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2009

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### Recommended Citation

Patricia W. Hatamyar, *The Effect of Tort Reform on Tort Case Filings*, 43 Val. U. L. Rev. 559 (2009).

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# THE EFFECT OF “TORT REFORM” ON TORT CASE FILINGS

Patricia W. Hatamyar\*

## I. INTRODUCTION

Does so-called “tort reform”<sup>1</sup> decrease tort case filings? In Texas and other states that have enacted numerous rounds of tort reform, the answer appears to be a resounding “yes,” at least as of the year 2000.<sup>2</sup>

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<sup>1</sup> I acknowledge the commonly accepted label of “tort reform” to encompass such legislative efforts as caps on noneconomic and punitive damages, narrowing traditional joint-and-several-liability rules, requiring pre-filing expert affidavits in tort cases, and the like. I do not believe that most efforts meet the classic definition of “reform” as “[a] change for the better; an improvement[.]” at least in the absence of universal health care and an improved social safety net. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2006); see also Francis P. Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 457 (2006). Additionally, in Oklahoma, so-called “tort reform” efforts are not limited to torts. E.g., S. 1467, 51st Leg., 2d Sess. § 11 (Okla. 2008) (introduced Feb. 4, 2008) (proposing to make classes certified in class actions “opt out” classes rather than “opt in” classes).

<sup>2</sup> See Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. LEGAL STUD. 183, 208 (2007) (state-level statistical analysis of medical malpractice claims nationwide from 1991–1998 showed that caps on pain and suffering damages reduce the number of cases by 10–13%; reforming joint and several liability decreases the number of cases by 8–9%; and periodic payment reform decreases the number of cases by 5–7%, albeit at a weaker statistical significance level); Bernard Black, Charles Silver, David A. Hyman & William M. Sage, *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988–2002*, 2 J. EMPIRICAL LEG. STUD. 207, 210 (2005) (the number of paid medical malpractice claims in Texas declined from 6.4 per 100 practicing Texas physicians per year in 1990–1992 to 4.6 per 100 practicing Texas physicians per year in 2000–2002); Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225 (2004) (reporting a 24.8% drop in new tort cases filed in the Texas trial courts from 1995 to 2001); Patricia M. Danzon, *The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims*, 48 OHIO ST. L.J. 413, 416 (1987) (finding that adoption of collateral source offset and shorter statutes of limitation decrease medical malpractice filings); NATIONAL CENTER FOR STATE COURTS, *Tort and Contract Caseloads in State Trial Courts*, in EXAMINING THE WORK OF STATE COURTS 26–32 (2001), [http://www.ncsconline.org/D\\_Research/csp/2001\\_Files/2001\\_Tort-Contract.pdf](http://www.ncsconline.org/D_Research/csp/2001_Files/2001_Tort-Contract.pdf) (reporting a 10% decline in tort filings from 1991–2000 in thirty states studied, not including Oklahoma).

More recent evidence from Oklahoma supports that conclusion and provides an interesting case study within the tort reform juggernaut.

During at least the past twenty years, tort reformers have achieved substantial legislative successes<sup>3</sup> and, some would argue, public relations victories.<sup>4</sup> Yet their desire for more "reform" seems insatiable, and their legislative agenda rarely sleeps.

Tort reform bills bloom perennially in the Oklahoma legislature,<sup>5</sup> and numerous significant changes in liability rules, restrictions on remedies, and procedural innovations were enacted in 2002, 2003, and 2004.<sup>6</sup> Despite their apparent success, tort reformers spun these victories as losses and vowed to press on.<sup>7</sup> One omnibus tort reform bill passed

Other studies have been less conclusive. See, e.g., CONGRESSIONAL BUDGET OFFICE, THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES 1 (2004), <http://www.cbo.gov/ftpdocs/55xx/doc5549/Report.pdf>; Mark J. Browne & Robert Puelz, *The Effect of Legal Rules on the Value of Economic and Non-Economic Damages and the Decision to File*, 18 J. RISK & UNCERTAINTY 189 (1999); Han-Duck Lee, Mark J. Browne & Joan T. Schmit, *How Does Joint and Several Tort Reform Affect the Rate of Tort Filings? Evidence from the State Courts*, 61 J. RISK & INS. 295 (1994).

<sup>3</sup> See generally Robert S. Peck, *Tort Reform's Threat to an Independent Judiciary*, 33 RUTGERS L.J. 835, 851-56 (2002); Hubbard, *supra* note 1, at 469-84.

<sup>4</sup> Stephen Daniels & Joanne Martin, *"The Impact It Has Had Is Between People's Ears": Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453 (2000). See generally Daniels & Martin, *supra* note 2.

<sup>5</sup> For an extensive discussion of the history of tort reform in Oklahoma, see Chris D. Jones, *Medical Negligence Lawsuits in Oklahoma: An Empirical Study*, 31 OKLA. CITY U. L. REV. 93 (2006).

<sup>6</sup> S. 1571, 48th Leg., 2d Sess. (Okla. 2002); S. 629, 49th Leg. 1st Sess. (Okla. 2003); H.R. 2661, 49th Leg., 2d Sess. (Okla. 2004). The key provisions included in these enacted laws are discussed *infra* at Part III. The Oklahoma Bar Association ("OBA"), the Canadian County Bar Association, and the Texas County Bar Association all passed resolutions opposing or questioning the original 2004 bill. See, e.g., *Oklahoma Bar Association Resolution on H.B. 2661*, (Apr. 23, 2004) (copy on file with author) ("The OBA has encountered no objective, non-biased studies, research or similar information to indicate that sufficient problems exist within Oklahoma's civil justice system to justify the drastic revisions of current law as set forth in this proposed legislation."). Some of the more draconian provisions in the bill were removed before passage. I testified in the Oklahoma legislature against a provision in the 2004 bill that would have limited plaintiffs' attorneys' fees in class actions; that provision was also ultimately omitted from the legislation passed.

<sup>7</sup> See, e.g., Ray Carter, *GOP Leaders Renew Call for Tort Reforms*, J. REC., July 27, 2004, at 1; Ray Carter, *Frustrated Doctors Enter Battle for Tort Reform*, J. REC., July 14, 2004, at 1 ("Believing lawsuit reform passed this year by the Oklahoma Legislature is little more than smoke and mirrors, a group of Oklahoma doctors plans to increase its political activity in the fall elections."); Paul Monies, *Oklahoma's Business Climate Remains in Top 10 on Real Estate Group's List*, DAILY OKLAHOMAN, Dec. 1, 2004 (reporting that the president of the state chamber of commerce says tort reform is one of three top legislative priorities for the coming session); Editorial, *Making History*, TULSA WORLD, Nov. 4, 2004, at A18 (reporting that tort reform is a priority of the new Republican majority in the Oklahoma House of Representatives); Stanley Hupfeld, *Point One on Tort Reform: Another One for the Gipper*, J. REC., June 30, 2004, at 4.

by the legislature in 2007 was immediately vetoed by the governor.<sup>8</sup> Its supporters, apparently undeterred, resurrected most of the provisions from the defeated 2007 bill and reintroduced them in 2008.<sup>9</sup>

One might reasonably ask whether anyone has stopped to see what, if anything, the enacted "reforms" have already wrought, before advocating even more sweeping changes. In this Article, I intend to make a small contribution toward answering that question.

I obtained data from the Oklahoma Administrative Office of the Courts ("OAOC") on the number of various types of tort cases filed annually from 2003 to 2007.<sup>10</sup> The data include case filings from thirteen Oklahoma counties<sup>11</sup> that are on the integrated Oklahoma Court Information System ("OCIS"),<sup>12</sup> which account for roughly 56% of the population in Oklahoma and include the largest metropolitan areas.<sup>13</sup>

The OAOC's data show a 17.5% decrease in the number of tort cases (claiming over \$10,000) filed, from 6,764 cases in 2003 to 5,576 cases in 2007.<sup>14</sup> During that same time period, the number of *all* civil cases (over \$10,000) filed has increased 4% (primarily due to an increase in foreclosure and indebtedness cases) while the population of Oklahoma has increased 3.4%.<sup>15</sup> The proportion of all civil cases (over \$10,000) filed that are tort cases has decreased from 26.2% to 20.8% in five years.<sup>16</sup>

<sup>8</sup> S. 507, 51st Leg., 2d Sess. (Okla. 2007) (vetoed April 28, 2007). See Editorial, *The Sooner Back Flip*, WALL ST. J., May 10, 2007, at A16; Vince Orza, *Tort Deform?*, OKLA. GAZETTE, May 23, 2007, at 4. The *Wall Street Journal* and some of the popular press in Oklahoma excoriated Governor Brad Henry for his veto of S.B. 507. See, e.g., Editorial, *The Sooner Back Flip*, WALL ST. J., May 10, 2007, at A16; Vince Orza, *Tort Deform?*, OKLA. GAZETTE, May 23, 2007, at 4.

<sup>9</sup> S. 1467, 51st Leg., 2d Sess. § 11 (Okla. 2008); S. 1821, 51st Leg., 2d Sess. (Okla. 2007) (introduced February 4, 2008). Both bills were referred to the Judiciary Committee and are dormant.

<sup>10</sup> E-mail from Misty Smith, Oklahoma Administrative Office of the Court, to Patricia Hatamyar (Jan. 22, 2008) (on file with author) (attaching data in Excel format).

<sup>11</sup> *Id.* The thirteen counties are Adair, Canadian, Cleveland, Comanche, Ellis, Garfield, Logan, Oklahoma, Payne, Pushmataha, Roger Mills, Rogers, and Tulsa. *Id.*

<sup>12</sup> Oklahoma Court Information System, <http://www.oscn.net/applications/oscn/start.asp?viewType=DOCKETS>.

<sup>13</sup> POPULATION DIVISION, U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION FOR COUNTIES OF OKLAHOMA: APRIL 1, 2000 TO JULY 1, 2007 (Mar. 22, 2007), available at [http://factfinder.census.gov/servlet/GCTTable?\\_bm=y&-geo\\_id=04000US40&-\\_box\\_head\\_nbr=GCT-T1&-ds\\_name=PEP\\_2007\\_EST&-\\_lang=en&-format=ST-2&-\\_sse=on](http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US40&-_box_head_nbr=GCT-T1&-ds_name=PEP_2007_EST&-_lang=en&-format=ST-2&-_sse=on).

<sup>14</sup> See Table 2 *infra*.

<sup>15</sup> POPULATION DIVISION, U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION FOR COUNTIES OF OKLAHOMA: APRIL 1, 2000 TO JULY 1, 2007 (Mar. 22, 2007), available at [http://factfinder.census.gov/servlet/GCTTable?\\_bm=y&-geo\\_id=04000US40&-\\_box\\_head\\_nbr=GCT-T1&-ds\\_name=PEP\\_2007\\_EST&-\\_lang=en&-format=ST-2&-\\_sse=on](http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US40&-_box_head_nbr=GCT-T1&-ds_name=PEP_2007_EST&-_lang=en&-format=ST-2&-_sse=on) (showing population estimate of 3,617,316 at July 1, 2007 and 3,499,937 at July 1, 2003).

<sup>16</sup> See Table 2 *infra*.

To focus on the types of tort actions that have generated the most intense debate, the number of medical negligence cases filed has decreased 29.7% since 2003 in the thirteen OCIS counties, from 646 cases in 2003 to 454 cases in 2007.<sup>17</sup> In addition, publicly available data from the Oklahoma Insurance Department (“OID”) show that the number of closed claims reported by medical professional liability insurers declined 29.5% from 2004 (974 claims) to 2007 (687 claims).<sup>18</sup> Further, the number of products liability and strict liability cases filed has decreased 43% since 2003, from 218 cases in 2003 to 124 cases in 2007.<sup>19</sup>

Thus, the numerous tort reform provisions already enacted in Oklahoma appear to have contributed to a fairly pronounced decrease in tort filings. Unless the ultimate goal of tort reform advocates is to eliminate all tort cases (which it may well be), they would be well advised to study the recent data.

## II. A BRIEF HISTORY OF OKLAHOMA “TORT REFORM”

### A. *Key Provisions Passed: 2002–2004*

The smorgasbord of Oklahoma provisions enacted in 2002, 2003, and 2004 restricting remedies and the ability to sue (primarily in tort cases) includes:

- ***Affidavit of negligence:*** Requires a plaintiff filing a medical negligence action to attach an affidavit that plaintiff obtained “a written opinion from a qualified expert . . . that the acts or omissions of the health care provider against whom the action is brought constituted professional negligence[.]”<sup>20</sup>
- ***Appeal bonds:*** Amount of bond can be reduced to avoid “substantial economic harm” to judgment debtor (insolvency or significant risk thereof); if so reduced, court

<sup>17</sup> See Table 5 *infra*.

<sup>18</sup> See generally Oklahoma Insurance Department, *Medical Professional Liability Insurance Closed Claim Reports*, [http://www.ok.gov/oid/Producers\\_Adjusters/Rate\\_and\\_Form\\_Filing/Property\\_and\\_Casualty/Publications/index.htm](http://www.ok.gov/oid/Producers_Adjusters/Rate_and_Form_Filing/Property_and_Casualty/Publications/index.htm) (last visited Dec. 3, 2008) (reports cover the following time periods: July 1, 2003–Dec. 31, 2003; Jan. 1, 2004–Dec. 31, 2004; Jan. 1, 2005–Dec. 31, 2005; Jan. 1, 2006–Dec. 31, 2006; and Jan. 1, 2007–Dec. 31, 2007) [hereinafter *Closed Claim Report*]; see also Table 14 *infra*.

<sup>19</sup> See Table 8 *infra*.

<sup>20</sup> OKLA. STAT. tit. 63, § 1-1708.1E (2008). See *Zeier v. Zimmer, Inc.*, 152 P.3d 861 (Okla. 2006). This “Affidavit of negligence” provision of the Oklahoma legislature, OKLA. STAT. tit. 63, § 1-1708.1E, was later held to violate the Oklahoma Constitution. See *id.*

shall enter an order enjoining dissipation or transfer of assets outside the normal course of business.<sup>21</sup>

- **Class actions:** In awarding attorneys' fees, "the court shall conduct an evidentiary hearing to determine a fair and reasonable fee for class counsel, the court shall act in a fiduciary capacity on behalf of the class."<sup>22</sup>
- **Collateral source:** Allows admission of evidence of payments of medical bills made to the injured party unless a court determines that such payment is subject to subrogation.<sup>23</sup>
- **Dismissal:** A medical liability action is "deemed dismissed without prejudice[]" if a summons is not served within 180 days of filing suit.<sup>24</sup>
- **Expert witnesses:** Sets forth qualifications for expert witnesses in medical liability actions.<sup>25</sup>
- **Joint and several liability:** In an action based on fault and not arising out of contract, a joint tortfeasor shall be liable only for the amount of damages allocated to that tortfeasor, unless any joint tortfeasor acted with willful and wanton conduct or with reckless disregard.<sup>26</sup>
- **Noneconomic damages:** In medical negligence actions, "noneconomic damages" (defined as "mental pain and suffering, inconvenience, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation[]") are

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<sup>21</sup> OKLA. STAT. tit. 12, § 990.4(B)(1)(a) (2008).

<sup>22</sup> Tit. 5, § 7.1.

<sup>23</sup> Tit. 63, § 1-1708.1D.

<sup>24</sup> Tit. 12, § 150. See *Jones v. Integris Baptist Med. Ctr.*, 178 P.3d 191 (Okla. Civ. App. 2008). This "Dismissal" provision of the Oklahoma legislature was later held to violate the Oklahoma Constitution. See *id.*

<sup>25</sup> OKLA. STAT. tit. 63, § 1-1708.1I (2008). Oklahoma's rules of evidence already closely track the Federal Rules of Evidence relating to expert witnesses. Compare tit. 12, §§ 2702-06, with FED. R. EVID. 702-06.

<sup>26</sup> OKLA. STAT. tit. 23, § 15 (2008). However, a defendant shall be jointly and severally liable for damages recoverable by plaintiff if the percentage of responsibility attributed to the defendant is greater than 50%. *Id.*

limited to a “hard cap” of \$300,000, if defendant has made an offer of judgment and the amount of the verdict is less than 1-1/2 times the amount of the final offer.<sup>27</sup>

- **Prejudgment interest:** In medical liability actions, prejudgment interest shall be calculated on the average U.S. Treasury bill rate (instead of the prior rate of prime + 2%).<sup>28</sup>
- **Punitive damages:** Capped at \$100,000 when the defendant exhibits “reckless disregard for the rights of others[.]” and \$500,000 when the defendant “has acted intentionally and with malice[.]”<sup>29</sup>
- **Products liability:** Requires manufacturer to indemnify seller against loss arising out of a products liability action, except for any loss caused by the seller’s negligence or intentional misconduct.<sup>30</sup>
- **Rule 11:** In addition to Oklahoma’s general provision, tracking Rule 11 of the Federal Rules of Civil Procedure,<sup>31</sup> adds a new rule for tort actions that a court shall, on a motion to dismiss or for summary judgment or subsequent to a merits determination, determine whether the claim is “frivolous.”<sup>32</sup>

#### B. Key Provisions Proposed After 2004

After the elimination of some of the harsher provisions originally contained in the 2004 bill, advocates of tort reform introduced more bills in the Oklahoma legislature from 2005 through 2008.<sup>33</sup> Some of the key

<sup>27</sup> Tit. 63, § 1-1708.1F-1(A)-(C). The cap does not apply if nine or more jurors find negligence by clear and convincing evidence, or find by a preponderance of the evidence that a defendant’s conduct was willful and wanton. *Id.*

<sup>28</sup> Tit. 63, § 1-1708.1G.

<sup>29</sup> Tit. 23, § 9.1(A)(1)-(C)(1). This provision was most recently amended in 2002, but much of it has been in effect since 1997. As early as 1993, however, researchers had found that punitive damages awards were included in only a small percentage of verdicts in, for example, products liability cases. *See, e.g.,* Thomas Koenig & Michael Rustad, *The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability*, 16 JUST. SYS. J. 21, 25 (1993) (citing sources).

<sup>30</sup> OKLA. STAT. tit. 12, § 832.1 (2008).

<sup>31</sup> Tit. 12, § 2011. *Cf.* FED. R. CIV. P. 11.

<sup>32</sup> OKLA. STAT. tit. 12, § 2011.1 (2008).

<sup>33</sup> S. 1821, 51st Leg., 2d Sess. (Okla. 2007) (introduced February 4, 2008); S. 1467, 51st Leg., 2d Sess. (Okla. 2008); S. 507, 51st Leg., 2d Sess. (Okla. 2007) (vetoed April 28, 2007);

provisions proposed in these bills, yet to be enacted, include the following:

- **Appeal bonds:** Would allow an Oklahoma state court to stay judgment "in any court in or outside of th[e] state;" would place an absolute limit of \$25,000,000 on any bond and \$1,000,000 if the party is an individual or a business with 250 employees or less; and would eliminate the requirement of an appeal bond for appeals of punitive damages.<sup>34</sup>
- **Class actions:** Class members would be required to "opt in" to be included in a class instead of "opting out" to be excluded; when plaintiff's class counsel requests fees, the court would, on request, appoint an independent attorney to represent the class.<sup>35</sup>
- **Collateral source:** For breach of an obligation not arising from contract, if the plaintiff receives or is to receive compensation for the injuries or harm from a source wholly independent of the defendant, such a fact would be admitted into evidence and the amount would be deducted from the amount of damages that the plaintiff recovers from the defendant.<sup>36</sup>
- **Damages:** Would limit "noneconomic damages" (including pain and suffering) to \$300,000, "regardless of the number of parties against whom the action is brought or the number of actions brought" in tort actions.<sup>37</sup>
- **Expert witnesses:** Would resurrect the affidavit requirement for a qualified expert "[i]n any action not arising out of contract, wherein the party intends or is required by law to use a qualified expert to prove liability, . . . [and] that the

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H.B. 2047, 50th Leg., 1st Sess. (Okla. 2005) (died in conference May 27, 2005); S. 1657, 50th Leg., 2d Sess. (Okla. 2005).

<sup>34</sup> S. 1467, at § 7.

<sup>35</sup> *Id.* §§ 1, 11.

<sup>36</sup> *Id.* § 18.

<sup>37</sup> *Id.* § 19. The cap would not apply "[i]f the jury finds by clear and convincing evidence" that the party's acts were "grossly negligent or committed intentionally or with malice toward others, and the court finds, on the record and out of the presence of the jury that there is evidence beyond a reasonable doubt that the defendant was grossly negligent or acted intentionally or with malice toward others[.]" *Id.*



claim is meritorious and based on good cause[;]"<sup>38</sup> would require "the courts of this state" to follow the United States Supreme Court cases of *Daubert*, *Joiner*, *Kuhmo*, and *Weisgram*; would set appellate standards of review of trial court decisions on admissibility of expert testimony; and would allow interlocutory appeal of a ruling on the admissibility of expert evidence at the discretion of the appellate court.<sup>39</sup>

- **Joint and several liability:** Would limit the existing willful and wanton or reckless clause to provide for joint and several liability only for the tortfeasor who acted with willful, wanton, or reckless conduct.<sup>40</sup>
- **Juries:** Would mandate that the Oklahoma Uniform Jury Instructions include an instruction that personal injury and wrongful death awards are not subject to federal or state income tax;<sup>41</sup> would mandate that a trial judge submit special questions of fact to the jury (in addition to the general verdict) upon request.<sup>42</sup>
- **Medical negligence:** Would authorize a court "[u]pon request of a party[]" in a health care liability action to order payments of future damages in periodic payments rather

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<sup>38</sup> *Id.* § 2.

<sup>39</sup> *Id.* § 13. Oklahoma courts already follow *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). See *Scruggs v. Edwards*, 154 P.3d 1257 (Okla. 2007); *Christian v. Gray*, 65 P.3d 591 (Okla. 2003); *Ryder v. State*, 83 P.3d 856 (Okla. Crim. App. 2004); *Harris v. State*, 13 P.3d 489 (Okla. Crim. App. 2000); *Gilson v. State*, 8 P.3d 883 (Okla. Crim. App. 2000); *Wood v. State*, 959 P.2d 1 (Okla. Crim. App. 1998); *Taylor v. State*, 889 P.2d 319 (Okla. Crim. App. 1995). In civil cases, the Oklahoma Supreme Court has approvingly cited *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) (holding abuse of discretion standard applied to trial court's decision to exclude scientific evidence) and *Weisgram v. Marley Co.*, 528 U.S. 440 (2000) (federal court of appeals may direct entry of judgment for verdict loser under Fed. R. Civ. P. 50 without violating Seventh Amendment of the U.S. Constitution). See *Christian v. Gray*, 65 P.3d 591 (Okla. 2003).

<sup>40</sup> S. 1467, at § 15.

<sup>41</sup> *Id.* § 3.

<sup>42</sup> *Id.* § 4. This provision facially violates the Oklahoma Constitution. See OKLA. CONST., Art. VII, § 15 ("In all jury trials the jury shall return a general verdict, and no law in force nor any law hereafter enacted, shall require the court to direct the jury to make findings of particular questions of fact, but the court may, in its discretion, direct such special findings.").

than a lump sum;<sup>43</sup> would protect the recommendations made and action taken as a result of any professional peer review process from discovery or admissibility at trial.<sup>44</sup>

- **Prejudgment interest:** For most kinds of tort suits resulting in a plaintiff's verdict, would provide that no prejudgment interest begins to accrue for three years following the suit's filing, and that the rate for both prejudgment and postjudgment interest would be decreased from the prime rate + 2 (currently about 3.25 + 2 = 5.25%) to the average U.S. Treasury bill rate (currently about 2.9%).<sup>45</sup>
- **Products liability:** The Common Sense Consumption Act would "prevent frivolous lawsuits against manufacturers, packers, distributors, carriers, holders, sellers, marketers or advertisers of food products that comply with applicable statutory and regulatory requirements."<sup>46</sup> Another new proposed law would provide that "[n]o firearm manufacturer, distributor, or seller who lawfully manufactures, distributes, or sells a firearm is liable to any person or entity[] . . . for any injury suffered, including wrongful death and property damage, because of use of such firearm by another."<sup>47</sup>
- **Rule 11:** Would change the definition of "frivolous" in Oklahoma state equivalents to "without any rational argument based in law or facts to support the position of the litigant."<sup>48</sup>
- **Statute of repose:** Would require any tort action to be brought within eight years "from the date of the act or omission that gives rise to the claim[,] or the claim would be time-barred."<sup>49</sup>

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<sup>43</sup> S. 1467, at § 16.

<sup>44</sup> *Id.* § 23.

<sup>45</sup> *Id.* § 6.

<sup>46</sup> *Id.* §§ 39–42.

<sup>47</sup> *Id.* §§ 43–46.

<sup>48</sup> *Id.* § 9.

<sup>49</sup> *Id.* § 35.

## III. METHODOLOGY

A. *The Oklahoma Court Information System*

Only thirteen of the seventy-seven counties in Oklahoma are on the integrated and computerized OCIS, which creates the database that can be accessed by OAOC,<sup>50</sup> but these thirteen counties include 56% of Oklahoma's total population.<sup>51</sup> The OCIS counties also include the largest metropolitan areas (Oklahoma City, Tulsa, and Norman), which have many hospitals and probably have the higher-stakes tort actions.<sup>52</sup>

One can locate a great deal of information online for cases filed in the thirteen OCIS counties (and even in the non-OCIS counties). Unfortunately, there is no way to quantify or aggregate this information. But one can click on each individual case and discover its case classification (such as "Foreclosure"), so at least theoretically, there is a countercheck on the aggregate information OAOC provided.

As an example of how the OCIS search engine works, assume the reader wants to see all the civil cases filed on January 25, 2008, in the Oklahoma County District Court requesting more than \$10,000 in relief. Access the OCIS web site,<sup>53</sup> and click on "Search Dockets." Select "Oklahoma County" as the database search and "Civil relief more than \$10,000 (District Courts)" as the case search. Now limit the dates searched by typing "1/25/2008" in both the "Cases Filed After" and "Cases Filed Before" boxes. By clicking on the first case listed, *Singh v. Allen*, No. CJ-2008-703, one can retrieve the docket sheet in the case and see that it has been classified as a "Quiet Title" action.

Theoretically, one could do this for each case filed in each county going back as far as the county has been on OCIS. Obviously, however, this would be very time-intensive and inefficient. Only OAOC has access to the entire database so that it may perform aggregate searches such as the one I requested. I therefore contacted OAOC, and those individuals who assisted me were cooperative and helpful, but provided the information subject to some caveats about its reliability.

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<sup>50</sup> See *supra* note 12 and accompanying text.

<sup>51</sup> See *supra* notes 13, 15 and accompanying text.

<sup>52</sup> See Danzon, *supra* note 2, at 415 (noting that urbanization is positively correlated with the rate of medical malpractice claims).

<sup>53</sup> The Oklahoma State Courts Network, <http://www.oscn.net/applications/oscn/start.asp?viewType=DOCKETS> (last visited Dec. 3, 2008).

B. *Classifications of Cases as "Tort" Cases*

To understand the nature and limitations of the OAOB data, one must begin with the Civil Cover Sheet "[r]equired to be submitted by all parties with their initial filing[]" in a civil case in Oklahoma district (trial-level) court.<sup>54</sup> At the bottom of the Civil Cover Sheet, parties must identify one of the fifty-two listed "[c]laims of [r]elief [r]equested ([c]ircle primary relief, check all others)."<sup>55</sup> The only "claim of relief" entered into the database is the "primary relief."<sup>56</sup> There is no computerized method of ascertaining whether any other claims of relief were checked.<sup>57</sup>

I began with the assumption that the causes of action listed on the bottom of the Civil Cover Sheet constituted the universe of case classifications used by the court clerks. Accordingly, my initial request to OAOB included all the claims listed on the Civil Cover Sheet that I believed anyone could characterize as "torts," and also included class actions.<sup>58</sup> I requested, for all thirteen OCIS counties, the number of cases filed annually in the categories I specified for the years 2003 to 2007, within the overall category of "Civil Relief More Than \$10,000."<sup>59</sup>

The OAOB then informed me that the county court clerks sometimes used another, older system of classification, adding twenty-four more possible categories of "claims of relief" to those listed on the cover

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<sup>54</sup> District Courts of Oklahoma Cover Sheet, <http://www.oscn.net/static/forms/districtcover.asp> (emphasis omitted) (last visited Dec. 5, 2008) [hereinafter Civil Cover Sheet] (follow Civil Cover Sheet hyperlink).

<sup>55</sup> *Id.* (emphasis omitted).

<sup>56</sup> Telephone Interview with Joyce Green, Oklahoma Administrative Office of the Court (Jan. 11, 2008) [hereinafter Interview].

<sup>57</sup> See Interview. In other words, an attorney may join any number of causes of action in a single lawsuit, but that case only receives one classification in the computerized system. So, for example, if a case has one count for breach of contract and one count for tortious interference with contract, it would only be classified as one or the other, and there is no computerized way to know which count was not used.

<sup>58</sup> See Civil Cover Sheet, *supra* note 54. The categories on the Civil Cover Sheet that I characterized as a "tort" action are Assault and Battery, Auto Negligence, Bad Faith Insurer Liability, Breach of Fiduciary Duty, Class Action, Fraud, Intentional Infliction of Emotional Distress, Legal Negligence, Libel/Slander, Loss of Consortium, Malicious Prosecution, Medical Negligence, Premises Liability, Professional Negligence, Product Liability, Strict Liability, Tortious Interference/Contract, Wrongful Death, and Wrongful Termination. I also requested the data on Foreclosure and Indebtedness.

<sup>59</sup> See *infra* Table 1. There are vastly more civil cases filed in the "Civil Relief Less Than \$10,000" category than in the "More Than \$10,000" category, but I limited my request to the higher-dollar cases.

sheet.<sup>60</sup> I therefore modified my request to include six additional possible classifications of tort cases.<sup>61</sup>

The revelation that there are (at least) two systems of classification led to other questions for which there are no ready answers. Who circles the claim on the Civil Cover Sheet: an attorney, a law clerk, a paralegal, an administrative assistant, the court clerk, or someone else? If the box on the form is already circled or checked when the court clerk receives it, does the clerk necessarily accept the designation? Or might the clerk in his or her own judgment decide what the suit “really” involves? OAOC warned me that although many of the classifications may be erroneous, it is the best computerized data available.<sup>62</sup>

As mentioned above, one could theoretically access every single case on OCIS and determine whether the aggregate information OAOC provided is correct.<sup>63</sup> But that does not address the problems of whether the case was classified correctly to begin with or whether there are other causes of action contained within the complaint. One would have to access the physical court file for the case in order to learn anything further.

Table 1 is an example of the raw county-by-county data received from OAOC.

**Table 1**

**Example of Data Received From OAOC:  
Civil Cases by Type Over \$10,000 Filed in Oklahoma County**

Filing Code Description	2003	2004	2005	2006	2007
A&B—ASSAULT & BATTERY	30	23	20	29	17
AUTONEG—AUTO NEGLIGENCE	1152	939	1086	1157	1175
CLASS—CLASS ACTION	10	4	7	4	27
CLASS1—CLASS ACTION-CIVIL NO DAMAGES	0	0	0	0	0

<sup>60</sup> E-mail from Misty Smith, Oklahoma Administrative Office of the Court, to Patricia Hatamyar, (Oct. 3, 2007) (on file with author).

<sup>61</sup> The categories added were Class Action—Civil No Damages, Conversion, Negligence (General), Sexual Harassment, Wrongful Termination—Civil No Damages, and Tort—Personal.

<sup>62</sup> See Interview, *supra* note 56. See also Jones, *supra* note 6, at nn.195-96 & accompanying text (showing that similar warnings were given to Jones when he obtained data from court clerks on medical negligence lawsuits in Oklahoma).

<sup>63</sup> My indefatigable research assistant, Steven Foster, did that with all of Canadian County, and his figures essentially matched OAOC’s figures, with discrepancies of only one or two cases in a couple of categories.

CONVERT – CONVERSION	19	16	16	11	17
DEATH – WRONGFUL DEATH	46	36	26	52	31
DISCRIM – DISCRIMINATION	9	10	8	3	12
DUTY – BREACH OF FIDUCIARY DUTY	13	10	20	25	15
EMOTION – INTENTIONAL INFLICTION					
EMOTIONAL DISTRESS	5	10	4	5	5
FORE – FORECLOSURE	2512	2565	2544	2950	3365
FRAUD – FRAUD	67	75	64	56	48
INDEBT – INDEBTEDNESS	1464	1719	1343	1320	1419
INSURE – BAD FAITH INSURER LIABILITY	63	43	40	44	60
INTERFERE – TORTIOUS INTERFERENCE					
CONTRACT	4	3	4	7	4
LEGALNEGL – LEGAL NEGLIGENCE	20	18	27	20	23
LIABLE – STRICT LIABILITY	19	9	4	8	6
LIBEL – LIBEL/SLANDER	14	5	14	7	15
LOSS – LOSS OF CONSORTIUM	0	1	1	0	0
MEDNEG – MEDICAL NEGLIGENCE	278	183	169	172	213
NEGL – NEGLIGENCE (GENERAL)	191	167	122	119	159
PREMISE – PREMISES LIABILITY	114	117	152	147	146
PROD – PRODUCT LIABILITY	69	50	60	81	49
PROFNEG – PROFESSIONAL NEGLIGENCE	31	10	10	17	11
PROSEC – MALICIOUS PROSECUTION	2	1	1	2	2
SEXH – SEXUAL HARASSMENT	0	2	0	0	0
TERMINATE – WRONGFUL TERMINATION	46	56	56	52	52
TERMINATE1 – WRONGFUL TERMINATION-CIVIL					
NO DAMAGES	0	0	0	0	0
TORTP – TORT-PERSONAL	66	73	94	125	116
<b>Grand Total</b>	<b>6244</b>	<b>6145</b>	<b>5892</b>	<b>6413</b>	<b>6987</b>

## IV. OKLAHOMA ADMINISTRATIVE OFFICE OF THE COURTS DATA RESULTS

## A. Overall Results

Using the county-by-county data like that contained in Table 1, I computed the total number of cases filed in all counties for each type of tort. The aggregate results are shown in Table 2.

**Table 2****Civil Cases by Type over \$10,000 Filed in OCIS Counties Combined**

<b>Court Clerk Filing Code Description</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>
A&B – ASSAULT & BATTERY	97	71	63	77	70
AUTONEG – AUTO NEGLIGENCE	3035	2777	2716	2926	2793
CLASS – CLASS ACTION	31	93	23	10	37
CONVERT – CONVERSION	101	87	95	80	70
DEATH – WRONGFUL DEATH	147	117	93	116	109
DISCRIM – DISCRIMINATION	25	35	21	36	22
DUTY – BREACH OF FIDUCIARY DUTY	150	109	101	129	121
EMOTION – INT'L INFLICTION EMOT'L DISTRESS	124	59	39	62	44
FRAUD – FRAUD	402	387	283	332	272
INSURE – BAD FAITH INSURER LIABILITY	171	111	107	107	113
INTERFERE – TORTIOUS INTERFERENCE	93	90	69	58	40
LEGALNEGL – LEGAL NEGLIGENCE	108	93	79	82	86
LIABLE – STRICT LIABILITY	63	48	41	45	25
LIBEL – LIBEL/SLANDER	45	39	32	35	55
LOSS – LOSS OF CONSORTIUM	27	27	28	16	19
MEDNEG – MEDICAL NEGLIGENCE	646	416	348	357	454
NEGL – NEGLIGENCE (GENERAL)	684	705	599	565	492
PREMISE – PREMISES LIABILITY	289	293	308	314	335
PROD – PRODUCT LIABILITY	155	196	121	142	99
PROFNEG – PROFESSIONAL NEGLIGENCE	92	39	27	53	40
PROSEC – MALICIOUS PROSECUTION	28	11	12	14	16
SEXH – SEXUAL HARASSMENT	2	3	1	1	0
TERMINATE – WRONGFUL TERMINATION	144	154	116	126	131
TORTTP – TORT-PERSONAL	105	95	110	135	133

All tort actions over \$10,000 in OCIS counties	6764	6055	5432	5818	5576
All civil relief over \$10,000 in OCIS counties	25780	25213	24428	25103	26832
% of > \$10,000 civil cases that are tort cases	26.2%	24.02%	22.24%	23.18%	20.78%
% decrease in tort cases, from 2003–2007	17.5%				
% increase in >\$10,000 cases, 2003–2007	4.08%				
% population increase in Oklahoma, 2003–2007	3.24%				

**Table 3**

**% Decrease or Increase in Number of "Tort" Suits  
Over \$10,000 Filed in OCIS Counties Combined**

**Court Clerk Filing Code Description  
% Decrease/Increase 2003–2007**

A&B – ASSAULT & BATTERY	-27.84%
AUTONEG – AUTO NEGLIGENCE	-7.97%
CLASS – CLASS ACTION	19.35%
CONVERT – CONVERSION	-30.69%
DEATH – WRONGFUL DEATH	-25.85%
DISCRIM – DISCRIMINATION	-12.00%
DUTY – BREACH OF FIDUCIARY DUTY	-19.33%
EMOTION – INT'L INFLICTION EMOT'L DISTRESS	-64.52%
FRAUD – FRAUD	-32.34%
INSURE – BAD FAITH INSURER LIABILITY	-33.92%
INTERFERE – TORTIOUS INTERFERENCE	-56.99%
LEGALNEGL – LEGAL NEGLIGENCE	-20.37%
LIABLE – STRICT LIABILITY	-60.32%
LIBEL – LIBEL/SLANDER	22.22%
LOSS – LOSS OF CONSORTIUM	-29.63%
MEDNEG – MEDICAL NEGLIGENCE	-29.72%
NEGL – NEGLIGENCE (GENERAL)	-28.07%
PREMISE – PREMISES LIABILITY	15.92%
PROD – PRODUCT LIABILITY	-36.13%
PROFNEG – PROFESSIONAL NEGLIGENCE	-56.52%



PROSEC – MALICIOUS PROSECUTION	-42.86%
SEXH – SEXUAL HARASSMENT	-100.00%
TERMINATE – WRONGFUL TERMINATION	-9.03%
TORTP – TORT-PERSONAL	26.67%
<b>All tort actions over \$10,000 in OCIS counties</b>	<b>-17.56%</b>

Two initial observations may be noted. First, the total number of cases filed for every type of “tort” from 2003–2007 has decreased, except for class actions (from 31 to 37 cases), libel/slander (from 45 to 55 cases), premises liability (from 289 to 335 cases), and the amorphous tort-personal category (from 105 to 133 cases). Second, some of the steepest declines were seen in categories of torts not usually targeted by tort reform measures, such as bad faith insurer liability, conversion, fraud, intentional infliction of emotional distress, malicious prosecution, and tortious interference with contract.

#### B. Automobile Negligence Cases

The single largest category of tort cases filed over \$10,000 in Oklahoma is automobile negligence. This is consistent with other states’ statistics.<sup>64</sup> Although auto negligence cases are not usually the express target of tort reforms, they suffer the fallout from such enactments.<sup>65</sup>

As shown in Table 2, auto negligence case filings declined roughly 8% from 2003 to 2007. One possible cause of this decline might be an overall decrease in the number of fatal accidents.

However, the decrease in auto negligence cases filed in the thirteen OCIS counties from 2003 to 2007 cannot be attributed to a corresponding decrease in traffic fatalities during that same period. As shown in Table 4, traffic fatalities in OCIS counties rose 9% from 2003 to 2006: from 242 fatalities in 2003 to 263 fatalities in 2006. In all of Oklahoma, traffic fatalities rose 14% from 2003 to 2006: from 671 fatalities in 2003 to 765 fatalities in 2006. At the same time, cases classified as auto negligence in the OCIS counties database show a 4% decrease: from 3,035 cases in 2003 to 2,926 cases filed in 2006.<sup>66</sup> The number of auto negligence cases filed in the OCIS counties dropped further in 2007, to just 2,793.<sup>67</sup>

<sup>64</sup> NATIONAL CENTER FOR STATE COURTS, *supra* note 2, at 28.

<sup>65</sup> Daniels & Martin, *supra* note 2, at 1232–36 (filing rate for auto cases in Texas decreased 22.2% from 1995 to 2000).

<sup>66</sup> See Table 2 *supra*.

<sup>67</sup> National Highway Transportation Safety, Traffic Safety Facts, <http://www.nhtsa.gov> (last visited Nov. 16, 2008). There were 55,681 traffic fatalities in 2007. *Id.*

**Table 4****Traffic Fatalities by OCIS Counties and Statewide, 2001-2006<sup>68</sup>**

<b>County</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
Adair	5	13	3	9	7	5
Canadian	14	23	17	19	26	15
Cleveland	30	18	14	27	13	22
Comanche	13	10	5	12	7	14
Ellis	2	1	0	1	1	2
Garfield	6	7	4	10	12	10
Logan	5	10	8	6	12	11
Oklahoma	66	71	78	77	72	57
Payne	9	13	12	16	16	12
Pushmataha	4	4	14	5	3	10
Roger mills	4	2	4	0	2	7
Rogers	20	25	23	17	21	33
Tulsa	67	59	60	72	67	65
<b>Total OCIS counties</b>	<b>245</b>	<b>256</b>	<b>242</b>	<b>271</b>	<b>259</b>	<b>263</b>
<b>Total, all counties in Oklahoma</b>	<b>682</b>	<b>739</b>	<b>671</b>	<b>774</b>	<b>803</b>	<b>765</b>

Conversely, limited data have shown that tort reform efforts have actually caused a decrease in the rate of fatal accidents, theoretically due

<sup>68</sup> See National Highway Transportation Safety Administration, Fatality Analysis Reporting System Encyclopedia, <http://www-fars.nhtsa.dot.gov/States/StatesCrashesAndAllVictims.aspx>. In addition, as reported by the Federal Motor Carrier Safety Administration, the number of crashes involving large trucks in Oklahoma has increased from 1,580 in 2002 to 1,763 in 2006. See Federal Motor Carrier Safety Administration, <http://ai.fmcsa.dot.gov/CrashProfile/pdfwait.asp?filename=pdfCompleteHistory&state=OK&rt=1> (last visited Dec. 3, 2008).

to potential victims taking greater precautions to avoid accidents.<sup>69</sup> The Oklahoma experience from 2003–2007 does not support this theory.

### C. Medical Malpractice Cases

Step increases in medical malpractice insurance premiums over the last two decades have been catalytic in the “tort reform” movement. Also, many of the proposals passed or promulgated in Oklahoma explicitly or implicitly target medical malpractice lawsuits<sup>70</sup> on the assumption that such lawsuits cause premiums to rise<sup>71</sup> or the quality<sup>72</sup> or accessibility<sup>73</sup> of health care to decline.

<sup>69</sup> Michael B. Kelly, *What Makes the Collateral Source Rule Different?*, 39 AKRON L. REV. 1171, 1177 (2006).

<sup>70</sup> The Oklahoma legislature is hampered in its efforts to explicitly target medical malpractice suits by the state constitutional provisions limiting the enactment of “special laws[.]” OKLA. CONST. art. V, § 46.

The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law . . . [r]egulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts, justices of the peace, sheriffs, commissioners, arbitrators, or other tribunals, or providing or changing the methods for the collection of debts, or the enforcement of judgments or prescribing the effect of judicial sales of real estate[.]

*Id.*; OKLA. CONST. art. V, § 59 (“Laws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted.”). See Zeier v. Zimmer, 152 P.3d 861 (Okla. 2006) (holding that tort reform provision violates Oklahoma Constitution, Article V, Section 46, as a “special law” affecting only medical malpractice plaintiffs rather than all individuals seeking redress for negligent acts).

<sup>71</sup> See, e.g., Kathryn Zeiler, *Turning from Damage Caps to Information Disclosure: An Alternative to Tort Reform*, 5 YALE J. HEALTH POL’Y, L. & ETHICS 385, 391–95 (2005) (reviewing empirical studies and finding results mixed); Brandon Van Grack, *The Medical Malpractice Liability Limitation Bill*, 42 HARV. J. LEGIS. 299, 305 (2005) (suggesting that “[s]everal sources confirm that . . . noneconomic damages caps[] stem[] insurance rate growth.”).

<sup>72</sup> See, e.g., David A. Hyman & Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?*, 90 CORNELL L. REV. 893, 893 (2005) (suggesting that “[n]o evidence shows that malpractice lawsuits cause the quality of health care to decline.” (emphasis omitted)).

<sup>73</sup> See, e.g., Van Grack, *supra* note 71, at 303 (citing GAO study “conclud[ing] that many reported physician departures and hospital unit closures in response to rising insurance premiums were unsubstantiated or did not widely affect access to healthcare.”). In the last few years, there have been many billboards in Oklahoma proclaiming that doctors were leaving the state because of frivolous lawsuits; one was right on my way home from work for almost a year. However, in 2007 *Physicians Practice* magazine included Oklahoma in its list of the five best states in the country in which to be a doctor, as measured by the criteria of lower cost of living, higher reimbursement, lower physician density per capita, and “more agreeable malpractice climates.” Bob Keaveney, *Best Places to Practice: America’s Physician Friendliest States We Scoured America for States that Let Doctors Be Doctors*,

The data in Table 5 show an overall decline of 29.7% in medical negligence cases filed since 2003 in the thirteen OCIS counties, from 646 cases in 2003 to 454 cases in 2007. The largest decline occurred from 2003 to 2005, and the number of case filings crept up from 2005 to 2007, but is still at a level well below the case filings in 2003.

In addition, Table 6 shows that medical negligence cases, as a percent of all civil cases requesting over \$10,000 in relief, have declined from 2.51% in 2003 to 1.69% in 2007.

**Table 5**

**Number of Cases Filed and Classified as "Medical Negligence" in OCIS Counties**

	2003	2004	2005	2006	2007
Adair	1	1	0	0	0
Canadian	4	4	2	2	4
Cleveland	66	27	18	22	15
Comanche	19	13	10	8	18
Ellis	0	0	0	1	1
Garfield	18	7	4	11	7
Logan	1	2	0	0	2
Oklahoma	278	183	169	172	213
Payne	10	8	3	4	6
Pushmataha	0	0	0	0	0
Roger Mills	0	0	0	0	0
Rogers	5	7	1	2	5
Tulsa	244	164	141	135	183
<b>Total OCIS counties</b>	<b>646</b>	<b>416</b>	<b>348</b>	<b>357</b>	<b>454</b>
<b>Decrease, 2003-2007</b>	<b>29.72%</b>				

**Table 6**

**Percent of "Civil Relief More than \$10,000" Cases That Are "Medical Negligence"**

	2003	2004	2005	2006	2007
<b>OCIS counties, med negl</b>	646	416	348	357	454
<b>OCIS cases, all CJ</b>	25780	25213	24428	25103	26832
<b>Med Neg as % of CJ</b>	2.51%	1.65%	1.42%	1.42%	1.69%

Chris Jones earlier performed an empirical study of medical negligence actions in Oklahoma for eight of the thirteen OCIS counties.<sup>74</sup> Table 7 compares the figures he obtained from court clerks and the figures I obtained from OAOC.

**Table 7**

**Number of Cases Filed in OCIS Counties and Classified as "Medical Negligence";  
Counties Used by Jones 1996-2003 and Hatamyar 2003-2007**

	1996	1997	1998	1999	2000	2001	2002	2003	2003	2004	2005	2006	2007
	Jones								Hatamyar				
Canadian	1	0	1	1	4	4	5	4	4	4	2	2	4
Cleveland	10	10	12	10	18	27	105	67	66	27	18	22	15
Comanche	5	3	0	2	14	10	15	19	19	13	10	8	18
Garfield	0	2	8	0	8	4	10	19	18	7	4	11	7
Oklahoma	146	144	140	156	180	209	265	282	278	183	169	172	213
Payne	1	0	0	1	4	8	9	10	10	8	3	4	6
Rogers	N/A	0	1	0	4	6	1	5	5	7	1	2	5
Tulsa	86	78	88	95	132	149	150	172	244	164	141	135	183
<b>Total</b>	<b>249</b>	<b>237</b>	<b>250</b>	<b>265</b>	<b>364</b>	<b>417</b>	<b>560</b>	<b>578</b>	<b>644</b>	<b>413</b>	<b>348</b>	<b>356</b>	<b>451</b>

<sup>74</sup> Jones, *supra* note 5.

The only significant difference in the data occurs in Tulsa County in 2003, as I was given a much higher figure (244 cases) than Mr. Jones (172 cases). I have no way of accounting for this difference. Nonetheless, even using the figure Mr. Jones was given, there has been a decline in the number of medical negligence cases filed in the OCIS counties overall from 2003–2007.

Some excursions into the underlying cases support the hypothesis that the overall number of medical negligence cases in Oklahoma is small enough that one or two unforeseen events in a year can skew the data. For example, of the 105 cases classified as "medical negligence" in 2002 in Cleveland County, forty-three were against a single doctor, James C. Hill.<sup>75</sup> Of the sixty-seven cases classified as "medical negligence" in 2003 in Cleveland County, thirty were against that same doctor: James C. Hill. There are no cases in the database filed against Dr. Hill after 2003. Only one case was filed against Dr. Hill in Cleveland County in 2001. Thus, Dr. Hill alone was responsible for an increase of forty-two cases filed between 2001 and 2002, or 29% of the total increase reported by Mr. Jones.

Mr. Jones postulated that much of the large increase in medical negligence cases in Cleveland County and Oklahoma County from 2001 to 2003 can be attributed to one nurse-anesthetist reusing needles and syringes, exposing more than 1,000 patients to Hepatitis C.<sup>76</sup> This theory is supported by the fact that the number of medical negligence cases in 2004 in both counties returned to approximately their 2001 levels.

In fact, one might assume that the medical negligence filings in 2002 and 2003 were aberrational due to these two incidents alone. Looking at the data another way, one could conclude that the number of medical negligence cases filed has actually risen slightly from 2001 to 2007, after falling in 2005 and 2006. At least two factors may theoretically have contributed to the increase in 2007. First, the Oklahoma Supreme Court declared in late 2006 that the previously enacted "affidavit of medical negligence[]" filing requirement was unconstitutional.<sup>77</sup> Second, as an omnibus tort reform bill cleared the legislature in 2007 and made its way to the governor's desk for signature (where it was vetoed), there may have been a rush to file cases prior to the bill's effective date.<sup>78</sup>

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<sup>75</sup> See The Oklahoma State Courts Network, Dockets of Oklahoma Courts, <http://www.oscn.net/applications/oscn/start.asp?viewType=DOCKETS>.

<sup>76</sup> Jones, *supra* note 5, at 130–31.

<sup>77</sup> Zeier v. Zeier, Inc., 152 P.3d 861 (Okla. 2006).

<sup>78</sup> The "rush to file" hypothesis has been noted by other researchers analyzing filing trends in the face of tort reform. See, e.g., NATIONAL CENTER FOR STATE COURTS, *supra* note 2, at 28; E. Farish Percy, *Checking Up on the Medical Malpractice Liability Insurance Crisis in*

*D. Products Liability and Strict Liability Cases*

Products and strict liability cases have not received the same volume of criticism from tort reformers in Oklahoma as medical negligence cases. But changes to joint and several liability rules, punitive damages rules, and seller-indemnification rules were passed in 2002–2004.<sup>79</sup> These changes appear already to have contributed to a decrease in the filing of product liability and strict liability cases, as shown in Tables 8 and 9.

**Table 8****Number of Cases Filed and Classified as "Product Liability" or "Strict Liability"**

	2003	2004	2005	2006	2007
<b>"Product Liability" cases</b>					
Adair	0	0	0	0	0
Canadian	1	4	3	5	1
Cleveland	17	10	12	5	0
Comanche	0	2	3	0	2
Ellis	0	0	0	0	0
Garfield	3	3	2	0	1
Logan	1	1	1	0	3
Oklahoma	69	50	60	81	49
Payne	1	1	0	1	2
Pushmataha	0	0	1	1	0
Roger Mills	0	0	0	0	0
Rogers	5	1	0	2	3
Tulsa	58	124	39	47	38
<b>"Strict Liability" cases</b>					
Adair	0	0	0	0	0

*Mississippi: Are Additional Tort Reforms the Cure?*, 73 MISS. L.J. 1001, 1101 (2004); Thomas R. Ireland & David G. Tucek, *Economic Damages Under House Bill 393*, 62 J. MO. B. 214, 214 (2006).

<sup>79</sup> See OKLA. STAT. tit. 23, § 15 (2008); OKLA. STAT. tit. 63, § 9.1 (2008); OKLA. STAT. tit. 12, § 832.1 (2008).

Canadian	2	1	0	0	1
Cleveland	1	0	1	3	2
Comanche	1	2	1	2	0
Ellis	0	0	0	0	0
Garfield	1	0	1	1	0
Logan	0	1	1	3	1
Oklahoma	19	9	4	8	6
Payne	0	0	0	0	0
Pushmataha	0	0	0	0	0
Roger Mills	0	0	0	0	0
Rogers	1	0	3	3	3
Tulsa	38	35	30	25	12
<b>Total, PL &amp; SL cases</b>	<b>218</b>	<b>244</b>	<b>162</b>	<b>187</b>	<b>124</b>
<b>Decrease, 2003-2007 =</b>	<b>43.12%</b>				

**Table 9**

**Percent of "Civil Relief More than \$10,000" (CJ) Cases  
That Are "Product Liability" (PL) or "Strict Liability" (SL)**

	2003	2004	2005	2006	2007
<b>OCIS counties, PL &amp; SL</b>	218	244	162	187	124
<b>OCIS cases, all CJ &gt; \$10,000</b>	25780	25213	24428	25103	26832
<b>PL &amp; SL as % of CJ</b>	0.85%	0.97%	0.66%	0.74%	0.46%

Thus, there has been a 43.12% drop in filings for products and strict liability cases from 2003 to 2007. Moreover, such cases account for only a small percentage (0.46%) of all civil actions over \$10,000. But tort reform advocates appear dissatisfied with these results, proposing further limits on noneconomic damages, joint and several liability, jury instructions, prejudgment interest, and the statute of repose—all of which would apply to product and strict liability cases.<sup>80</sup> In addition, new laws have

<sup>80</sup> S. 1467, 51st Leg., 2d Sess. § 15 (Okla. 2008).



been proposed imposing further restrictions on product and strict liability lawsuits involving food products and firearms.<sup>81</sup>

A well-worn line from an old Wendy's commercial asks, "where's the beef?" This line seems to apply here because I have been unable to locate a single reported case for products or strict liability involving firearms or food products in Oklahoma state courts since 2001.<sup>82</sup>

### E. Class Actions

The "tort reform" movement has frequently targeted class actions, even though many class actions are based in contract or other non-common-law-tort causes of action, such as deceptive trade practices statutes.<sup>83</sup> The most common type of class action filed in Oklahoma state courts seeks royalty payments on oil and gas leases.<sup>84</sup>

In Oklahoma, the anti-class-action constituency verges on the hysterical, propped up by what one can only term public relations propaganda.<sup>85</sup> The continuing push to further limit—or even eliminate—class actions in Oklahoma flies in the face of available evidence indicating that class actions are already a rarity in the state. This is a particularly pungent example of the tort reformers' tendencies to run on rhetoric rather than facts.

As I testified before the Oklahoma state legislature in 2004,<sup>86</sup> class actions are infrequently filed in Oklahoma state courts and even more rarely succeed in obtaining class certification, let alone the award of plaintiffs' attorneys' fees. The recent data obtained from OAOC, shown in Table 10, confirms the scarcity of class action filings.

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<sup>81</sup> *Id.*

<sup>82</sup> Searches performed on Westlaw on July 17, 2008 in the "OK-CS" database included: (1) DA(AFT 01/01/2001) & "PRODUCTS LIABILITY" "STRICT LIABILITY" & "FIREARM" "GUN" "FOOD PRODUCT" "OBESITY", and (2) "products liability" "strict liability" & "firearm" "gun" "food product" "obesity". The latter search was also performed in the "OKNEWS" database, as was the search ("products liability" "strict liability" & "food" "obes!").

<sup>83</sup> See *supra* notes 22–23, 35 and accompanying text. See also, e.g., Bradley W. Joondeph, *The Deregulatory Valence of Justice O'Connor's Federalism*, 44 HOUS. L. REV. 507, 541 (2007) (terming the Federal Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005), an example of "federal tort reform legislation[]").

<sup>84</sup> E.g., *Velma-Alma Indep. Sch. Dist. No. 15 v. Texaco, Inc.*, 162 P.3d 238 (Okla. Civ. App. 2007).

<sup>85</sup> It seems that a single case, *Bayhulle v. Jiffy Lube Int'l, Inc.*, 146 P.3d 856 (Okla. Civ. App. 2006), outraged tort reformers by upholding a "coupon[]" "settlement" agreement. See JOURNAL RECORD, March 3, 2006 (2006 WLNR 10716711).

<sup>86</sup> Testimony on H.R. 2661, 49th Leg., 2d Sess. § 3 (2004) (on file with author).

**Table 10****Number of Cases Classified as "Class Actions"**

	2003	2004	2005	2006	2007
Adair	0	0	0	0	0
Canadian	1	1	3	2	0
Cleveland	3	4	2	0	6
Comanche	1	0	3	0	0
Ellis	0	0	0	0	0
Garfield	0	0	0	0	1
Logan	0	0	1	0	0
Oklahoma	10	4	7	4	27
Payne	0	0	0	0	0
Pushmataha	0	0	0	0	0
Roger Mills	0	0	0	0	0
Rogers	2	0	0	0	0
Tulsa	14	84	7	4	3
<b>Total OCIS counties</b>	<b>31</b>	<b>93</b>	<b>23</b>	<b>10</b>	<b>37</b>

I did not ask OAOC for the docket numbers of the cases filed by type, including class actions, so I cannot easily look at the individual docket reports for cases classified as "class actions" to see if there are any apparent causes for the rise in such filings from 2006–2007 in Oklahoma County, or from 2003–2004 in Tulsa County. An earlier request by my research assistant, Steven Foster, to the Oklahoma County Court Clerk revealed the docket numbers for the thirty-two cases filed and classified as "class actions" in Oklahoma County during the entire five-year period from 2001 to 2005. A search of each of those cases' docket records on OCIS revealed that only twenty-eight of those thirty-two cases were correctly classified as "class actions," and in only one of those cases was a plaintiff class actually certified at the trial court level. Most of the cases were dismissed (eighteen), settled (three), or removed to federal court

(four). Only one of these cases upheld an award of fees to plaintiff class counsel.<sup>87</sup>

Even assuming that all of the cases reported in Table 10 were correctly classified as class actions, such cases comprise a very small part of civil actions over \$10,000 as a whole. This is illustrated in Table 11. If one considers all civil actions filed in Oklahoma, including those under \$10,000, the percentage of class actions filed becomes infinitesimal (Table 12).

**Table 11**

**Cases Classified as "Class Actions" (CA) as Percent of "Civil Relief over \$10,000" (CJ): An Illustration With Years 2003 and 2007**

	2003	2003	2003	2007	2007	2007
	# of CA	# of CJ	# CA/# CJ	# of CA	# of CJ	CA/# CJ
Adair	0	397	0.00%	0	132	0.00%
Canadian	1	725	0.14%	0	863	0.00%
Cleveland	3	2166	0.14%	6	2407	0.25%
Comanche	1	1149	0.09%	0	1228	0.00%
Ellis	0	N/A		0	20	0.00%
Garfield	0	527	0.00%	1	550	0.18%
Logan	0	390	0.00%	0	346	0.00%
Oklahoma	10	10837	0.09%	27	11184	0.24%
Payne	0	724	0.00%	0	545	0.00%
Pushmataha	0	N/A		0	52	0.00%
Roger Mills	0	11	0.00%	0	19	0.00%
Rogers	2	790	0.25%	0	820	0.00%
Tulsa	14	8064	0.17%	3	8666	0.03%
<b>Total OCIS counties</b>	<b>31</b>	<b>25780</b>	<b>0.12%</b>	<b>37</b>	<b>26832</b>	<b>0.14%</b>

<sup>87</sup> Court records on file with author. We tried to compare the class action rate in Oklahoma County (in which Oklahoma City is located) to the rates in other cities of similar size (Seattle, Kansas City, Milwaukee, and Boston). All of the court clerks in these locations stated that their court systems do not have a specific code for class actions, making it extremely difficult or impossible to generate a quantitative report.

**Table 12**

**An Illustration of Percent of Class Action Lawsuits Filed in Oklahoma County in 2007 as a Percent of All Major Types of Civil Litigation<sup>88</sup> Filed in Oklahoma County in 2007**

	No. of cases filed
Civil Relief More Than \$10,000	11184
Civil Relief Less Than \$10,000	10639
Family and Domestic	6303
Probate	1380
Protective Order	3115
Small Claims	27698
Total number of civil cases	60319
Class actions – percent of total	0.04%

The recent proposal to make all class actions “opt in” rather than “opt out”<sup>89</sup>—a procedural dinosaur rejected by the drafters of the Federal Rules of Civil Procedure in 1966<sup>90</sup>—appears to be a wildly disproportional response to a type of case that constitutes less than one-tenth of 1% of all civil filings in Oklahoma. Following some of those cases through their docket records, and researching how class actions fare in reported opinions in Oklahoma, it appears that the procedural mechanisms and protections already in place (Oklahoma’s class action rule essentially tracks the federal rule) are more than adequate to weed out unmeritorious claims.

<sup>88</sup> Table does not include thirty other categories of civil proceedings at the district court level listed on OCIS website.

<sup>89</sup> See *supra* note 35 and accompanying text.

<sup>90</sup> See Advisory Committee Notes to FED. R. CIV. P. 23, 1966 amendments (“A [class] member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.”); Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753, 759–62 (2007).

## F. Foreclosures and Indebtedness Cases

Tort case filings are falling, but civil case filings as a whole are rising. Not surprisingly, much of the gap is bridged by a 20% increase in foreclosure and indebtedness filings from 2003 to 2007, as shown in Table 13.

**Table 13****Number of Foreclosure and Debt Suits Over \$10,000 Filed In All OCIS Counties**

Filing Code Description	2003	2004	2005	2006	2007
FORE – FORECLOSURE	7407	7730	7788	8291	9088
INDEBT – INDEBTEDNESS	3283	3309	3286	3203	3740
<b>Total foreclosure and debt cases</b>	10690	11039	11074	11494	12828
<i>% increase, 2003-2007</i>	20.00%				
<b>Number of all civil cases &gt; \$10,000</b>	25780	25213	24428	25103	26832
<i>% increase, 2003-2007</i>	4.08%				
<b>% of &gt; \$10,000 civil cases that are foreclosure &amp; debt</b>	41.47%	43.78%	45.33%	45.79%	47.81%
<b>% population increase in Oklahoma, 2003-2007</b>	3.24%				

## V. OKLAHOMA INSURANCE DEPARTMENT DATA

Since July 1, 2003, a statute requires the Oklahoma Insurance Department to compile annual Medical Professional Liability Closed Claim Reports.<sup>91</sup> These reports are publicly available on the OID's website.<sup>92</sup>

<sup>91</sup> OKLA. STAT. tit 36, §§ 6810-16 (2008). The OID is currently working with the Statistical Information Task Force of the National Association of Insurance Commissioners to develop a Medical Malpractice Closed Claim Reporting Model Law. Meeting with Kathie Stepp, Assistant Commissioner, Director, Property and Casualty Division, Oklahoma Insurance Department (Mar. 18, 2008) [hereinafter OID Meeting]; see Medical Malpractice Closed Claim Reporting Model Law, available at

As the OID's disclaimer emphasizes, the information it aggregates in the closed claim reports is provided entirely by the insurers, and the OID does not guarantee the accuracy of the information submitted.<sup>93</sup> For example, the statute requires the OID to report "[a] listing of the type of injury or loss by medical specialty[.]"<sup>94</sup> but the OID reports do not include such a listing. The legislature provided no uniform definitions or other guidance, so the data provided by the insurers could not be meaningfully aggregated.<sup>95</sup>

The insurance companies required to submit closed claim reports to the OID are not individually listed in the OID's closed claim reports but the OID's overall annual report lists the top ten medical liability insurers in Oklahoma.<sup>96</sup> Hospitals that are self-insured are not required to report.<sup>97</sup>

The OID's figures include all closed claims reported by medical liability insurers in the state of Oklahoma, while the OAOC data only include medical negligence lawsuits filed in thirteen Oklahoma counties. Thus, a direct comparison of the figures is not possible. However, the downward trend in the incidence of medical negligence cases is discernible in both sets of data.

Table 14 shows that the absolute number of closed claims, the total amount paid out by insurers on closed claims, and the average amount paid per closed claim have all declined from 2004 to 2006. The number

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[http://www.naic.org/documents/committees\\_c\\_sitf\\_080221\\_med\\_mal\\_close\\_claim\\_jan15\\_08.pdf](http://www.naic.org/documents/committees_c_sitf_080221_med_mal_close_claim_jan15_08.pdf) (draft as of Jan. 15, 2008).

<sup>92</sup> See Closed Claim Report, *supra* note 18.

<sup>93</sup> See, e.g., Closed Claim Report, *supra* note 18, at 2. The report stated:  
[T]he closed claim reports submitted to the Insurance Department are done without any type of affirmation of accuracy by the insurer. The Insurance Department makes no final and absolute guarantees about the information contained within the report. . . . The Department continues to work with the Oklahoma Legislature and with other Oklahomans to more accurately define the statutory requirements and to enhance the data collection understanding and process.

*Id.*

<sup>94</sup> 36 Okla. Stat. tit. 36 § 6812(3) (2008).

<sup>95</sup> OID Meeting, *supra* note 91.

<sup>96</sup> For example, in 2006, the top ten companies writing medical malpractice premiums in Oklahoma, accounting for approximately 95% of the market share, were Physicians Liability Insurance Company, The Medical Protective Company, Continental Casualty Company, Health Care Indemnity, Inc., Darwin National Assurance Company, The Medical Assurance Company, Inc., American Casualty Co. of Reading, Pennsylvania, Zurich American Insurance Company, Fortress Insurance Company, and Cimarron Insurance Exchange. Oklahoma Insurance Department Annual Report for Dec. 31, 2006, available at [http://www.ok.gov/oid/News\\_and\\_Events/News/Annual\\_Report/index.html](http://www.ok.gov/oid/News_and_Events/News/Annual_Report/index.html) (follow the 2006 annual report hyperlink).

<sup>97</sup> OID Meeting, *supra* note 91.

of reported closed claims declined 29.5%, from 974 claims in 2004 to 687 claims in 2007. The total amount insurers paid on all closed claims declined 10.8%: from \$74,299,831 in 2004 to \$66,311,324 in 2007. The average claim award declined 8.6%: from \$301,123 in 2004 to \$275,151 in 2007.

According to the medical liability insurers' reports to the OID, they paid nothing for prejudgment interest in 2005, \$31,780 in 2006, and \$300,000 in 2007. The insurers also reported paying nothing for punitive damages in 2005, 2006, or 2007. The OID's closed claim data indicating that prejudgment interest and punitive damages comprise only a tiny fraction of the total amount of claims paid is consistent with similar empirical data from Texas.<sup>98</sup> Further legislative encroachments on prejudgment interest and punitive damages in medical liability cases seem unwarranted, to say the least.<sup>99</sup>

The amounts reported by the insurers as paid for economic and noneconomic damages are suspiciously close. The OID speculates that without definitions or guidelines to follow, most insurers might simply have split their totals down the middle.<sup>100</sup> An amendment to the reporting statute in 2006 eliminated the reporting requirement specifying economic and noneconomic damages.<sup>101</sup>

**Table 14**

**Cost Components of Closed Claims Reported  
by Medical Professional Liability Insurers in Oklahoma**

	7/1/2003- 12/31/2003	2004	2005	2006	2007
Number of closed claims	347	974	831	805	687

<sup>98</sup> Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers, and Consumers*, 48 RUTGERS L.J. 673, 711-13 (1996) (reporting Texas Department of Insurance data for 1988 showing that punitive damages constituted only 7%, and prejudgment interest only 3%, of Texas tort awards and settlements).

<sup>99</sup> See Scott Cooper & Ben Fenwick, "Tort Reform," OKLA. GAZETTE, Mar. 21, 2007, at 21 (examining the OID's report; noting that during 2005 there were no payments for prejudgment interest and commenting that "[t]he prejudgment interest void is difficult to understand. At least nine out of 29 [sic] cases went to trial with a verdict in favor of the plaintiff.>").

<sup>100</sup> OID Meeting, *supra* note 91.

<sup>101</sup> Formerly OKLA. STAT. tit 36, § 6812(7) (2008).

Number (percent) of closed claims paid by insurer	Not reported	257 (26%)	247 (30%)	234 (29%)	241 (35%)
Number (percent) of closed claims not paid by insurer	Not reported	717 (74%)	584 (70%)	571 (71%)	446 (65%)
Amount of award	\$104,228,139	\$74,299,831	\$73,339,667	\$60,345,465	\$66,311,324
Amount paid by medical professional liability insurer	\$25,649,523	\$77,388,723	\$43,810,096	\$49,956,627	\$54,465,322
Average claim settlement or award	Not reported	\$301,123	\$177,369	\$257,887	\$275,151
Economic compensatory damages paid	\$11,678,271	\$32,059,954	\$21,149,909	Not reported	Not reported
Noneconomic compensatory damages paid	\$11,649,174	\$35,399,325	\$21,815,711	Not reported	Not reported
Prejudgment interest paid	\$11,010	\$92,285	\$0	\$31,780	\$300,000
Prejudgment interest as a percent of total amount paid	0.04%	0.12%	0.00%	0.06%	0.45%
Punitive damages paid	\$13,124	\$1,647,953	\$0	\$0	\$0
Punitive damages as a percent of total amount paid	0.05%	2.13%	0.00%	0.00%	0
Allocated loss adjustment expense	\$511,751	\$20,624,242	\$26,605,680	\$24,496,408	\$20,217,867
Defense cost	\$8,888,205	\$22,545,070	\$23,543,857	\$22,819,318	\$18,806,841
Paid by another insurer	\$53,884,424	\$27,625,460	\$1,130,122	\$1,817,000	\$2,802,950
Paid by another defendant	\$2,234,750	\$111,280	\$1,579,000	\$4,675,000	\$8,331,800

Some of the terminology is hardly self-explanatory but the OID was given little guidance by the legislature. The name for the category "Amount of Award" was "Amount of Court Award" in 2003 and 2004,



"Total Amount of Claim Cost" in 2005, and "Total Amount of the Court Award or Settlement" in 2006. In 2006, the name of the category "Amount paid by medical professional liability insurer" changed to "Amount paid on behalf of the insured exclusive of attorney fees or case costs." As to the term "Allocated loss adjustment expense," the following note appears in the 2003, 2004, and 2005 reports but the last sentence of the note is missing in the 2006 and 2007 reports:

Allocated Loss Adjustment Expense (ALAE) may include defense attorney expenses, court costs, stenographer costs, expenses for expert testimony, specific research, etc. However, it is important to note that insurers may not have reported this data consistently. Some carriers may have included defense attorney expenses in the Amount of Allocated Loss Adjustment Expense category and the Amount Paid for Defense costs or one category but not the other.<sup>102</sup>

In addition, Table 15 shows that the disposition of those reported claims that make it to court is decidedly in defendants' favor. The number of medical liability lawsuits actually going to trial has declined from seventy-eight in 2004 to sixteen in 2007. Judgments for defendants outnumbered judgments for plaintiffs by four-to-one in 2004 and 2005.<sup>103</sup>

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<sup>102</sup> See, e.g., 2005 Closed Claim Report, *supra* note 18.

<sup>103</sup> Due to definitional uncertainties, the OID no longer reports the data for judgments in plaintiffs' and defendants' favor. The limited data available for 2004 and 2005, however, are consistent with the conclusion of a recent researcher studying three decades of jury verdicts in medical malpractice cases that "juries are so reluctant to hold physicians liable that they render defense verdicts in half of the cases that medical experts think plaintiffs should win." Philip G. Peters, Jr., *Doctors & Juries*, 105 MICH. L. REV. 1453, 1492 (2007). For decades, courts have allowed plaintiffs' attorneys to explore jurors' possible pro-defense biases in medical liability actions during voir dire as a result of tort reform propaganda. See, e.g., *Capoferri v. Child. Hosp. of Philadelphia*, 893 A.2d 133, 137 (Pa. Super. Ct. 2006) (reversing jury verdict for defendant after plaintiff's lawyer was not permitted to ask voir dire questions such as "[h]ave you seen or heard advertisements which criticize persons who use the judicial system as a method of recovering money for personal injuries or damages caused by another person? If so, what have you seen or heard?") (internal quotation marks omitted); *Tighe v. Crosthwait*, 665 So. 2d 1337, 1341 (Miss. 1995) (holding it was error for the trial court to refuse to allow plaintiff's counsel to ask such questions, but finding the error was harmless); *Barrett v. Peterson*, 868 P.2d 96 (Utah Ct. App. 1993); *Kozlowski v. Rush*, 828 P.2d 854 (Idaho 1992); *Sutherland v. Fenenga*, 810 P.2d 353, 362 (N.M. Ct. App. 1991) (noting that the good faith questioning concerning the possible effect of media accounts regarding an insurance crisis was proper, but that counsel exceeded proper bounds by conveying an impression that defendant was in fact insured); *Babcock v. Nw. Mem'l Hosp.*, 767 S.W.2d 705 (Tex. 1989); *Borkoski v. Yost*, 594 P.2d 688, 694 (Mont. 1979) (observing that "an attorney may inquire whether a prospective juror has heard or

**Table 15**

**Disposition of Closed Claims Reported By  
Medical Professional Liability Insurers in Oklahoma**

	7/1/2003- 12/31/2003	2004	2005	2006	2007
Number of closed claims	347	974	831	805	687
Number of claims with payment by insurer	Not reported (NR)	257	247	234	241
Number of claims with no payment by insurer	NR	717	584	571	446
Lawsuits filed	302	842	653	610	471
Lawsuits going to trial	35	78	56	25	16
Directed verdict for plaintiff	1	10	1	NR	NR
Directed verdict for defendant	6	0	11	NR	NR
Judgment for plaintiff	4	7	8	NR	NR
Judgment for defendant	20	57	9	NR	NR
JNOV for plaintiff	NR	0	0	NR	NR
JNOV for defendant	NR	2	2	NR	NR
"All Others" (going to verdict—does not explain what this means)	8	7	4	NR	NR

The OID warned me that the following table, Comparison of Premiums Written With Claims Paid, compares apples to oranges because the premiums were paid in a different year than the claims were made.<sup>104</sup> Still, when premiums paid for medical malpractice insurance from 2003 to 2007 total more than twice the claims paid for the same

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read anything to indicate that jury verdicts for plaintiffs in personal injury cases result in higher insurance premiums for everyone[.]” but holding that the trial court’s refusal to permit such questions in this case was harmless). See generally Emmanuel O. Iheukwumere, *Tort Reform Voir Dire Questions in Medical Malpractice Cases*, 18 PRAC. LITIGATOR 49 (2007); Stephen Daniels & Joanne Martin, “The Impact That It Has Had Is Between People’s Ears:” *Tort Reform, Mass Culture, and Plaintiffs’ Lawyers*, 50 DEPAUL L. REV. 453 (2000).

<sup>104</sup> OID Meeting, *supra* note 91.

period, it raises legitimate questions about the causes of the premium rate levels. One of the express legislative purposes of the Affordable Access to Health Care Act passed in Oklahoma in 2003 was to “[l]ower the cost of medical liability insurance[.]”<sup>105</sup> Beginning in 2004, the claims paid by medical malpractice insurers have declined, while the total premiums have risen.

**Table 16**

**Comparison of Premiums Written With Claims Paid**

	2003	2004	2005	2006	2007	Total 2004-2007 only
Premiums written for medical malpractice insurance	\$102,241,982	\$106,630,258	\$130,994,648	\$127,858,587	\$116,712,049	\$482,195,542
Claims paid by medical malpractice insurers (six months only)	\$25,649,523	\$77,388,723	\$43,810,096	\$49,956,627	\$54,465,322	\$225,620,768
Claims paid as percent of premiums	N/A	72.8%	33.4%	39.1%	46.7%	46.8%

VI. CONCLUSION

By reducing plaintiffs’ potential recoveries, and by enacting barriers to the filing and prosecution of tort claims, tort reforms make many potential cases uneconomical for plaintiffs’ attorneys who normally operate on a contingency fee basis.<sup>106</sup> The public debate over tort reform in Oklahoma has largely focused on medical negligence actions. The recent data on court filings show that the numerous tort reform provisions already enacted in Oklahoma may have contributed to a fairly pronounced decrease in most tort filings – not just those torts targeted by tort reformers. If any tort case is a bad tort case, then we should adopt more barriers to suit, erect more evidentiary hurdles for plaintiffs, cap damages even further, eliminate joint and several liability, and do away

<sup>105</sup> OKLA. STAT. tit. 63, § 1-1708.1B (2008).

<sup>106</sup> See Daniels & Martin, *supra* note 12, at 1242 (interviews with Texas plaintiffs’ attorneys revealed perceptions that tort reform advocacy efforts had “poisoned” the jury pool and lowered case values used by insurance companies in settlement discussions); Kyle Graham, *Why Torts Die*, 35 FLA. ST. U. L. REV. 359, 431-32 (2008) (“Though the vast majority of tort reform measures do not single out a claim for elimination, by driving up the costs of a suit or reducing its potential returns, many of these laws make certain tort claims less profitable and thus less attractive to plaintiffs and their lawyers.”) (footnote omitted).

with prejudgment and post-judgment interest in tort cases. But at what point are we reforming injured and uncompensated citizens out of court by denying them access to justice through willing plaintiffs' attorneys?<sup>107</sup>

Future study should include a close examination of the merits, progress, and results of individual tort cases. In addition, legislators should carefully evaluate whether each proposal, such as further caps on noneconomic damages, contains the tort reformers' stated goal of reducing medical malpractice insurance premiums.<sup>108</sup> It may be time to use a carefully-guided scalpel rather than a swinging axe to make further "reforms" – if any are needed at all.

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<sup>107</sup> See, e.g., Daniels & Martin, *supra* note 2, at 1229 ("Without a lawyer willing to take an injured party's case, the law has no teeth."); Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1264–65 (2004) ("The proponents of [damages] caps have given little or no thought to what their effects might be on the ability of injured individuals to find lawyers and gain access to the civil justice system or on whether certain groups of people will be more or less adversely affected.").

<sup>108</sup> For example, a statistical analysis of various types of tort reform measures on the frequency of medical malpractice claims per 100 physicians and the average "severity" (amount) per paid claim from 1975 through 1984 found that statutory caps on awards reduced the average award by 23%, that collateral source offset laws reduced both the frequency and severity of claims, and that reductions in the statutes of limitation reduced the frequency of claims. No other tort reform measures showed consistent statistically significant effects on the frequency or severity of medical malpractice claims. Danzon, *supra* note 2, at 416–17; see also Avraham, *supra* note 2. Many of the empirical studies of the effect of tort reform on medical malpractice cases are collected in Geoffrey C. Rapp, *Doctors, Duties, Death, and Data: A Critical Review of the Empirical Literature on Medical Malpractice and Tort Reform*, 26 N. ILL. U. L. REV. 439 (2006).