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Can We Sue Our Way to Prosperity? Litigation's Effect on America's Global Competitiveness

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## I. INTRODUCTION

Mr. Chairman and Members of the Committee:

I am pleased to offer a brief report bearing on two broad issues being considered by this Committee, namely the effects of the tort system on medical malpractice and the effects of punitive damages on businesses.

By way of Introduction, I hold the endowed Russell M. Robinson II Chair in Law at Duke Law School. I also hold a position of Professor in the Psychology Department at Duke University. My appointment in a law school is unusual, though not unique. I received my Ph.D. in Social Psychology from the University of Illinois in 1967, and in 1974, following a developing interest in law, I spent a year as a Russell Sage Fellow at Yale Law School. From that period forward, the overwhelming corpus of my academic and applied research has been devoted to empirical studies bearing on various aspects of the legal system, including the tort system. As a consequence of this research, I was invited to join the Duke Law faculty in 1987. I have written three books on the U.S. jury system and somewhere approaching 200 articles in law reviews and in peer reviewed social science or medical journals. I have provided expert testimony or advice on jury systems and related matters in the U.S., Canada, Australia, New Zealand, Hong Kong and the United Kingdom.

Most pertinent to my testimony here today regarding the U.S. tort system I will briefly address two of the areas in which I have conducted empirical research. For almost a quarter century I have published empirical studies bearing on medical malpractice litigation. I have previously testified about medical malpractice before U.S. Senate and House committees as well as state legislatures. I have drafted amicus briefs, endorsed by other researchers, bearing on malpractice litigation in a number of state courts. For a slightly shorter period, I have conducted research on the issue of punitive damages. I summarize some of my conclusions in these two areas in this statement.

I will come quickly to the point of my remarks. Wild claims about the American tort system and its negative effects on our society have consistently not stood up to scrutiny when examined carefully from an empirical perspective. By empirical perspective, I mean systematic examination of data and conclusions that can be drawn from those data.

Due to short notice I received about this hearing, my prepared statement is necessarily brief. However, I have appended two writings to this statement that expand upon my summary comments.

## II. Medical Malpractice Litigation

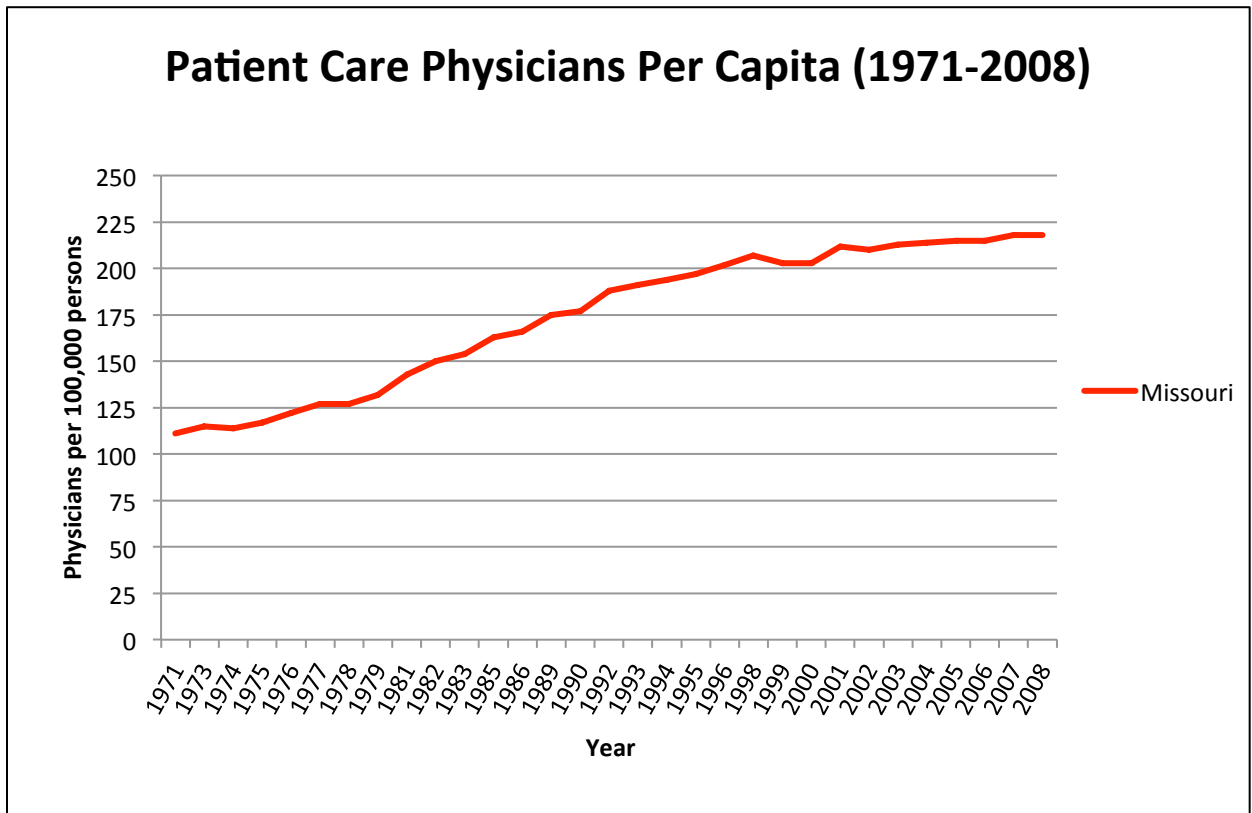
### A. Effects of Jury Awards on Per Capita Number of Physicians

The issue of lawsuits from alleged medical malpractice is one of the most common complaints about the tort system. Both the American Medical Association and state medical organizations have raised consistently similar claims. Runaway juries, it is alleged, increase the cost of medical liability

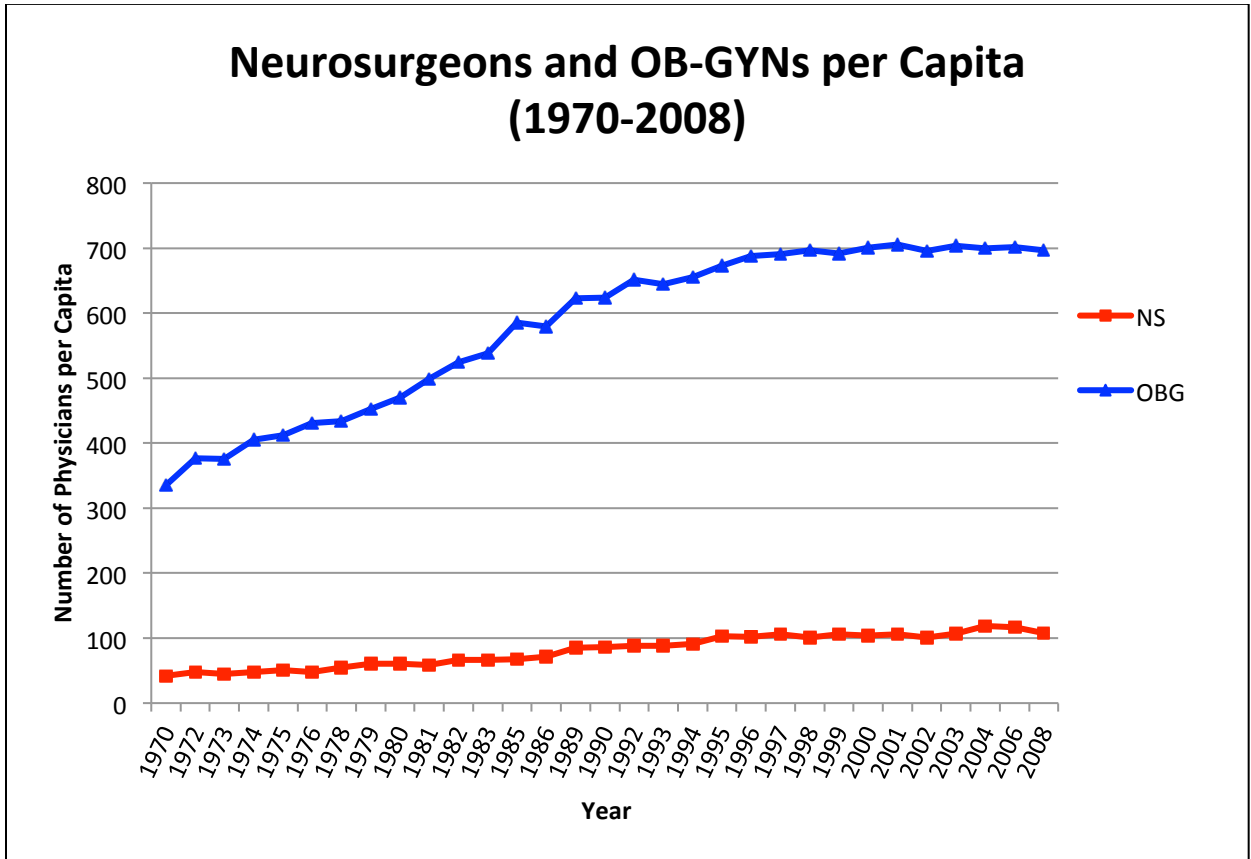
insurance; cause doctors to flee high litigation states to more friendly states; cause doctors to undertake unnecessary defensive measures, such as ordering unnecessary tests. These claims were outlined in a document published by the American Medical Association: *Medical Liability Reform – NOW!* (2005) at [www.ama-assn.org/amednews/2005/02/07/edca0207.htm](http://www.ama-assn.org/amednews/2005/02/07/edca0207.htm). A standard proposed remedy is to place a cap on the “pain and suffering” component of jury awards.

Beginning in 1990, I undertook an in-depth investigation of such claims in the State of North Carolina. That research resulted in a 1995 book that placed a different perspective on the medical negligence process: Vidmar, N., *Medical Malpractice and the American Jury: Confronting the Myths About Jury Incompetence, Deep Pockets, and Outrageous Damage Awards*, University of Michigan Press (1995). Subsequently, I have undertaken detailed investigations of these claims in the states of Illinois, Pennsylvania, Florida, Louisiana and Missouri. First, consider Missouri since it involves my most recent study, but the results are similar to my earlier studies.

To investigate the doctor exodus claim, I went to statistics from the AMA itself. That organization does a yearly sampling of physicians of all types in each state. The data are reported on a county by county basis, by types of medical practice and by counties within each state. Here is what I found about the alleged doctor exodus in Missouri: The number of patient care physicians per capita had steadily increased since 1971: These data are portrayed in Figure 1:



However, some claims had been made that the big problem was with specialized and critical areas such as neurosurgeons and Ob-Gyns. Fortunately, the AMA data list these specialties separately. Thus, Consider Figure 2:



A further claim that is often made is that the “litigation crisis” causes doctors to flee from rural areas. To be sure, there typically are fewer doctors per capita in rural areas, but this problem goes back roughly a hundred years. The root cause appears to be that, on the whole, doctors prefer to live and practice in urban areas. But like the general claim of a physician exodus, the AMA data also lends no support. Although the per capita number of physicians is lower in rural areas, the upward slope of the graph is roughly similar to Figure 1.

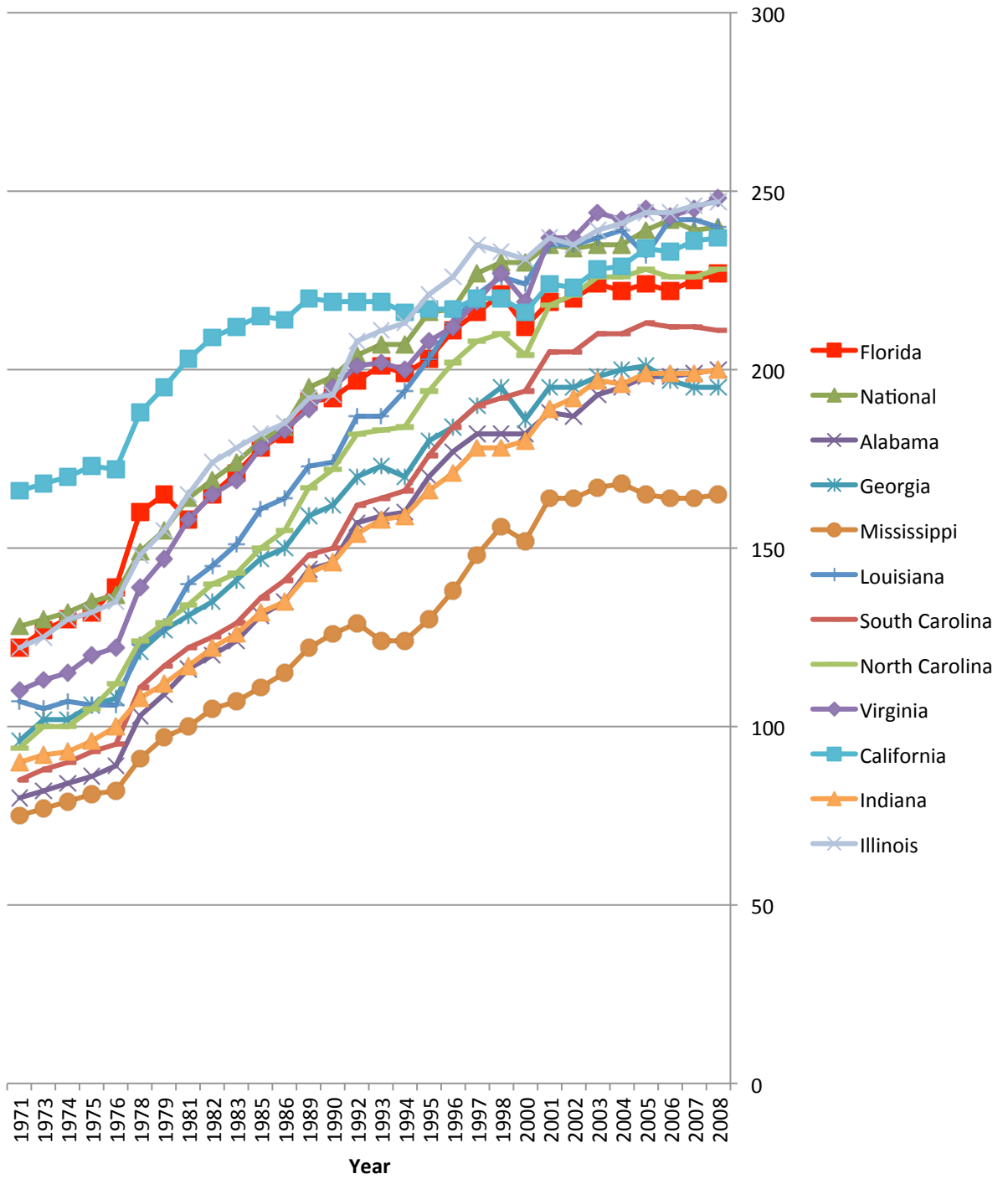
## B. Explanations for Upsurges in Medical Liability Premiums

But there is more to the story. The state of Missouri has an outstanding Department of Insurance and it operates with a level of credibility that is similar to the federal Congressional Budget Office. It has an outstanding record with respect to tracking medical malpractice claims; moreover it turns out periodic reports. A special report by that department in 2003 addressed the issue of increases in medical liability premiums with the following conclusions:

1. Claims closed and filed have trended downward for both physicians and other types of health care providers.
2. In the past decade, awards for malpractice damages actually lagged behind general inflation.
3. All increases in award sizes are accounted for by medical inflation, wage inflation (for lost earnings) and the increase in severity of the injury to the patients.
4. On average in 2003, physicians paid less for malpractice coverage than in 1990, even though 40 percent more doctors were licensed. All medical providers also paid less overall for coverage than in 1990.
5. Economic awards for increased medical costs and lost earnings accounted for a greater share of total damages than non-economic damages. (Underline added for emphasis.)
6. Missouri had few of the multimillion-dollar awards cited in the [nationwide] media and, when they did occur, most damages represented the medical costs to treat the injury and the income the victim could not earn.

In the event that a critic might argue that perhaps Missouri is unique, turn to Figure 3. Again using AMA statistics, Figure 3 reports physician trends for a selected number of states between 1970 and 2008. There are differences between states, but these differences can be ascribed to differences in population and other factors. The important lesson is that the per capita number of physicians has steadily increased over four decades. When the data are further disaggregated, as I have portrayed for Missouri, there are no surprises. The number of specialists and the number of rural doctors also show upward trends.

## Patient-Care Physicians per 100,000 Persons (1970-2008)



### C. Salutory Effects of Medical Malpractice Litigation

I would be remiss if I did not call this Committee's timely attention to an outstanding piece of empirical research that will shortly be published in the New York University Law Review. The author is Professor Joanna Schwartz at UCLA School of Law and the article is entitled, *A Dose of Reality for Medical Malpractice Reform*. While much of the discussion about the tort system has focused on the claim that malpractice litigation has negative effects on the practice of medicine, Professor Schwartz has conducted research strongly suggesting that it has positive effects. Professor Schwartz conducted a national survey of health care professionals supplemented with thirty-five "in-depth" interviews in a sample of U.S Hospitals across the country. Her respondents were professionals responsible for managing risk and improving patient safety. From this research, Professor Schwartz concludes that malpractice litigation is not compromising patient safety. In fact, it has fostered transparency with both patients and hospital staff. Her interviews lead to the conclusion that lawsuits have become a valuable source of data about weaknesses in hospital policies and the practices of the hospital's staff and administration. The research is carefully conducted and places a different light on the tort system, namely, some positive effects on patient safety.

### III. Product Liability

#### A. Care in the Interpretation of Data

About five years ago, I and two of my colleagues, Professor Tom Baker, University of Pennsylvania Law School, and Professor Herbert Kritzer, University of Minnesota Law School, published a critique of a 2007 report by the Pacific Research Institute entitled *Jackpot Justice: The True Cost of America's Tort System* that was widely available on the Internet. Our article was entitled, *Jackpot Justice and the American Tort System: Thinking Beyond Junk Science* (2008). In that article, we drew attention to the flaws and assumptions of the *Jackpot Justice* report. I append our report to this statement, because it goes into detail with respect to the problems with that report. The problems include its heavy reliance on data from reports of Tillinghast Towers Perrin, an industry-focused organization whose data are not available for independent public evaluation with respect to their validity and reliability. Our report is important in that this Committee will today hear about data from that company's successor, Towers Watson. I have taken the liberty of appending our report to this statement.

Of course, I have not heard the testimony about the Towers Watson report as I write this statement. However, I offer a summary of what my colleagues and I said about the earlier data:

1. It is a fundamental error to include tort transfer payments to victims as part of the costs of the tort system.
2. To be considered reliable, the data need to be subject to peer review.
3. The previous data came from financial reports that insurance companies prepare to enable insurance regulators to assess the solvency of insurance companies, not to make the civil justice system transparent.

4. The solvency data present a snapshot of insurance costs that can be very misleading due to a unique insurance industry business cycle. Depending on where the companies are in that cycle different conclusions will be drawn.

It is noteworthy that Judge Richard Posner, a highly respected scholar, drew similar objections regarding the use of those data to draw conclusions about the costs of the tort system.

My colleagues Baker and Kritzer and I also drew attention to the problem of comparing American tort costs to those of other countries for the following reasons:

1. Other countries have stronger regulatory mechanisms that eliminate the need for certain types of tort claims.
2. Social welfare systems in other countries may reduce the need to rely on the tort system for medical costs and other support following an injury.
3. Tort claims are heavily driven by medical costs and the cost of health care is much higher in the U.S. than in other countries.

I will not elaborate further on our critique of *Jackpot Justice* and its data issues since it is appended to these comments. But I do want to draw attention to the fact that the Baker, Kritzer and Vidmar critique also discusses the American tort system as a transfer system with examples from medical malpractice litigation.

#### B. The Always Controversial Topic of Punitive Damages.

In another article appended to this statement, Vidmar, N. and Holman, M., *The frequency, predictability and proportionality of jury awards of punitive damages in 2005: a new audit*, Vol. XLIII *Suffolk Law Review*, 101-138, 2010, Professor Holman and I discuss data from the 2005 Bureau of Justice Statistics 2005 Survey of State Courts, plus supplemental data from several other sources.

Our conclusions in that article are as follows:

Although punitive damages were asked for in about 8.8 percent of pleadings in the country's largest urban courts in 2005, only 131 cases resulted in punitive awards. The plaintiffs either dropped the claims or judges would not allow the punitive claims to be put before the jury or dropped them in post-verdict remittitur. Of the punitive awards, only 14 cases involved a ratio that exceeded the single digit ratio recommended by the U.S. Supreme Court. Moreover, the data that we analyzed are consistent with earlier research by Cornell Law Professor Theodore Eisenberg and his co-authors, who found that most of the variability in the ratios between compensatory and punitive awards was in cases at the low end of compensatory awards.

The Vidmar and Holman findings are generally consistent with an earlier study that my co-author Mary Rose and I found with a data set from Florida, Vidmar and Rose, *Punitive Damages; In Terrorem and in Reality*. 38 *Harvard Journal on Legislation*, 489-511 (2001). In that research, we found that the ratio of punitive to compensatory damages was 0.67 to 1.



Finally, it is important to draw attention to the fact that some of the mega punitive damages awards involve business to business lawsuits rather than individuals suing businesses. An article by Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 *Loy. L.A. L. Rev.*, 1297 (2005), looks carefully at these issues.

I hope my perspective is useful to this Committee. I am most willing to answer any questions.

#### **Additional Research by Neil Vidmar bearing on the Tort System**

Holman, M., Vidmar, N. and Lee, P., *Most Claims Settle: Implications for Alternative Dispute Resolution from A Profile of Medical Malpractice Claims in Florida*, 74 *Law & Contemporary Problems*, 103 (2011).

Vidmar, N. and Holman, M., *The frequency, predictability and proportionality of jury awards of punitive damages in 2005: a new audit*, Vol. XLIII *Suffolk Law Review*, 101-138 (2010).

Vidmar, N. and Wolfe, M.W., *Punitive Damages*, 5 *Annual Review of Law and Social Science*, 179-199 (2009).

Vidmar, N., *Juries and Medical Malpractice: Facts versus Claims*, *Clinical Orthopaedics and Related Research*, Springer Open Access DOI 10.1007/s11999-008-0608-6 (published November 2008). Available at <http://dx.doi.org/10.1007/s11999-008-0608-6>.