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Med Mal in Texas: Time to Tweak the Reforms? Plaintiff and Defense Lawyers Both See Room for Modifications

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Since January, well-known Houston plaintiffs lawyer Richard Mithoff filed on behalf of clients three petitions against medical providers in state court in Houston—more than the total number of such claims he filed in the previous seven years.

In those petitions, Mithoff targeted a hospital that allegedly allowed a nurse to give a nondiabetic patient insulin causing brain damage and two other sets of providers that allegedly failed to properly diagnose patients' conditions. Certainly, however, neither Mithoff, nor any other well-informed Texas plaintiff lawyer, imagines that his recent flurry of cases represents a rising tide of medical malpractice litigation.

"I simply look at the cases as they come to me as I always have and I do not know why I have filed more this year," Mithoff wrote in an email.

Medical malpractice litigation remains a rare bird for Mithoff and other Texas lawyers. Changes that Texas lawmakers enacted more than a dozen years ago continue to make it difficult for lawyers to represent plaintiffs who want to pursue medical malpractice claims, Mithoff said. Statistics corroborate his view. The numbers show the consequences of the lawmakers' changes significantly and indisputably decreased the amount of medical malpractice litigation in Texas. Although both plaintiff and defense lawyers agree the filing of med-mal cases has slowed, they do not share similar views about many other outcomes that the policy shift may have caused—such as if it drew better doctors to Texas.

Surprisingly though, plaintiff and defense lawyers do find common ground about the notion that Texas lawmakers in their next session need to at least tweak their prior changes to the laws governing medical malpractice litigation—changes passed before today's teenagers were even born.



MARK AIRS/GETTY IMAGES

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What the numbers say

Since June 2003, when then Texas Gov. Rick Perry signed HB-4—commonly referred to as "tort reform"—the state had seen its physician roster increase by 28 percent, according to the Texas Medical Board. During the same time period, the Texas population has increased by 20 percent, U.S. Census figures show. Texas still trails most other states if measured by the density of its physician population. According to the most recent figures published by the American Association of Medical Colleges in 2014, there were less than 215 doctors per each 100,000 in the state's population; that was 600 than in Northeastern and Northwestern states.

Although fewer doctors are available here per patient, the total number of doctors has grown in Texas at the same time the number of medical malpractice lawsuits has plummeted. In Texas federal courts, only 12 medical malpractice cases were filed so far in 2016. Prior to the 2003 reforms, more than 100 cases were filed in Texas's federal courts each year, according to PACER reports. No similar figures are available for the same time period in

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TEXAS STATE MEDICAL MALPRACTICE CLAIMS (2011-2016)

FISCAL YEAR*	NEW MEDICAL MALPRACTICE CLAIMS FILED IN TEXAS STATE COURTS	TOTAL MEDICAL MALPRACTICE CLAIMS ON THE DOCKET IN TEXAS STATE COURTS
2011	845	11,263
2012	746	15,289
2013	792	17,144
2014	856	18,603
2015	995	19,972
2016**	525	10,381

*Starting Sept. 1 through Aug. 31; **Starting Sept. 1 through Feb. 29, 2016
Source: Texas Office of Court Administration

state courts because the Texas Office of Court Administration only began segregating its count of such cases starting in fiscal year 2011—eight years after HB-4 was enacted.

But the Texas Medical Liability Trust, the largest insurer of medical providers in Texas, reports that claim frequency has dropped dramatically since the lawmakers enacted the reforms, which included a cap of \$250,000 on noneconomic damages, higher standards of proof of negligence in emergency care cases and the requirement of filing an expert report. The number of claims as a percentage of total medical providers who are policyholders dropped from 33.13 percent in 2003 to 6.31 percent in 2014, the most recent year reported by the insurer.

The number of bad doctors in Texas arguably may have increased since the reforms took place. From 2006 to 2015, the number of claims filed with the Texas Medical Board against medical providers increased 44 percent to

7,510. In the same time period, its disciplinary actions increased 65 percent to 554.

More bad doctors?

Josh Davis certainly believes he has seen his share of bad doctors. Davis of the Josh Davis Law Firm in Houston, recently served on a legal team that won a \$1.45 million jury verdict in a medical malpractice case. That award will likely be slashed to about \$275,000 because of statutory caps. After a four-day trial, a Houston state court jury issued in March the verdict against an anesthesiologist, whose Davis' client claimed had blinded a 70-year-old man during a cornea transplant. An unusual cost-saving option for the plaintiff's side: the blinded patient's daughter, who was an eye doctor herself, was able to testify as an expert.

The Texas Medical Board's increased number of complaints and disciplinary action may not mean more bad doctors, just more consumers resorting to such claims, suggests Elizabeth Fraley, a partner in Dallas' Fraley & Fraley, who represents defendants in medical malpractice cases. It often happens that a potential plaintiff sends a demand letter to her clients, it gets rejected and the plaintiff files a complaint with the board as "substitute for a lawsuit," Fraley said. "Are they using TMB [Texas Medical Board] more strategically as a substitute or in conjunction with court complaints?" she asks.

Fraley and Davis may disagree about why the board's disciplinary actions against medical providers have risen at the same time medical malpractice litigation has declined. But both the plaintiff and defense lawyer agree that lawmakers could modify the 2003 changes, particularly the caps for noneconomic damages to include cost of living adjustments.

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