized, over the years 2000-2003, there were 25 cases with verdicts more than \$1 M to \$5 M. In 2005 and 2006, there were just 10 each. [Pennsylvania Unified Courts System](#)
- In Philadelphia, there were 58 multi-million dollar med mal verdicts in 2000-2003, compared to 6 in 2005. That's a 90.69% decrease. In 2006, there were 3. (Note: these were annualized stats for 2000-2003.) [Pennsylvania Unified Courts System](#)
- According to the most recent data from the Pennsylvania Chief Justice and the Administrative Office of Pennsylvania Courts, there was a 38 percent decline in med mal filings from the base years 2000-2002. In Philadelphia, the state's largest judicial district, the decline has been over 50 percent. 2006 saw the fewest number of jury verdicts resulting in plaintiff awards. [Administrative Office of Pennsylvania Courts](#).
- Large awards in med mal cases dropped 56% since 1991. *Bush Administration, Bureau of Justice Statistics*
- Punitive damages were awarded in only two percent of product liability cases in 2001. *Bush Administration, Bureau of Justice Statistics*
- The median award for all personal injury cases dropped 56 percent between 1992 and 2001. The median inflation-adjusted award in all tort (personal injury) cases dropped 56.3% between 1992 and 2001 to \$28,000. *Bush Administration, Bureau of Justice Statistics*
- Punitive damages were awarded in less than one percent of all civil actions commenced during the periods of 1991-1992, 1996, and 2001. [Center for Justice and Democracy](#).
- In medical malpractice cases in 2001, the most recent year studied by the U.S. Department of Justice, punitive damages were awarded in only 4.9 percent of cases. *Bush Administration, Bureau of Justice Statistics*

### ***Punitive Damage Payments Are Not Radical, and Are Proportional***

- Most punitive damage awards are modest in amount. In 2001, the most recent year studied by the U.S. Department of Justice, the median inflation-adjusted punitive damage award was \$50,000 (compared with \$63,000 in 1992). For tort cases, (personal injury) cases,

#### **Top Six Points**

- 1. Punitive damage awards are way down in the nation, in Pennsylvania and in Philadelphia.**
- 2. They are awarded in the most outrageous cases of gross misconduct.**
- 3. With a government that protects big business, rather than regulating it, punitive damages are now our last resort to take dangerous products off the shelves, sanction repeater offender medical malpractitioners and protect our environment.**
- 4. Courts closely monitor punitive damage awards and often reduce them, which are usually proportional to economic damages.**
- 5. Procedural rule changes in Pennsylvania encourage lawyers to bring only the worst cases of malpractice, dangerous products and companies engaged in gross misconduct.**
- 6. The people who would suffer because of caps are the most vulnerable people in our society: children, senior citizens, minimum wage earners and non-wage earners such as mothers.**

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it was only \$25,000. *Bush Administration, Bureau of Justice Statistics*

- In medical malpractice cases between 1963 and 1993, punitive verdicts were largely proportional to compensatory awards, with the median ratio of punitive damages to compensatory damages awarded at trial 1.21 to 1. *Thomas Koenig & Michael Rustad, "Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not 'Moral Monsters,'" 47 Rutgers L. Rev. 975, 1009 (1995).*
- In products liability cases from 1965 to 1990, the overall median punitive damages award was 1.67 times the median compensatory award. Michael Rustad, "In Defense of Punitive Damages," 78 *Iowa L. Rev.* 1, 50 (1992).
- In 2001, punitive damages in tort cases were most likely to be awarded in slander/libel (58 percent), intentional tort like assault (36 percent), and false arrest/imprisonment (26 percent cases), as opposed to only 4.9 percent of medical malpractice cases. *U.S. Department of Justice, Bureau of Justice Statistics*
- In Pennsylvania, punitive damage awards subsidize medical practitioner insurance. In 2002, Pennsylvania established a fund to subsidize medical practitioners insurance. [Act 13 of 2002, §501 \(e\)\(2\).](#)

### **High Damage Awards Closely Examined by Courts**

- Between 1963-1993, judges eliminated or reduced punitive damages in 42% of cases in which they were awarded. *Michael Rustad, "Unraveling Punitive Damages: Current Data and Further Inquiry," 1998 Wisc. L. Rev. 15, 17-19 (1998).*
- Another ten percent (26 out of 270) of cases involving punitive damages were reversed by appellate courts. *Michael Rustad, "Unraveling Punitive Damages: Current Data and Further Inquiry," 1998 Wisc. L. Rev. 15, 17-19 (1998).*
- In 2001, in all types of cases, juries awarded punitive damages in 5.7 percent of cases; for judge awards, it was 4.4 percent. Notably, in tort trials, juries are more conservative. Juries awarded punitive damages in 4.5 percent of cases, as compared to judges in 10.7 percent of cases. *Bush Administration, Bureau of Justice Statistics.*
- As a procedural measure, the Pennsylvania Supreme Court gave trial judges the authority to reduce or even vacate non-economic damage awards. [Rule 1042.72, PA Supreme Court Rules in Professional Liability Actions, January 7, 2003](#)

### **Number of Cases Significantly Down**

- The number of personal injury trials in federal court is down nearly 80% since 1985. *Bush Administration, Bureau of Justice Statistics*
- In 1985, 3,600 personal jury cases were decided by a judge or jury in U.S. District Courts. *By 2003, that number dropped to less than 800. Bush Administration, Bureau of Justice Statistics*
- The number of personal injury trials in state courts is down by 31.8% between 1992 and 2001. These statistics were compiled by the U.S. Justice Department in a study of the nation's 75 largest counties. *Bush Administration, Bureau of Justice Statistics*

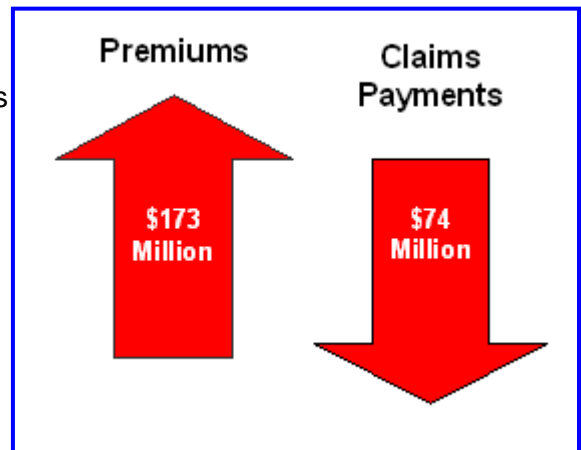
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- Med Mal cases initiated in Philadelphia are down by 60%, 1,365 in 2002 to 504 in 2005 in Philadelphia, 2903 in 2002 to 1698 for Commonwealth in 2005, *Unified Pennsylvania Judicial System Statistics*
- Automobile personal injury filings, which make up the majority of all tort claims, have fallen by 5% since 1993 and by 14% since their high in 1996. *“Examining the Work of State Courts,” 2003, at 23, National Center for State Courts, 2004*

### **Caps Don't Push Down Rates**

- Thirteen years after California placed a \$250,000 cap on damages, “doctors’ premiums had increased by 450 percent and reached an all-time high in California.” But in 1988, California voters passed propositions 103’s stringent insurance regulatory law, which “reduced California doctors’ premiums by 20 percent within three years,” stabilizing rates. [Foundation for Taxpayer and Consumer Rights, “How Insurance Reform Lowered Doctors’ Medical Malpractice Rates in California and How Malpractice Caps Failed,” March 7, 2003](#)
- “Rate increases are even slowing or stopping in some states that have not limited awards for pain and suffering, including Connecticut, where premium increases in the past have soared as much as 90 percent in a single year.” Connecticut is a no cap state. *Hartford Courant*, September 18, 2005
- In October 2006, the Illinois Division of Insurance announced that an Illinois malpractice insurer, Berkshire Hathaway’s MedPro, would be expanding its coverage and cutting premiums for doctors by more than 30 percent. The reduction was made possible because of new *insurance* reforms enacted by Illinois lawmakers in 2005, and expressly *not* the cap on compensation for patients. *St. Louis Post-Dispatch*, October 13, 2006
- Several top insurers actually saw their claims payouts fall, yet still increased premiums. For instance, Healthcare Indemnity, Inc. (HCI) raised its premiums by \$173 million (88%), while its claims payments fell by \$74 million (32%) (see chart at left). ProNational increased its premiums by \$87 million while simultaneously dropping its claims payments by \$43 million (63%). The insurer paid out only 13 cents on every premium dollar taken in. Medical Assurance raised its premiums by \$151 million (89%), while its claims payments decreased by one third. The insurer paid out just 10 cents on every premium dollar taken in. [Center for Justice and Democracy, July 7, 2005.](#)
- Four out of the top five most expensive states for malpractice premiums have caps in place: Florida, Michigan, Texas and West Virginia. *Medical Liability Monitor*



### **People Who Know—Judges, Business Leaders--Know There's No Problem**

- In its 2007 report to the legislature, the Pennsylvania Supreme Court said that the system is much improved. “The number of med mal lawsuits has dropped by more

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than a third since the Court reformed the procedural rules governing venue and required certificate of merit by an expert in the appropriate field. Our latest figures show that the dramatically lower level of filings remains stable throughout 2006. Additionally, a number of Pennsylvania's medical centers have instituted malpractice mediation programs, often resulting in pre-litigation settlement of medical malpractice claims. These programs appear very positive in preventing expensive litigation. The University of Pittsburgh Medical Center, for example, has found that mediation both accelerates case resolution and lowers attorney costs. UPMC also reports that mediation has brought about improvements in patient care." *Administrative Office of Pennsylvania Courts*

- A 2006 survey by the Federal Judicial Center - the research and education agency of the federal court system – shows most federal judges do not view "frivolous lawsuits" as a problem. Seventy percent of the 278 federal court judges who responded to the survey declared that groundless litigation is either a 'small problem' or a 'very small problem,' and 15 percent said it was no problem at all. *Federal Judicial Center study, 2005, published in Business Insurance, April 11, 2005*
- 91% of Federal Judges opposed the "Lawsuit Abuse Reduction Act," passed by the House of Representatives in the last Congress. *Federal Judicial Center study, 2005, published in Business Insurance, April 11, 2005*
- Business leaders put "fear of litigation" at the bottom of their list of concerns. The cost of non-wage compensation (e.g. health care) ranked number 1; taxes ranked 6<sup>th</sup>; litigation ranked 10<sup>th</sup>. *Study by National Association of Manufacturers, 2006*
- Federal judges already have the authority—under "Rule 11"—to throw out a frivolous lawsuit and sanction the attorney before the case even gets started, as do Pennsylvania state court judges.

### ***Are Caps on Damages Constitutional?***

- No, according to the courts of at least 14 states. One of the most recent decisions was in Wisconsin where the State Supreme Court said, "If the legislature's objective was to ensure that Wisconsin people injured as a result of medical malpractice are compensated fairly, no rational basis exists for treating the most seriously injured patients of medical malpractice less favorably than those less seriously injured. No rational basis exists for forcing the most severely injured patients to provide monetary relief to health care providers and their insurers." [Ferdon v. Wisconsin Patients Compensation Fund, Medical Protective Company](#)

### ***Why Imposing Caps Is Unfair and Bad Public Policy***

- Why do doctors and their insurers want a \$250,000-\$300,000 cap on non-economic damages? Because that will give them virtual immunity. The costs and time of bringing a med mal case to court are significant and come out of an attorney's pocket. The attorney takes considerable risk in bringing such actions and a \$250,000 cap will remove the incentive for an attorney to help an injured party gain access to the civil justice system. No matter how severe the injury, no matter how significant the negligence, lawsuits will not be brought against the small percentage of doctors who are malpractitioners.

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- Wall Street wrongdoers hide behind the doctors' white coats. The laws that would cap damages against doctors—so many of whom are vital caregivers who have no contact with civil justice courts--would also give virtual immunity to tobacco companies, environmental polluters, corporate defrauders like Enron and Worldcom and manufacturers who take short cuts to put dangerous products on the market.
  - In Pennsylvania, strong efforts have been made to assist medical practitioners—certification rules, empowering judges to reduce punitive damage awards and subsidizing medical practitioner insurance with tax dollars. Moreover, Pennsylvania already has a cap on punitive damages for doctors. And the stats show that case filings are down, as are the amount of monetary awards. Taking extreme efforts such as imposing caps would attempt to fix a system which is not broken.
  - It's a constitutional right. They would take a critical aspect of the civil justice system—used in a very small percentage of cases—out of the hands of jurors, who the founding fathers engaged to decide civil matters in the 7<sup>th</sup> Amendment of the Bill of Rights.
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". . . the right of trial by jury shall be preserved . . ." Amendment 7, U.S. Constitution

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