

## MEDICAL MALPRACTICE STUDY

# Disproving frivolous myth

By Jeffrey B. Bloom SPECIAL TO THE NATIONAL LAW JOURNAL

**I**N MAY, WITHIN days of the U.S. Senate performing its annual rite of taking up and then denying cloture to a bill to cap damages in medical malpractice cases, a study was released that clearly demonstrates that our current tort system is working quite well in ensuring that the vast majority of cases have valid claims and that frivolous or nonmeritorious malpractice cases are rarely brought and hardly ever result in damages being unjustly paid.

The study, "Claims, Errors, and Compensation Payments in Medical Malpractice Litigation," was conducted by a prestigious group from the Harvard School of Public Health and the Harvard Risk Management Foundation and was published in the May 11 issue of the *New England Journal of Medicine*. Physicians trained in reviewing malpractice claims were assigned malpractice files randomly selected from 1,452 closed medical malpractice files provided to the group by five malpractice insurance companies in four U.S. regions. The goal was to determine if so-called tort-reformers are correct when they claim that frivolous malpractice claims are common, costly and a substantial source of waste in the health care and legal system. The study supports what some lawyers have been stating for years: The vast majority of such cases are valid, and the claimants are rightfully entitled to compensation.

In the study, meritorious cases outnumbered nonmeritorious cases by 2 to 1. Of the claims that these reviewers opined were not caused by medical error, the vast majority received no recovery at all. Eighty percent of the claims involved injuries deemed to have caused significant or major disability or death. In only 3% of the claims, no adverse outcomes from medical care were evident. Of the 37 claims that were deemed to involve no injury, only a handful of claimants received any monetary award.

The authors also found that "the malpractice system performs reasonably well in its function of separating claims without merit from those with merit and compensating the latter." As further proof of how well the system works, most meritorious cases were settled without the need for a jury verdict. Malpractice insurers and hospital risk managers are well trained to recognize valid claims and often choose to resolve them by settlement, thereby reducing defense costs and the risk of larger damage awards

Jeffrey B. Bloom, a partner at New York-based Gair, Gair, Conason, Steigman & Mackauf, specializes in plaintiffs' medical malpractice cases.



from a jury. For these reasons, settlements were reached in 85% of all the malpractice claims evaluated. Of the remaining 15% that went to verdict, plaintiffs rarely won.

According to the study, 79% of the cases that went to trial resulted in no award for the plaintiff, including a significant number with meritorious claims. While the study found that nonerror claims were more likely to reach trial than error claims, 27% of claims in which the claimants suffered injuries resulting from medical errors received no compensation. If there is an injustice in the system, it's more likely that the victims of malpractice suffer the inequitable result rather than medical

providers. Perhaps we should label this injustice a successful "frivolous defense."

### Refuting claims by Bush, Frist

The study also dispelled the proclamations of President George W. Bush, Senator Bill Frist, R-Tenn., and others that our tort system is overrun by greedy trial lawyers bringing meritless malpractice lawsuits. The authors wrote: "The profile of non-error claims we observed does not square with the notion of opportunistic trial lawyers pursuing questionable lawsuits in circumstances in which their chances of winning are reasonable and prospective returns in the event of a win are high." In sum, the authors found that "portraits of a malpractice system that is stricken with frivolous litigation are overblown." Further, if the costs of malpractice litigation, including compensation paid, attorney fees, litigation and court costs in all the cases the reviewers labeled as nonerror were eliminated, the total savings would amount to 13% of the total cost—a far cry from the savings

promised by "tort reformers."

Rather than engaging in an honest debate and seeking ways to reduce medical errors and provide malpractice insurance premium relief for physicians, these "tort reformers" have perpetrated the myth that frivolous malpractice suits are the root cause of our country's rising medical costs. Senator John Ensign, R-Nev., the chief sponsor of the Senate's latest attempt to have the federal government usurp the power of the states and, in a clear affront to federalism, put in place a nationwide cap in malpractice cases, stated in support of his bill, S.22, "The number of frivolous lawsuits clogging our system is what we need to deal with."

Not only does this Harvard

study clearly disprove the notion that frivolous lawsuits are "clogging the system," the argument that capping damages will somehow reduce frivolous claims is patently absurd. Perhaps now that there is documentation that the number of "frivolous" cases brought is quite few, the debate will turn honest, and the president, along with Frist, Ensign and other "tort reformers" will reveal to the public their true agenda—they seek to save money for the insurance industry at the expense of victims of medical negligence.

It is to be hoped that this nonpartisan study, undertaken by one of the most prestigious schools studying public health issues, will put to rest the nonsensical notion that plaintiffs' lawyers are flooding the courts with meritless malpractice cases. To the contrary, plaintiffs' lawyers are well aware that only meritorious claims are likely to result in a recovery. As the study proves, when a claimant in a malpractice case receives an award of damages, he or she is likely to have been a victim of true malpractice. ■

SEND YOUR OPINIONS AND COMMENTS TO MAILBOX@NLJ.COM