

Medical Malpractice: Myths and Realities

Two major goals of this website are to provide some transparency to medical costs and to dispel some of the many myths about these costs. In a way, the second goal may be much more important because, if most people are misinformed about the cause of a problem, then the solutions they propose are likely to be equally misguided. This brings me to the subject of medical malpractice: How much of a problem is medical malpractice for doctors, how much does it really cost and what can, or should, be done about it?

The Cost of Medical Malpractice

Whenever I ask anyone “how much do you think I pay for my malpractice insurance?” their answer never fails to amuse me. People often guess that I pay anywhere from \$30,000 to \$150,000 per year (as if I could afford that). When I tell them what I actually pay, they’re usually shocked and some people have even gone so far as to tell me I must be wrong. I write the check each quarter so I know how much it is. Well, seeing is believing, so here is my malpractice bill for all of 2018.

Summary	Payment Options:	Annual	<- OR ->	1st Quarter
Previous Balance 09/28/2017:		\$ 1,346.36		\$ 1,346.36
Payments Received/Adjustments:		(1,346.36)		(1,346.36)
Premium:		7,267.00		1,816.75
Dividend Credits:		(2,178.84)		(544.72)
Voluntary MIEC PAC-CA Annual Contribution*		99.00		99.00
Amount Due 02/01/2018		\$ 5,187.16	<- OR ->	\$ 1,371.83

* MIEC PAC-CA is MIEC's political action committee, formed to support candidates for public office who share our commitment to protect and promote physician friendly tort reforms. The all-physician Governing Board of MIEC strongly recommends supporting the MIEC PAC-CA. Contributions are voluntary and opting not to contribute will not affect renewal of your insurance policy. Contributions are not tax deductible. This amount is an annual contribution and will not appear in subsequent quarterly invoices.

(Detach and remit with payment)

MIEC Medical Insurance Exchange of California
P.O. Box 22777
Oakland, California 94609-9912



Policy Number: DR01-03540I
Alpha Code: 01-BELK,DAVID L
Payment Due Date: 02/01/2018

	Payment Options:	Annual		1st Quarter
Amount Due		\$ 5,187.16	<- OR ->	\$ 1,371.83
Amount Due Excluding MIEC PAC-CA Contribution		5,088.16	<- OR ->	1,272.03

Amount Enclosed: \$ _____

Figure 1: My medical malpractice insurance bill for 2018.

That's right, \$5,088.16 for the whole year! (It says \$5,187.16 because they want a voluntary \$99.00 yearly PAC contribution that they add to the the bill.) That's not an aberration either. Since 2011, I've paid an average of less than \$5,000 a year for my malpractice premiums and they have been as low as \$3,000 one year. Ironically, that's actually less than what most trial attorneys pay for their malpractice liability insurance.

So, why so little? Are my malpractice premiums unusually low for some reason? Not really.

The nephrologist who has an office one floor below me pays about \$50 a year more than I pay and she runs a dialysis unit.

Also, a pulmonologist I work with pays \$6,000- \$7,000 a year, an ophthalmologists less than \$7,000, emergency room physicians: \$11,000-\$12,000 a year, anesthesiologists: \$12,000-\$14,000 a year, surgeons (including orthopedics) \$20,000-\$22,000 a year and Ob/Gyn about \$30,000- \$35,000 (obstetrics always has the highest malpractice premiums).

You can see from those amounts that medical malpractice premiums aren't bankrupting me or any of my colleagues. But that just covers the area where I practice. What about the rest of the country? Is sunny California just an oasis of inexpensive medical malpractice costs whereas doctors in the rest of the U.S. suffer much higher premiums? Let's examine the data.

A really good source for medical malpractice claims data is the National Practitioner Data Bank which posts data on all paid medical malpractice claims since 1991. The following graphs were derived from data obtained from that site and show that the number of paid medical malpractice claims has been dropping since 2001 and the total amount paid on these claims has been dropping since 2003.

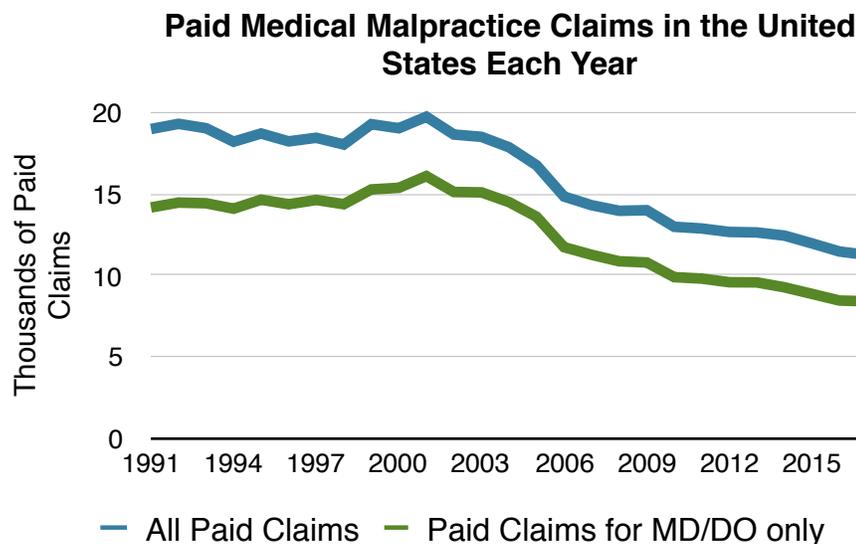


Figure 2: There were just over 16,000 paid malpractice claims against physicians (MDs and DOs) in 2001. By 2017 that number had dropped by nearly 50% to less than 8,500 paid claims.

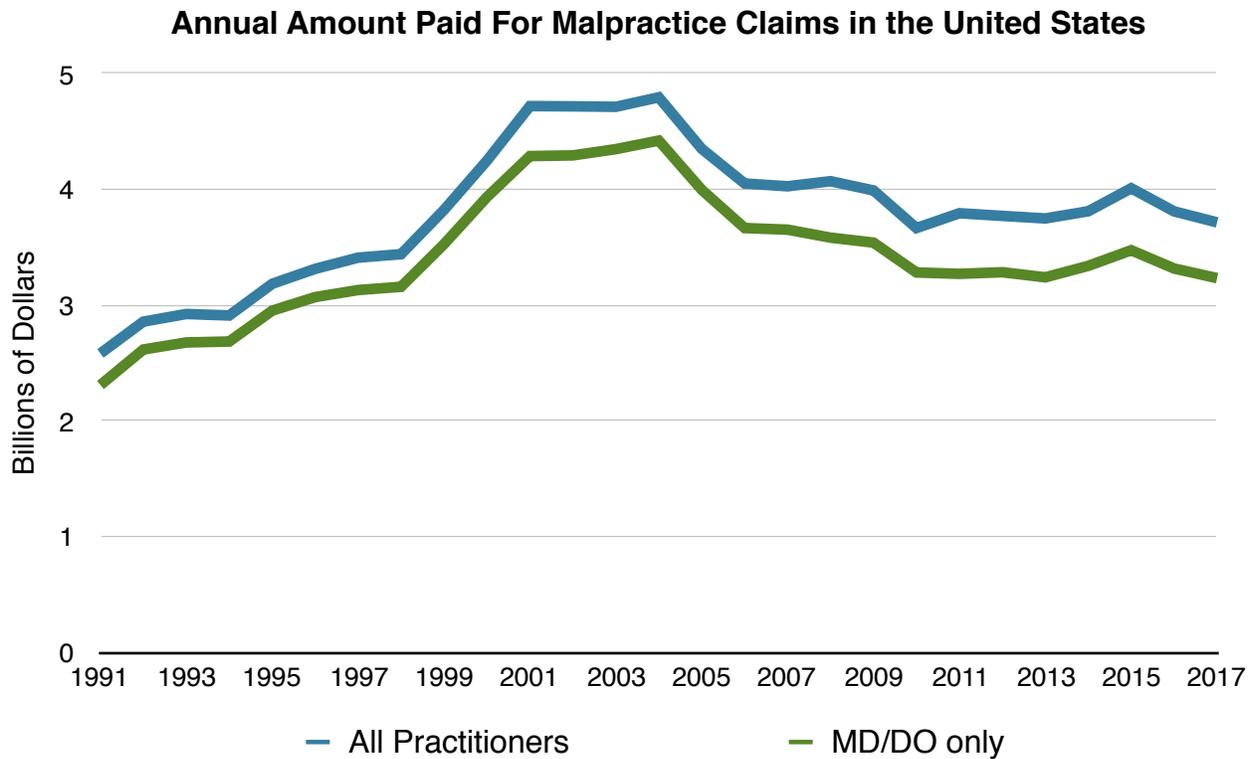


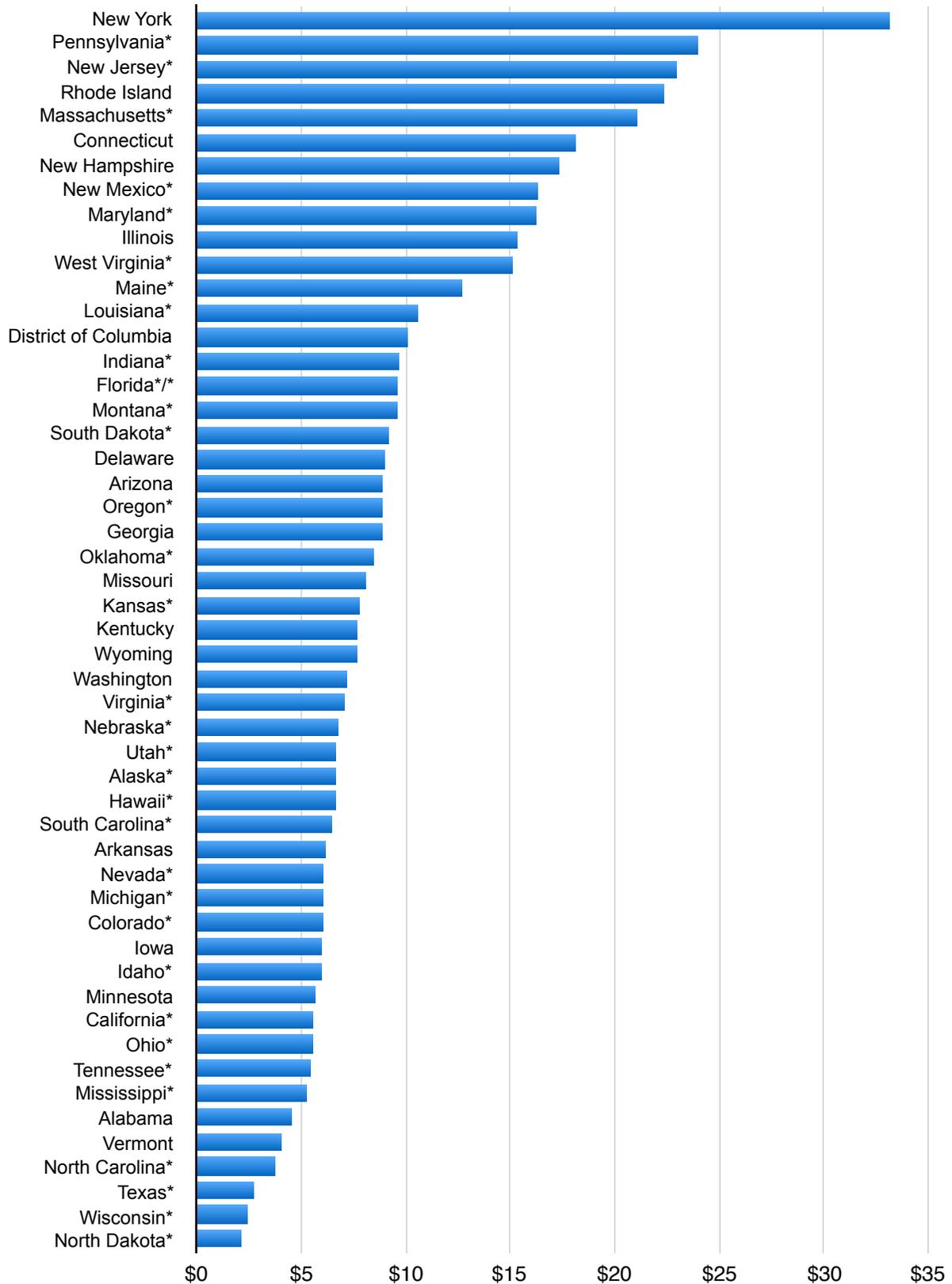
Figure 3: The total amount spent on medical malpractice claims in the U.S. has also dropped by about 23% since 2003.

Regional Variation in Medical Malpractice Costs

It’s important to note that medical malpractice costs aren’t distributed evenly throughout the United States. A doctor in New York City, for example, should expect to pay at least five to seven times as much in medical malpractice insurance premiums each year as a similar doctor in California would pay. The following graph shows just how uneven medical malpractice costs are in the U.S.:

Figure 4: (Next page.) The average amount paid each year per-capita for medical malpractice claims against physicians in New York was about 15 times as much as was paid for claims against physicians in North Dakota from 2012-2016. Annual per-capita malpractice costs were calculated by dividing the total amount paid in claims against physicians in a state each year by that state’s population from 2012-2016. An asterisk (*) indicates that the state has a tort reform law aimed at limiting medical malpractice costs (discussed below).

Average Annual Per-Capita Medical Malpractice Costs for Physicians From 2012-2016



So clearly, doctors in some parts of the country are paying far more for their medical malpractice insurance than others, including myself, are. Still, even most of the states with the highest per-capita medical malpractice costs have seen these costs drop in recent years. New York, which has had the highest per-capita medical malpractice cost each year for decades, has had these costs drop by more than 30% since 2004 and Pennsylvania has had their malpractice costs drop by 25% in the same amount of time. So even in the states where medical malpractice costs are the highest doctors are paying less, on average, for their malpractice premiums and are less likely to get sued than they were just a decade ago.

Now this should be good news for doctors everywhere. Fewer paid malpractice cases and lower overall malpractice costs have long been one of the AMA's solutions for rising healthcare costs in the U.S. It appears as though they're winning this battle so, why aren't we hearing more about this?

Possibly because healthcare costs in the U.S. have risen considerably since 2003 in spite of the drop in medical malpractice costs. That would appear to deflate one of the main arguments that's been used against medical malpractice: That it's a major factor in why healthcare costs so much in the U.S.

The Real Impact of Medical Malpractice

In fact, the total amount spent in the U.S. for medical malpractice (including the amount spent by hospitals as well as legal costs) was estimated to be about \$10 billion in 2010. We can assume it's less than that now, since these costs have been dropping. But even if it's the same amount, \$10 billion is only about 1/3rd of one percent of the more than \$3 trillion total spent on health care in the US in 2016. That's hardly a huge factor.

Defensive Medicine

Now, many doctors will tell you that medical malpractice is a problem even if it's not about the money. Any doctor who has been sued for medical malpractice will tell you that it was a humiliating and degrading experience even if they won their case. This is why doctors will often recoil at even the mention of medical malpractice.

That brings us to the subject of defensive medicine. As I've shown, the direct cost of medical malpractice is a negligible fraction of overall health care costs in the United States. Many have countered that by saying that doctors are so terrified of being sued they'll often order batteries of unnecessary tests on patients and make unnecessary referrals in order to avoid lawsuits. It's these unnecessary tests that drive up our healthcare costs, not the direct cost of medical malpractice.

This is an interesting argument, and one that's hard to prove either way. Still, we should at least be able to assume that the drop in paid medical malpractice claims each year since 2001 would likely result in doctors feeling less defensive. After all, if the risk of being sued is driving doctors

to over-utilize healthcare services, wouldn't a drop in that risk result in a drop in that unnecessary utilization? Yet our healthcare costs continue to rise. Why?

Also, what do we really mean when we say a test was unnecessary and why do doctors order such tests? It's safe to say that no doctor has ever been sued simply for not ordering a test that a patient wanted. Doctors can get sued for refusing to order a test that would have detected a real problem in a timely manner, but that's because that really is malpractice.

Doctors order medical tests in order to detect a disease that might not be detectable simply by examining a patient. Standard screening tests, like mammograms or colonoscopies, are routinely done on healthy people but most other medical tests are performed because a doctor is worried that the patient might have an illness that a test could detect. Early detection of a disease can make treating that disease much easier and might even save a patient's life.

Now, doctors aren't clairvoyant. We don't have any special psychic powers that will tell us exactly who might benefit from which medical tests. Instead we rely on protocols and our protocols do provide reasonably good guidelines for when we should order certain diagnostic tests on a patient. Unfortunately, protocols aren't always right because diseases don't always take the time to read the same textbooks we read.

Most practicing physicians have been faced, at some point, with a patient whose disease defied the protocols. Such patients don't show any of the classic signs or symptoms of their disease, causing doctors to miss important opportunities to diagnose and treat them as early as possible. Whenever this happens, the doctor will feel blindsided and a lot less certain when dealing with future patients. No doctor wants to miss an important diagnosis and this is true even if there were no malpractice attorneys.

It's the uncertainty doctors feel when dealing with potentially life threatening conditions that probably makes them so defensive. If a doctor is worried that he might be missing something in a patient who "feels ill" for no clear reason, he's likely to order another test just to be sure. If the extra test isn't part of an established protocol, the doctor can just blame the lawyers. Everyone is used to hearing that excuse, so it works.

If defensive medicine really were exclusively about the fear of malpractice then it should be easy to show that, in the states with higher malpractice costs, far more medical tests and procedures are done. So far, I've seen no evidence of that being the case, though.

Tort Reform

As I've said throughout this section, medical malpractice costs have dropped precipitously over the last 14 years. The question is, why have they dropped by so much? An obvious answer might be that so many states have enacted tort reform laws aimed specifically at reducing the cost of medical malpractice. By 2013, 33 states in the U.S. had some form of active tort reform law

aimed at limiting the cost of medical malpractice by capping damages (the amount a plaintiff can collect in a suit) in some way. How much of an impact have these laws really had?

Before trying to answer this, I should explain that not all tort reform laws are the same. In fact, each of the 33 different laws for each state that has such a law is unique in its own way. Some states have very robust tort reform laws that place rather low caps on the damages that can be awarded to a plaintiff in a medical malpractice case whereas other laws have either very high caps or only cap damages in very specific cases like wrongful death. These differences make it difficult to evaluate the overall impact of tort reform laws, but not impossible.

Before addressing how the different tort reform laws might have impacted medical malpractice costs, I need to explain how damages are awarded to plaintiffs whenever they win a medical malpractice case against a healthcare provider. The total damages a plaintiff might be awarded can usually be split into two broad categories: economic damages and non-economic damages.

Economic damages are what plaintiffs are awarded to compensate them for actual monetary losses they've endured as a result of medical negligence. The normal components of economic damages are lost wages, due to the person's temporary or permanent inability to work, and ongoing medical costs, if expensive medical treatment has been prolonged due to medical negligence.

Non-economic damages are awarded to plaintiffs to compensate them for the pain and suffering they might have endured as a result of the negligence of a healthcare worker. Punitive damages are what a jury awards a plaintiff when they really don't like the healthcare worker at all.

Most damage caps are aimed at limiting non-economic damages since those costs are rather subjective. Some states also have caps on total damages, or a combination of both.

For the purpose of this discussion, I've broken the different types of tort reform laws that have damage caps into two types: 1) Those with robust caps that either limit all non-economic damages to \$500,000 or less, total caps to \$1 million or less or both, and 2) less effective laws that have either higher caps, or caps that don't apply to most damage awards. 23 of the 33 states that had tort reform laws had robust laws by that standard.

The following graph is similar to Figure 4 above in that it ranks each state from highest to lowest in average per-capita medical malpractice costs from 2012-2016. What's different about Figure 5 is that states with the more robust tort reform laws (non-economic caps of \$500,000 or less, total caps of \$1 million or less or both) are marked with a red bar as opposed to a blue one. States with any form of damage cap, robust or not, are marked with an asterisk like in Figure 4. Florida is marked with */* because they had a non-economic damage cap of \$500,000 that was repealed by their state Supreme Court in 2014. This was halfway through the allotted time period of 2012-2016, though their medical malpractice costs haven't yet changed significantly since the repeal.

Average Annual Per-Capita Medical Malpractice Costs for Physicians From 2012-2016

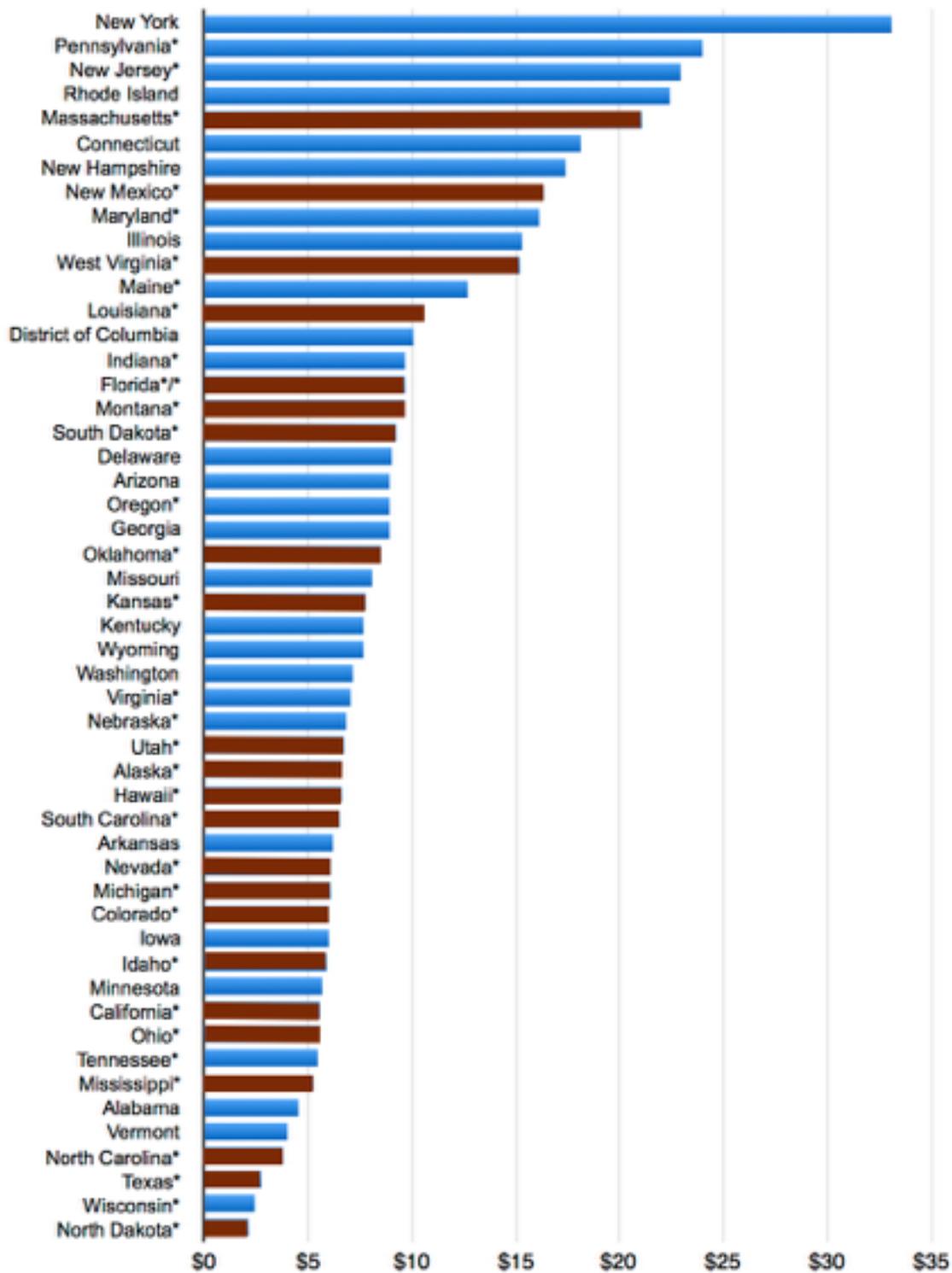


Figure 5: (Previous page.) States with robust damage caps (red bars) were somewhat more likely to have lower per-capita medical malpractice costs, though roughly 1/3rd of the states with such caps still had above average costs from 2012-2016.

Figure 5 shows that, although the states with more robust tort reform laws were more likely to have lower medical malpractice costs, the relationship is far from 100%. Several states with very robust tort reform laws like Massachusetts, New Mexico or West Virginia had very high per-capita medical malpractice costs whereas Alabama, Minnesota and Vermont have very low malpractice costs even though they have no tort reform law addressing these costs.

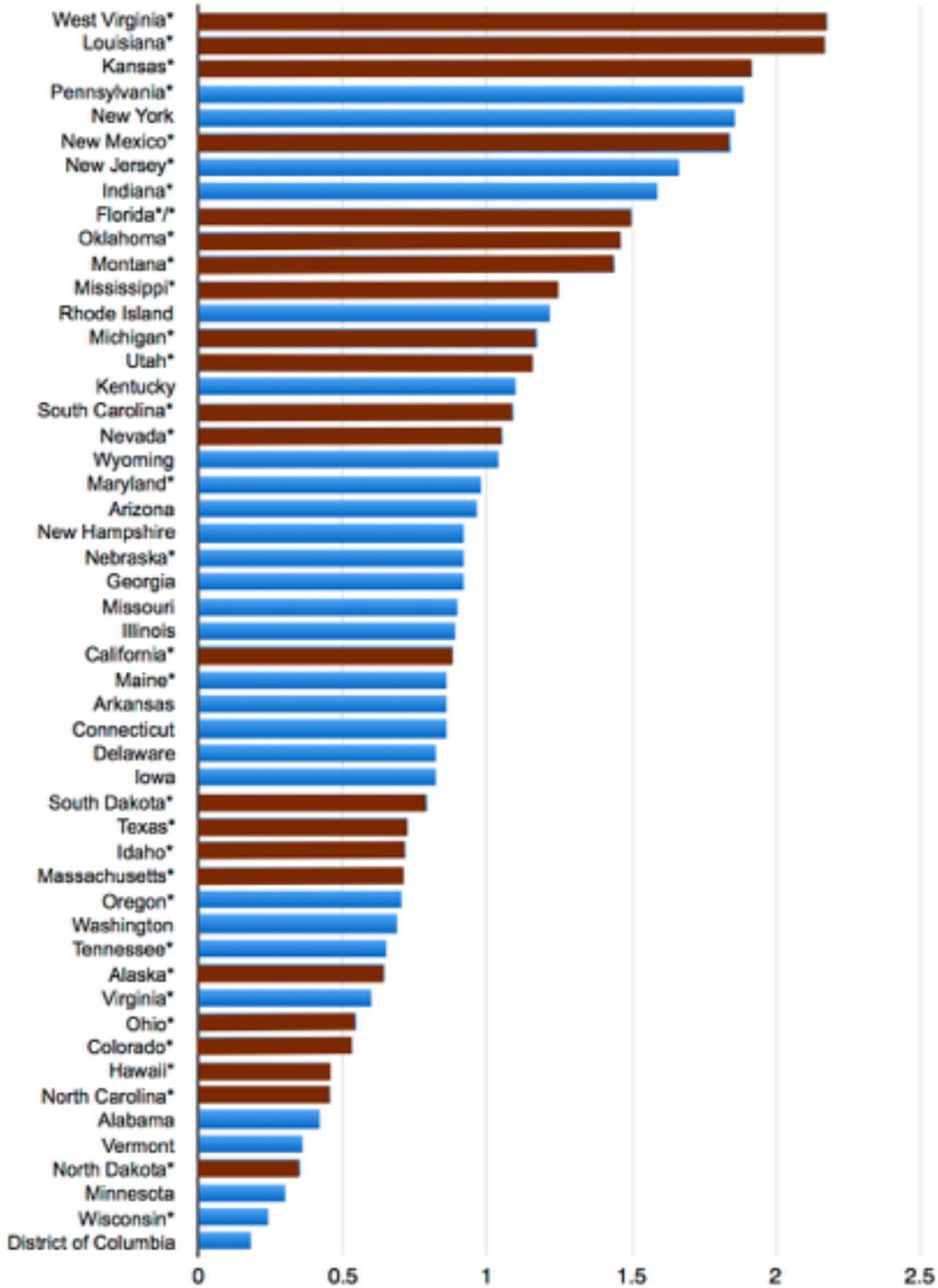
What's more, North Dakota and North Carolina both had very low medical malpractice costs before enacting their tort reform law, so there's little evidence that the laws in these states are the reason for their lower costs.

So the case for whether tort reform laws really decrease medical malpractice costs is hardly clear cut. What about reducing the number of paid claims against doctors? Are doctors who practice in states that have laws aimed at reducing medical malpractice claims less likely to be sued? Apparently not.

The Figure below shows the average number of paid medical malpractice claims in each state from 2012-2016 per 100 doctors practicing in that state those years.

Figure 6: (Next Page.) Overall, the states with the most robust tort reform laws were rather evenly distributed on this graph indicating that these tort reform laws had no real effect on how likely a doctor in any of these states might get sued. In fact, states with the most robust tort reform laws aimed at reducing medical malpractice costs had, in some cases, the most paid medical malpractice claims per 100 practicing physicians from 2012-2016.

Average Annual Per-Capita Medical Malpractice Claims per 100 Physicians From 2012-2016



Figures 5 and 6 imply that tort reform laws aimed at reducing medical malpractice costs may have a modest (though hardly consistent) effect on these costs, but they do nothing to reduce the likelihood of a doctor being sued in a state that has them. This may be good news for companies that offer medical malpractice insurance, since their costs might be lower in a state with a robust tort reform law. It might also give doctors in these states a break on the malpractice insurance premiums.

However, as stated above, the direct cost of medical malpractice is only about 1/3rd of one percent of our overall healthcare costs in this country. Since medical malpractice costs have such a remarkably small effect on the cost of healthcare overall in the U.S., the small benefit these tort reform laws have on malpractice costs should barely effect healthcare costs at all, which is what we're seeing.

What's more, if the risk of medical malpractice were actually driving up healthcare costs through the cost of defensive medicine, then these tort reform laws have been complete failures. A doctor is no less likely to be sued (so presumably no less defensive) in a state that's enacted a strict tort reform law than in a state with no such law.

Conclusion

The most obvious conclusion from all of this is that medical malpractice costs have very little impact on healthcare costs overall in the U.S. Even if they did have an impact, medical malpractice costs are going down, so they can't be responsible for the rising cost of healthcare in the U.S.

What's more, all of the tort reform laws that different states have passed aimed at controlling medical malpractice costs have had, at best, a very muted effect on these costs directly. These laws have also had almost no effect on whether a doctor gets sued in any of those states that have such laws and virtually no effect on healthcare costs as a whole in the U.S.

Sources

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