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Malpractice Makes Perfect

How the GOP milks a bogus doctors' insurance crisis.

By [Stephanie Mencimer](#)

When he went out on strike last January, Dr. Robert Zaleski had his 15 minutes of fame. The Wheeling, W. Va., orthopedic surgeon was one of two dozen surgeons to walk off the job in January to protest his state's high costs of malpractice insurance. Arguing that "frivolous lawsuits" were driving up insurance premiums and forcing physicians to leave the state, Zaleski and his colleagues threatened to stay out for 30 days unless the legislature passed a bill that would cap non-economic damages in such suits at \$250,000. As the walkout turned into a national story, Zaleski became one of its most visible faces, making the rounds of TV news shows and telling CNN, "I would certainly jump in front of a bus if I could to continue to serve my patients as I have for 23 years." Just a few weeks later, Zaleski's mug shot appeared with those of five other doctors in *The New York Times Magazine*, where he claimed to be "on the brink" of moving out of state because of high insurance rates and lawsuits.

Zaleski and his colleagues are the leading edge of a much broader movement. All across the country, doctors like him are telling reporters, legislators, and even their patients that frivolous lawsuits are driving up insurance costs and driving doctors out of practice and out of state, threatening access to care. They've mobilized around state legislation to limit malpractice lawsuits and linked arms with President Bush and Republicans in Congress who have been pushing similar bills in Washington. Indeed, Zaleski himself was even personally invited to attend a speech President Bush delivered in Scranton, Pa., where he railed against the threat to patient care posed by out-of-control lawsuits.

Upon closer inspection, however, it appears that Zaleski may be more a source of the problem than a victim of it. Between 1987 and 2002, according to the West Virginia Board of Medicine, patients filed 14 lawsuits against Zaleski, eight of which resulted in payouts that together came to \$1.7 million. By contrast, according to a Public Citizen study, only 1 percent of the state's doctors made five or more malpractice payouts over the past decade. And while Zaleski says the settlement figures are misleading because they also include defense costs, his record is hardly squeaky

clean. In a 1985 lawsuit (one not among the 14 reported to the Board of Medicine), he admitted in a deposition to being addicted to prescription painkillers for a substantial part of the time that he was operating on people in the early 1980s. Not only was he a drug addict, but to maintain his Percodan habit, Zaleski allegedly wrote prescriptions for other local addicts, who filled them and kicked back some pills to the doctor, according to court documents that include copies of the prescriptions and depositions from some of the addicts.

Yet even though a suspicious police officer reported him to the state medical board, Zaleski was never disciplined by his fellow physicians. (He says he does not remember the specifics of the case, and while he acknowledges a past substance-abuse problem, insists that he has been clean and sober for 21 years.) Given this history, the real scandal may not be how high Zaleski's insurance premiums are, but the fact that he can get insurance at all. Zaleski's malpractice record may have been extreme, but it was not unusual among the doctors who walked out of West Virginia hospitals in January. According to a Charleston Gazette report, nine of the 18 doctors striking at Wheeling Hospital, including Zaleski, had cost their insurers more than \$6 million in malpractice settlements and judgments. At least some of the suits don't seem to merit the adjective "frivolous." In one case, a doctor had left a clip on an artery, eventually forcing the patient to have a liver transplant. In another, a surgeon cut into his patient's stomach wall during surgery, causing a massive, fatal infection. Indeed, a number of those doctors leading the protest movement include former drug addicts, felons, doctors whose licenses have been revoked, and many, many others who get sued a lot--and far more than most of their colleagues.

Not all the physicians angry about malpractice lawsuits and high insurance rates have such checkered histories as Dr. Zaleski. Many ethical and responsible doctors say the system invites frivolous litigation, subjecting them to considerable hassle and anxiety. One result, they argue, is an increase in "defensive medicine"--when doctors schedule too many tests, just to be safe--which contributes to higher health care costs for everybody. But even the respected General Accounting Office (GAO) has recently concluded that there's little evidence to back the striking doctors' main claim, which is that lawsuits are forcing many of them to abandon the practice of medicine or to avoid high-risk procedures. And while there's no doubt that malpractice insurance is getting more expensive across the board--about 30 to 40 percent, on average, during the last three years--this increase is largely due to the ailing stock market and poor business practices in a virtually unregulated industry. As a result, there's no reason to think that capping jury awards would bring premiums down, a fact the insurance industry itself acknowledges. Robert E. White Jr., president of First Professional Insurance Company, the leading medical malpractice insurer in Florida, told the Palm Beach Post in January, "No



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responsible insurer can cut its rates after a [medical malpractice] bill passes." The one surefire way to bring down the number of big-payout lawsuits is to reduce the number of those doctors who inspire most of them. But state medical boards--which are run by doctors--have been notoriously reluctant to aggressively police their own.

The doctors' protests aren't about good policy. They're about good politics. Although the malpractice strikes look like a natural outgrowth of physician frustration, they are, in fact, the product of a sophisticated lobbying campaign coordinated by Republican operatives and underwritten by business groups with little interest in the practice of medicine. GOP leaders view malpractice lawsuits as a pivotal issue for the 2004 campaign. With health-care costs skyrocketing on its watch, the GOP is eager to shift blame onto the Democrats, who have long enjoyed greater public trust on the issue. And doctors, who enjoy great credibility among voters, are the key. By linking rising health-care costs to frivolous medical lawsuits, Republicans can use doctors as a cudgel against trial lawyers, the Democratic Party's second-largest funding base and one which could be paralyzed by lawsuit caps. Once bills to restrict malpractice lawsuits are on the table--in Congress and in the state legislatures--Republicans can slip in much broader legal relief for corporations under the guise of bringing down health-care costs, especially for senior citizens. Frank Galitski, a former Bush campaign staffer who works with the doctors as head of the Texas Alliance for Patient Access (TAPA), a coalition of insurance companies and health-care corporations, puts it bluntly: "This is a great issue for the president, particularly in the key battleground states of Pennsylvania, Michigan, Ohio, where they have an aging population." Indeed, if the experience in West Virginia is any indication, the GOP has found itself a winning formula.

The perfect storm

The doctors who walked off the job last January were primarily from the Wheeling and Weirton areas of West Virginia, right in the heart of steel country and on the borders of Ohio and Pennsylvania--the only solidly Republican section of historically Democratic West Virginia. Nestled in the Ohio Valley, Wheeling is a relic of the Industrial Revolution. Once home to a bustling steel, glass and even tobacco industry, the area today offers a rusting landscape of smokestacks and the dying steel mills which are an endangered species in America. Downtown Wheeling is nearly deserted, its once grand Victorian architecture blackened from years of neglect. A "Coffee Shop" on the main drag is actually a video poker hall with a single coffee pot to provide an occasional pick-up to the pasty, overweight gamblers glued to video poker machines and smoking cigarettes in dark rooms.

Like much of West Virginia, Wheeling and the surrounding Ohio County rank among the poorest places in the country. Thanks to the closing of the steel mills, Ohio County has lost 30 percent of its population since 1968, leaving it with one of the oldest populations of any county in the country. Today's residents are thus heavily dependent on the local hospitals, which also happen to be the area's largest employers. Wheeling Hospital, where most of the doctors went on strike, employs some 3,000 local residents.

Thanks to the health-care-based economy, doctors make up the area's upper crust, and their patients are mostly poor folks reliant upon government health-care programs like Medicaid and Medicare. As trial lawyers are quick to point out, with its high rates of poverty and uninsured residents--as many as one in five--Wheeling is not exactly a magnet for medical talent, especially because it must compete with the highly-acclaimed University of Pittsburgh Medical Center only 60 miles away.

As a result, many of West Virginia's striking doctors were foreign-born and -trained, and even

some of the native doctors were trained in places like Guadalajara, Mexico. At the same time, Ohio County has an unusually active and talented trial bar, lawyers who honed their skills through decades spent suing coal companies for workers' cases of black lung. The tension between the two groups has been brewing for years, and by 2001, when malpractice insurance companies imposed stiff premium increases on doctors, conditions were ripe for the perfect storm.

While the jury verdicts aren't nearly as outrageous as the doctors make them out to be, there have been a few whoppers in Ohio County--albeit usually in cases involving egregious malpractice--and these seem to be what really riled the doctors. The case that really sticks in their craw is that of Dr. Fred Payne. Like his colleague Robert Zaleski, Payne had been sued a dozen times over the past decade, and had paid out settlements of at least \$7.3 million, according to the *Charleston Gazette*. In 1998, Payne operated to repair a minor spine injury on a spry 76-year-old World War II veteran who had fallen out of a tree. On his way to the operating room, he ran into a medical-equipment salesman who encouraged him to try out a new type of clamp. The patient hadn't consented to the procedure, nor had Payne ever even seen the tool used or studied its use; but he tried it out anyway. After Payne left the hospital, a nurse paged him to let him know that the patient wasn't doing well in recovery. An examination found that the clamp had slipped into the spinal canal and paralyzed the man from the neck down--a hideously worse injury than he had initially sustained. He died a year later. A lawsuit over the case, which charged that the man didn't even need surgery in the first place, was settled for \$4.6 million.

The Ohio Valley Medical Center agreed to pay \$3.5 million of the settlement, but insisted that Payne was responsible for the rest. But Payne's minimal insurance didn't cover the balance, so the judge on the case, Fred Risovich II, insisted that he use his personal assets to pay his share of the settlement, a rare move in a malpractice case. "The negligence was so gross, and the injury so bad that justice required that he pay something," says Risovich. Payne has not practiced medicine since.

Doctors in Wheeling had not been particularly politically active before this, but they were outraged by the case--not by Payne's behavior, but by Risovich's. The doctors organized to oust him in a nasty campaign that would foreshadow the tenor of the battle over malpractice suit caps two years later. According to Risovich and people in the local medical community, during the 2000 judicial race, anonymous flyers appeared on the windshields of cars at the local supermarket, accusing Risovich of beating his wife and being a racist. Risovich says one night someone set fire to his campaign materials in his front yard and urinated on his stoop. "Someone sent investigators to call my children at college, asked my stepchildren if they'd ever been molested. It was horrible," says Risovich. Dozens of Republican physicians changed their party affiliation so they could vote against Risovich in the Democratic primary, and many today take credit for his crushing defeat.

Claim adjustment

Just as the doctors were becoming politically energized, the malpractice insurance industry went into a financial tailspin. St. Paul Companies, once the nation's largest malpractice insurance firm, pulled out of West Virginia and other states in 2001, leaving 1,000 West Virginia doctors without insurance. Doctors in Charleston--apparently not averse to lawsuits when these suit their own purposes--filed a class action against the company, alleging that St. Paul stiffed the doctors after pursuing a business strategy designed to enrich top executives with more than \$45 million in bonuses, salaries, and stock options. The suit alleged that St. Paul raided \$1.1 billion in reserved doctors' premiums to artificially inflate its earnings in 1999 and 2000, a move that helped executives to \$5.2 million in bonuses and increased the value of their

stock options to \$28 million.

Despite evidence of insurance company shenanigans, though, doctors put the blame for their insurance woes on trial lawyers, malpractice suits, and juries. They had some help in staying focused: Between 1995 and 2001, Medical Assurance, a large company which provided medical malpractice insurance to doctors to cover their legal costs and damages in lawsuits, paid the state medical association at least \$115,000 to lobby on the company's behalf, according to a story in the *Charleston Gazette* by Lawrence Messina. Medical Assurance offered members breaks on their insurance premiums for attending "White Coat Day" at the legislature and provided the glossy brochures and information on "meritless lawsuits" and "outrageous" damage awards that doctors used in their talking points with reporters and elected officials.

Similarly, the PR materials on "lawsuit abuse" and patient petitions that began to fill doctors' offices last year came from the West Virginia Care Coalition; the coalition was actually a project of Maple Creative, a Charleston-based PR firm with close ties to the Bush administration. Those groups footing the bill for Maple's services included, not surprisingly, several with a direct stake in medical issues. The state HMO association and the local hospital association, according to Wheeling Hospital CEO Donald Hofreuder, gave the Care Coalition more than \$200,000. But other business groups with a broader agenda of lawsuit restrictions also pitched in, including the West Virginia Oil and Gas Coalition, the state chambers of commerce, the West Virginia Building and Industry Coalition and the Business Roundtable.

Once corralled behind malpractice caps, doctors came up with their own innovations. At one point, physicians in Wheeling began adding a "tax" to their bills, \$5 or \$10 above and beyond what insurance would pay for, telling patients it was intended to cover their outrageous malpractice insurance premiums. Predictably, older people on fixed incomes were outraged and flooded their elected officials with calls for lawsuit restrictions.

All in all, claims about a "lawsuit abuse crisis" proved remarkably effective in West Virginia--and resistant to contradictory evidence. In February 2001, responding to the doctors' allegations, the *Charleston Gazette* undertook a computer-assisted analysis of more than 2,000 medical malpractice claims reported to the West Virginia Board of Medicine. The paper determined that far from being in a state of crisis, West Virginia ranked 35th in the country for median malpractice payouts. The paper also found that both the number of malpractice claims and the dollar amounts of the settlements and verdicts had actually declined between 1993 and 2001. Nor was West Virginia suffering under an epidemic of "disappearing doctors." Last August, the *Gazette's* Messina attended a rally at which the West Virginia medical society set out 37 empty chairs labeled with the names of local doctors who supposedly had been forced out of practice because of insurance costs. He discovered that at least two of the doctors named were indeed not practicing--because they were dead. Another two were still actually treating Wheeling patients. A Public Citizen study of the state medical board records later found that the number of doctors in West Virginia increased by more than 350 between 1997 and 2002.

This fall, the GAO reached a similar conclusion: of five states identified by the American Medical Association (AMA) as malpractice "crisis" states, including West Virginia, it found that "many of the reported provider actions taken in response to malpractice pressures were not substantiated or did not widely affect access to health care ... some reports of physicians relocating to other states, retiring, or closing practices were not accurate or involved relatively few physicians." Nor, in those same states, could the GAO "identify any major reductions in the utilization of certain services some physicians reported reducing because they consider the services to be high risk."

Lawyers' trial

As doctors and insurance companies in West Virginia mobilized to impose caps, Republicans in Washington began to ramp up their own campaign for lawsuit restrictions. In July of last year, the Bush administration kicked off the effort with the release of a report called, "Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing Our Medical Liability System," which claimed that the "critical element" for expanding health insurance to uninsured Americans was "curbing excessive litigation." Soon after, in mid-July, congressional Republicans launched a hearing titled "Harming Patient Access to Care: The Impact of Excessive Litigation." The supposed travails of West Virginia doctors made a perfect case study. Rep. Shelley Moore Capito (R-W.Va.), a close confidant of White House adviser Karl Rove, personally escorted a West Virginia doctor named Dr. Samuel Roberts to the House floor to testify. Roberts, one of only three doctors who testified, told the committee that he could not afford the insurance to continue delivering babies, and claimed that this year, "I will have to stop, leaving seven counties around me with no family physician delivering prenatal or maternity care."

As with so much of the malpractice campaign, Roberts's testimony omitted some critical facts that might have explained some of his insurance woes: In 1987, he pleaded guilty to five counts of cocaine possession and was sentenced to five years probation, according to the Charleston Gazette. In response, the state suspended his medical license for a year, though it later reduced the penalty to five years of supervised probation. (Incidentally, a year after his dire warnings to Congress, Roberts is today still delivering babies, according to his office.)

Nonetheless, the campaign gained steam, and in July 2002, Bush gave a major speech on medical malpractice in North Carolina, home state of trial lawyer and Democratic presidential hopeful John Edwards. "Healthcare costs are up because docs are worried about getting sued," the president declared. Before the speech, Bush met privately with AMA president-elect Donald Palmisano, who told *The Wall Street Journal* that Bush had counseled him to "get out the grassroots" if he wanted caps on malpractice damages. The West Virginia doctors took his advice. When they staged their strike in January, it coincided perfectly with Bush's State of the Union address, in which he raised the malpractice issue before a national TV audience.

The West Virginia strike did inconvenience a few patients, but its real sting was felt--as intended--at the statehouse. Joe DeLong, a delegate from Weirton--where some of the surgeons walked out--views the doctors' strike as a form of extortion. "When I grew up, a strike was a sacrifice," he says. "The doctors' livelihoods were never at stake. This was a movement to inflict pain on the sick and the elderly." He recalls being flooded with calls, including one from a 96-year-old woman in tears because she was dependent on a state transportation program to get to her doctors. The shuttle wouldn't cross state lines to take her to Pennsylvania or Ohio if doctors in West Virginia quit practicing; she only calmed down when DeLong offered to drive her should it prove necessary.

Such calls sent the legislature into a frenzy. "It's an emotional issue for them," DeLong says, noting that the doctors have done a good job of turning their insurance problems into an anti-lawyer issue. Aside from the trial lawyers, there has been very little organized opposition on the other side. In March, state legislators, most of them Democratic, voted overwhelmingly in favor of a sweeping malpractice bill. (DeLong was among them.) Gov. Bob Wise practically begged to sign it.

Thanks in part to the ripple effect of the West Virginia strike, the national campaign by protesting doctors has been a smashing success. In state after state, doctors have had only to

threaten walkouts to win promises of damage caps from local legislators. Shortly after the West Virginia doctors went on strike, for instance, doctors in Scranton, Pa., sat down to talk strategy with Frank Galitski, the former Bush campaign worker--who admits that "there is some coordination" between the doctors' protests and the White House. Which makes sense: At the national level, Republican-led efforts to impose restrictions on medical malpractice lawsuits have helped unite otherwise disparate elements of the health-care industry behind a broader effort for lawsuit restrictions. A malpractice bill passed by the House in March with backing from the AMA, for instance, would completely exempt not just doctors but also drug companies, medical-device manufacturers, nursing-home operators, and HMOs from punitive damage awards for reckless conduct. The Senate just rejected a similar measure, but the GOP plans to use the issue during next year's election--and for good reason. Limits on malpractice suits have proved to be a powerful inducement to the medical community at a time when frustration with managed care has been alienating this once-reliably Republican constituency. (Lawsuit-prone doctors like Zaleski have proven especially eager to lead the crusade against trial lawyers.) After the West Virginia success, the AMA pledged to spend a whopping \$22 million this year on the malpractice issue alone, establishing a nationwide, state-level grassroots operation that will come in handy during the 2004 election--a figure nearly eight times larger than the entire budget of the Association of the Trial Lawyers of America. And so far this year, Bush's reelection campaign has netted more than \$750,000 from doctors.

Error reports

It's worth noting that the walkouts would never have proved so effective had the media taken a closer look at the doctors involved--and the interests backing them. Aside from a few skeptical reporters in West Virginia, most of the press has taken the doctors' claims at face value, rarely challenging their evidence and anecdotes. In June, for instance, *Time* magazine devoted an entire cover story to "disappearing doctors," complete with data supplied by the AMA--the same data that previously had been challenged by consumer groups around the country and later was authoritatively debunked by the GAO. Reporters have also abetted the campaign by portraying wealthy doctors as the impoverished victims of "lawsuit abuse" and the often poor and injured plaintiffs as the greedy pawns of billionaire trial lawyers. Yet as with the AMA's data, that image doesn't hold up under inspection.

Take Dr. Rajai Khoury, a striking Wheeling cardiovascular surgeon who told a local TV news interviewer in January, "We're hurting, our patients are hurting, the community is suffering." It's no secret in Wheeling that Khoury recently built a 12,000-foot mansion with a five-car garage, a pool, and a lovely view of the countryside from "Pill Hill," the ritzy neighborhood that's home to many doctors. (According to county building records, the house is valued at close to \$3 million, in a town where houses go for as little as \$19,000.) Even Zaleski seems to be doing pretty well, despite his claims on television. He says his malpractice insurance of \$150,000 a year is about 30 percent of his income, which would net him \$300,000 annually. "I'm not starving," he admits.

Dr. Greg Saracco, the telegenic surgeon who became the unofficial spokesman for the Wheeling walkout, defends his profession, saying, "I don't think it's really an issue how much a doctor makes. Who says we have to do this for free?" In an interview, Saracco rails against the "outrageous jury awards" given in Wheeling, offering the story of a local man who violated company rules and safety guidelines on the job and used a broomstick to unstick some kind of machine, which then cut his arm off. Saracco says the man then sued the company for safety violations, and a jury awarded him \$4 million for his stupidity.

"Is somebody's arm worth \$4 million?" he says with amazement. Alas, the story may be apocryphal, as many "frivolous lawsuit" stories often are. Verdicts over \$1 million are rare in

West Virginia (there were none last year), and none of the trial lawyers I spoke with in Wheeling could recall such a case. They suggest Saracco may be confusing it with a similar case--lost leg, not arm--but the suit was against an insurance company, a very different issue.

When asked whether he's ever been sued, Saracco says he just settled a "crappola" suit for \$25,000. In that "crappola" suit, James Westfall, a man in his mid-50s, came into the hospital for a hernia repair surgery, performed by Saracco and his partner, Dr. Robert Cross. According to the lawsuit, during surgery, Saracco pierced Westfall's bowel while stitching him up and sewed it into his abdomen. The wound closure later tore and created a hole in Westfall's bowel, causing it to leak. Cross failed to respond to nurses' reports of complications until Westfall was in critical condition--too late, as it turned out. Westfall died a miserable death two days later. The lawsuit was ultimately settled with Cross and the hospital for well over a million dollars.

Bad medicine

Saracco suggests that most of the people who suffer from "malpractice" usually have themselves to blame, like obese people and the smokers he says are getting money from asbestos lawsuits. The solution, he insists, is a cap on jury awards like the one passed in California during the '70s--the law all the doctors' talking points refer to as proof of the efficacy of such caps. But Saracco and his fellow physicians have a short memory. California passed its law in 1976, after malpractice insurers, blaming out-of-control lawsuits, suddenly hiked doctors' premiums by more than 300 percent in a single year. Some years after the law took effect, insurance premiums had shown no sign of going down. California doctors ended up suing Travelers' Insurance Co., alleging that it grossly overcharged in the name of a non-existent malpractice crisis. (Here, too, the plaintiff's bar came in handy: A trial lawyer won the doctors a \$50 million refund.) The state ultimately passed strict insurance reform that kept a lid on future premium increases.

There are, however, other solutions that might help reduce insurance rates that Saracco and his colleagues never mention. Studies have repeatedly shown that only 5 percent of the nation's doctors are responsible for more than half of all malpractice payouts. Yet those lawsuit-magnet practitioners generally pay the same insurance rates as doctors who've never been sued, the equivalent of giving drunks the same car insurance rates as soccer moms with perfect driving records. This practice exists among malpractice insurers partly because many of them are owned by doctors themselves, but mostly because they make their money on investments, not on claims management. As a result, the insurers have an incentive to sign up as many doctors as possible so they can invest their premiums in the stock market--a strategy which ensured that, when the economy went south they would have to begin hiking premiums sharply. The use of experience rating, like that employed by auto insurers to weed out the dangerous drivers, would reward better doctors and price those who attract the most lawsuits out of business rather than subsidizing them.

Better regulation of health care would likely reduce the number of malpractice lawsuits simply by reducing the number of medical injuries. In 1999, the Institute of Medicine (IOM) reported that preventable medical errors kill as many as 100,000 people a year--and cause a tremendous number of lawsuits. The IOM recommended a national mandatory public error-reporting system, along with stronger requirements that doctors regularly upgrade their skills as a condition of maintaining their licenses. Error reporting would allow better data-mining that, in turn, would help the health-care industry combat mistakes more systematically by detecting problem areas and suggesting remedies. Research has already shown that surgeons who do a large volume of high-risk procedures such as bypass or delicate spine surgery make the fewest mistakes, since practice makes perfect. That's why the IOM also has recommended that such procedures be restricted only to experienced doctors at high-volume specialty facilities rather

than letting any neurosurgeon in Wheeling, W. Va., try his hand at it now and then.

Yet striking doctors aren't advocating any of these proposals: Their organizational lobbyists have indeed vigorously fought such measures, even simple protocols such as marking surgical sites with a pen to avoid, say, amputating the wrong foot, as did a doctor in Florida in 1995. These days, the only solution that doctors seem to offer for any of the nation's myriad health care problems is limiting the patients' right to sue. And the Bush administration is just fine with that.

Stephanie Mencimer is a contributing editor of *The Washington Monthly*.

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