HB

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An Update on the Liability Crisis

Tort Policy Working Group

March 1987

INTRODUCTION
AND
EXECUTIVE SUMMARY

In February of 1986 the Tort Policy Working Group issued a report entitled "Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability."[1] As its title indicates, the Report not only documented the existence of the crisis in insurance availability and affordability, but analyzed its various causes and made a number of appropriate policy recommendations.

The following is an update on that Report. It not only updates the Working Group's prior Report in the sense of reviewing the past year's developments as to both the insurance crisis and tort law (and, most importantly, tort reform), but it also summarizes and analyzes recently published empirical data on our Nation's tort system. In addition, it discusses new issues and questions relating to the liability crisis which have emerged in the course of the national debate during 1986 over the problems and the future of our civil justice system.

Chapter 1 of the Report (An Update On the Availability and Affordability of Liability Insurance) summarizes the current state of insurance availability and affordability in the United States. It indicates that while availability problems have substantially ameliorated since a year ago, they continue to exist in certain lines or types of coverage, where they remain serious. Affordability problems also have ameliorated, but only in the sense that premiums appear to have stabilized at much higher levels. This increased availability and price stability has been accompanied by, and in no small part is a result of, the use of higher deductibles, lower coverage limits and additional policy exclusions and limitations. Moreover, the past year has witnessed an increasing reliance on both self-insurance and captive insurer programs, though it remains to be seen whether such arrangements provide reliable long-term insurance coverage. Most importantly, the Chapter shows that, despite some assertions to the contrary, the impact of the crisis in insurance availability and affordability continues to be felt -- often acutely -- throughout much of the American economy.

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[1] The Tort Policy Working Group consists of senior Administration officials of eleven federal agencies, seven of whom serve as the chief legal officer of their agency.

Chapter 2 of the Report (The Insurance Industry's Economic Performance) updates the Working Group's prior analysis of the economic state of the property/casualty insurance industry. It indicates that the industry's profitability in 1986 improved markedly from 1984 and 1985, although its 1986 rate of return was roughly equivalent to its ten-year average, and was slightly less than the ten-year rate of return for Fortune 500 industrial corporations. The Chapter also shows that the two key lines that have been central to insurance availability and affordability problems -- Commercial General Liability and Medical Malpractice -- continue to generate disproportionately high underwriting losses. These two lines produced 13% of the industry's written premiums in 1986, but accounted for 33% of the industry's total underwriting loss. The Chapter also briefly discusses the fact that while the industry's profitability has varied cyclically, the industry's economic downturn in the mid-1980's was far more serious than its downturn in the mid-1970's.

Chapter 3 (The Contribution of Tort Law to the Crisis in Insurance Availability and Affordability) addresses a number of different issues relating to our tort system. Part I of the Chapter (Jury Awards) analyzes data recently published by the Rand Corporation's Institute for Civil Justice on jury award trends in Cook County, Illinois and San Francisco from 1960 through 1984. The Institute's data, which are inflation-adjusted, show that during this period the average jury malpractice award increased by 2,167% (from $52,000 to $1,179,000) in Cook County and 830% (from $125,000 to $1,162,000) in San Francisco. The comparable increase in average jury product liability awards was 212% (from $265,000 to $828,000) in Cook County and 1,016% (from $99,000 to $1,105,000) in San Francisco.

Even more astounding is the increase in the "expected jury award" -- the average jury award multiplied by plaintiff's likelihood of success. From 1960 to 1984, the expected jury malpractice award (also inflation-adjusted) increased by 4,254% (from $13,000 to $566,000) in Cook County and 1,172% (from $34,000 to $616,000) in San Francisco. The comparable increase in expected jury product liability awards was 445% (from $76,000 to $414,000) in Cook County and 927% (from $56,000 to $575,000) in San Francisco.

It is interesting to note that both the average jury award and expected jury award data show that most of the increase in jury verdicts from 1960 to 1984 occurred during the 1980 to 1984 period. For example, in many of the expected jury award categories, the increase in awards from 1980 to 1984 was double or triple the entire increase in jury awards from 1960 to 1980.

The Institute's data also show a very substantial increase in inflation-adjusted million-dollar jury awards. Of particular

interest is the fact that million-dollar awards accounted for 85% of the total damages awarded by Cook County juries in 1980 to 1984 (as compared to 4% in 1960 to 1964) and 58% of the total damages awarded by San Francisco juries during the same period (as compared to 14% in 1960 to 1964). Thus, a small percentage of all tort cases appears to account for a very large percentage of the total tort damages awarded by juries.

Part II of the Chapter (Case Filings) addresses a number of arguments that have been raised regarding the Working Group's evidence of substantial growth in product liability and medical malpractice cases filed in federal court. The Chapter discusses the recent study of the National Center for State Courts, which has been widely cited for the proposition that there is no "litigation explosion" in the United States. Part II not only identifies a number of serious methodological deficiencies in the Center's study, but notes that because the Center's study aggregates all tort filings -- including automobile accident cases -- it cannot and does not provide any meaningful insights as to the growth in the type of complex tort litigation, such as product liability, medical malpractice and many municipal liability cases, that have been at the center of the debate over tort reform.

Part II also answers a number of assertions that have been made regarding the methodology and meaning of the federal district court caseload data compiled by the Administrative Office of the United States Courts.

Part III of the Chapter (Punitive Damages) discusses the most recent data collected by the Institute for Civil Justice on punitive damage awards. It also notes the growing consensus within the legal community that punitive damages have become a source of substantial litigation abuse, and discusses a number of reasons why punitive damages need to be reformed. Of particular importance is the fact that punitive damages not only exacerbate insurance availability and affordability problems, but that they often serve as a significant obstacle to settlement, even where the likelihood of a punitive damage award is relatively small.

Part IV (Transaction Costs) discusses data recently published by the Institute for Civil Justice on the overall transaction costs of the tort litigation system. The data show, for example, that out of a total tort litigation expenditure in 1985 of $29 to $36 billion, plaintiffs received at most $14 to $16 billion. If only non-automobile tort cases are considered, the net compensation paid plaintiffs amounted to only 43% of the system's total expenditures.

Part V of the Chapter (Doctrinal Changes in Tort Law) discusses the fact that many of the current problems of the tort system can be traced to the sweeping doctrinal changes in tort

law embraced by the courts over the past two decades. These doctrinal changes almost universally seem to have shared one common objective -- to increase plaintiff's likelihood of obtaining compensation. As noted in Part V, this has led to a systematic undermining of the most fundamental principles of tort liability -- most importantly, the roles of fault and causation. Part V notes that this judicial attack on the traditional limitations and conditions placed on tort liability has not only had the effect of increasing the amount of tort liability, but has introduced considerable uncertainty and unpredictability into tort law. This uncertainty and unpredictability greatly exacerbates the already serious problems of the tort system, and substantially increases the cost of liability insurance. And, as importantly, the lack of predictability has undermined and perverted the deterrent role of tort law.

Chapter 4 (Public and State Support for Tort Reform) summarizes the remarkable success of tort reform in 1986. It describes the wide-spread popular support for tort reform, as indicated by opinion polls, ballot initiatives, the breadth of many of the coalitions formed to advocate tort reform, and even the support for tort reform from much of the legal profession. The Chapter also describes the National Governors Association's recent unanimous endorsement of product liability reform, as well as the support for tort reform of a number of State Commissions and Task Forces which were directed to analyze the insurance and liability crisis and make appropriate recommendations. In addition, the Chapter summarizes the extraordinary record of tort reform initiatives in the State legislatures in 1986, a year in which over two-thirds of the States enacted tort reform legislation of one sort or another. Finally, the Chapter briefly summarizes the State legislative activity last year relating to insurance regulation.

Chapter 5 of the Report (An Analysis of Various Tort Reform Provisions) analyzes six areas of tort reform which were the subject of considerable legislative activity in State legislatures in 1986. The analysis reviews the strengths and weaknesses of some of the different legislative reform formulations enacted by the States. Where appropriate, the Chapter also sets out the legislative provisions drafted by the Working Group which were part of the Administration's civil justice reform package submitted both last year and this year to the Congress, and explains the reasons for the specific legislative language adopted by the Working Group.

Chapter 6 (The Relationship of Tort Reform to Insurance Availability and Affordability) addresses an issue which has been central to the debate over tort reform -- whether such reforms in fact have a significant effect on insurance availability and affordability. The Chapter explains the reasons why tort reforms take some time to affect the insurance market. But it also notes that there is persuasive evidence that over the long-term tort reforms can have a very substantial impact on insurance. Specifically, the Chapter compares the experience of California physicians, who have the benefit of a rigorous medical malpractice reform statute enacted in 1975, with that of New York and Florida physicians, who practice in States with far weaker medical malpractice reforms. The difference in the experience of California physicians to that of their New York and Florida colleagues is instructive, to say the least. The rate of increase of medical malpractice premiums paid by New York and Florida physicians from 1980 to 1985 was substantially higher than for California physicians; indeed, for high risk specialties such as obstetrics/gynecology and neurosurgery, the rate of increase was two to three times larger in New York and Florida than in California. And the premiums paid by obstetricians/gynecologists in 1985 was substantially less in California than in New York or Florida for similar coverage, both in absolute dollar terms as well as in the percentage of physician net income and physician gross revenue. Accordingly, it seems evident that strong tort reform measures, if given sufficient time, can have a very substantial impact on the insurance market.

The Appendix to the Report provides the results of an economic analysis by the Antitrust Division of the Department of Justice, prepared at the request of the Working Group, of the causes of the crisis in insurance availability and affordability. The analysis reviews the merits of the four most commonly alleged causes of the crisis -- insurer collusion, imprudent insurer business practices and declines in investment income, State insurance regulation, and changes in tort liability. It finds that it is unlikely that any of the first three of these alleged causes in fact caused the crisis. The analysis concludes that only the last alleged cause -- changes in tort liability -- can be directly responsible for the recent availability and affordability problems in property/casualty insurance. Based on its review of the property/casualty industry's financial performance, the Antitrust Division's analysis concludes that two specific aspects of the tort system -- changes in the average awards, and increased uncertainty -- have contributed greatly to the crisis in insurance availability and affordability.

The Conclusion to the Report lists eight conclusions of the Working Group regarding the insurance and liability crisis and the appropriate response of the federal government to that crisis.

Richard K. Willard
Chairman
Tort Policy Working Group

Robert L. Willmore
Chairman
Task Force on Liability
Insurance Availability

March, 1987

CITIZENS COALITION FOR TORT REFORM

907-561-6250

April 27, 1987

FEDERAL TORT POLICY REPORT UPDATE

In March, the Attorney General of the United States released a report of the federal interagency Tort Policy Working Group. This 140 page report is enclosed for your attention. The Executive Summary is only 5 pages long if you are short on time. But have your staff read the full text - its worth it.

Below are a few excerpts from the report:

Chapter 1 indicates that while availability problems have substantially ameliorated since a year ago, they continue to exist in certain lines or types of coverage, where they remain serious. The problem of affordability has stabilized with rates at a much higher level. This increased availability and high price stability are accompanied by, and in no small part are a result of, the use of higher deductibles, lower coverage limits and additional policy exclusions and limitations. The past year has also witnessed an increasing reliance on both self-insurance and captive insurer programs, though it remains to be seen whether such arrangements provide reliable long-term insurance coverage. Despite some assertions to the contrary, the impact of the crisis in insurance availability and affordability continues to be felt - often acutely - throughout much of the American economy.

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The Institute's data also show a very substantial increase in inflation adjusted million-dollar jury awards. Of particular interest is the fact that million-dollar awards accounted for 85% of the total damages awarded by Cook County juries in 1980-84 (as compared to 4% in 1960-64). Thus, a small percentage of all tort cases appear to account for a very large percentage of the total tort damages awarded by juries.

Part II of the Chapter discusses the recent study of the National Center for State Courts, which has been widely cited for the proposition that there is no "litigation explosion". Part II identifies a number of serious methodological deficiencies in the Center's study. It also answers a number of assertions that have been made regarding the methodology and meaning of the federal district court caseload data complied by the Administrative Office of the U.S. Courts.

Part III discusses the most recent data collected by the Institute for Civil Justice on punitive damage awards. It also notes the growing consensus within the legal community that punitive damages have become a source of substantial litigation abuse, and discusses a number of reasons why punitive damages need to be reformed.

Part IV discusses data recently published by the Institute for Civil Justice on the overall transaction costs of the tort litigation system. The data show, for example, that out of the total tort litigation expenditure in 1985 of $29 to $36 billion, plaintiffs received at most $14 to $16 billion. If only non-automobile tort cases are considered, the net compensation paid plaintiffs amounted only to 43% of the system's total expenditure.

Part V discusses the fact that many of the current problems of the tort system can be traced to the sweeping doctrinal changes in tort law embraced by the courts over the past two decades. These doctrinal changes almost universally seem to have shared on common objective - to increase plaintiff's likelihood of obtaining compensation... Added uncertainty and unpredictability greatly exacerbated the already serious problems of the tort system, and substantially increase the cost of liability insurance. And, just as importantly, the lack of predictability has undermined and perverted the deterrent role of tort law.

Chapter 4 describes the widespread popular support for tort reform, as indicated by opinion polls, ballot initiatives, the breadth of many of the coalitions formed to advocate tort reform, and even the support for tort reform from much of the legal profession. In addition, the Chapter summarizes the extraordinary record of tort reform initiatives in the State legislatures in 1986. Finally, the Chapter briefly summarizes the State legislative activity last year relating to insurance regulation.

Chapter 5 analyzes six areas of tort reform which were the subject of considerable legislative activity in state legislatures in 1986. The analysis reviews the strengths and weaknesses of some of the different legislative reform formulations enacted by the States.

Chapter 6 addresses an issue which has been central to the debate over tort reform - whether such reforms in fact have a significant effect on insurance availability and affordability. The Chapter explains the reasons why tort reforms take some time to affect the insurance market. But it also notes that there is persuasive evidence that over the long-term tort reforms can have a very substantial impact on insurance.

The Appendix to the Report provides the results of an economic analysis by the Antitrust Division of the Department of the Department of Justice of the causes of the crisis in insurance availability and affordability. the analysis reviews the merits of the four most commonly alleged causes of the crisis - insurer collusion, imprudent insurer business practices and declines in investment income, State insurance regulation, and changes in tort liability.

It finds that it is unlikely that any of the first three of these alleged causes in fact caused the crisis. The analysis concludes that only the last alleged cause - changes in tort liability - can be directly responsible for the recent availability and affordability problems in property/casualty insurance. Based on its review of the property/casualty industry's financial performance, the Antitrust Division's analysis concludes that two specific aspects of the tort system - changes in the average awards, and increased uncertainty - have contributed greatly to the crisis in insurance availability and affordability.

CONCLUSIONS

The primary conclusions regarding the insurance and liability crisis and the appropriate response of the federal government to that crisis are:

1. The crisis in insurance availability and affordability, while substantially ameliorated, continues to impose significant costs on much of the American economy. The effects of the crisis likely will be felt throughout the economy - particularly in certain sectors - for some time to come.

2. Tort liability is a key underlying reason for the crisis in insurance availability and affordability. Its contribution to the crisis is two-fold: rapidly expanding liability, including dramatically higher damage awards, have substantially increased the cost of the tort liability system; and, changing doctrinal standards have significantly heightened the uncertainty and unpredictability of the tort system, and thereby have exacerbated the already serious problems of the system.

3. Legislative tort reforms are a reasonable, legitimate and effective response to many of the deficiencies of tort law. Such

legislation, however, is by no means the only answer to the problems of the tort system; much of the responsibility for improvement remains with the courts.

4. Rigorous and meaningful tort reforms can have a real impact on insurance availability and affordability if given the opportunity and sufficient time to work.

5. The Working Group continues to believe that there is no justification or need for federal insurance regulation or the creation of federal insurance or indemnification programs.

6. There is an appropriate role for federal tort reform legislation in those areas where there is a compelling federal interest. Such areas include product liability, the liability of federal government contractors, and the tort liability of the federal government and its employees.

7. The Administration should continue to support and work actively with Governors and State legislators to achieve reasonable and workable tort reforms at the State level.

8. The Working Group continues to believe that the eight tort reforms recommended in its prior Report represent the most sensible and effective potential reforms of the American civil justice system.

The Citizens Coalition for Tort Reform is pleased to provide you with a copy of this important national report. We are in general agreement with the conclusions of the report. If you have any questions on the report or other national reports on the lawsuit crisis please give us a call.

Ric Davidge
Executive Director

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

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Official Business

Alaska State Legislature
House

P.O. BOX V
State Capitol
Juneau, Alaska 99811

DATE: April 8, 1987

TO: House Community and Regional Affairs Committee

FROM: Representative Ron Larson

SUBJ: Bill Analysis, House Bill No. 250

This legislation is proposed in an effort to correct technical problems with tort reform legislation passed last year (Chapter 139 SLA 1986) and to clarify and strengthen the new law.

Section 1: Noneconomic Damages

This section amends AS 09.17.010(c) to reduce the cap on noneconomic damages from $500,000 to $100,000. This is only a cap on noneconomic damages; it does not limit economic or punitive damages. Noneconomic damages are defined as "subjective, nonpecuniary damages including pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, and all other nonpecuniary damages."

Section 2: Punitive Damages

This section amends AS 09.17.020 by clarifying the terms "clear and convincing evidence" as "evidence of fraud, malice, gross negligence, or reckless misconduct of the defendant." Current statute has the same burden of proof but does not specify the type of conduct that will trigger an award.

Section 3: Damages Resulting from Commission of a Crime

This section amends AS 09.17.030 by expanding the class of persons who may not recover damages for personal injury or death if incurred while the person was engaged in the commission of crime. Current statute is limited to those persons who commit and are convicted of a felony which substantially contributes to the injury or death. HB 250

replaces "felony" with "crime," and eliminates the requirement of substantial contribution to the injury or death.

Section 4: Recovery of Damages

This section amends AS 09.17.040(d) by allowing either the plaintiff or defendant to choose periodic payments rather than large one time cash awards. Current statute allows only the injured party to make such a request.

Section 5: Limited Liability of Certain Directors and Officers

This section amends AS 09.17.050 to add the member of the Board of Directors or an officer of an electric or telephone cooperative to the list of persons not liable for damages for personal injury, death, or damage to property in the course and scope of official duties.

Section 6: Collateral Benefits

This section repeals and reenacts AS 09.17.070 to require that a judge or jury be informed of any settlements by parties in the case, cash awards agreed to by the defendant and the plaintiff, or insurance payments granted. The new language provides that a person may only recover damages that exceed amounts that he or she has already received from a collateral source, whether it be a private, group, or government source, either contributory or noncontributory. The only exceptions are where the collateral source is from a federal program that by law must seek subrogation, or from death benefits paid under life insurance. The language also requires the judge or jury be advised of tax implications of awards. (Depending on how an award is structured, a victim can loose a significant portion of the award to taxes.)

Section 7: Several Liability

This section amends AS 09.17.080(d) by eliminating the theory of joint and several liability and replacing it with several liability. In any case involving a claim of negligence, the judge or jury will apportion to each person or entity, whether or not a party to the action, the percentage for which he/she/it is responsible for the damages awarded. Each party to the suit will be liable only for the portion of damages assessed to them. Under current

statute, a party can be held liable for all of the damages, even if that party has been allocated a certain percentage of the fault. The only exception under the present statute is that a party allocated less than 50 percent of the total fault may be liable up to twice his or her degree of fault.

Section 8: Definitions

This section clarifies the definitions of economic and noneconomic losses.

Sections 9: Elimination of Civil Rule 82

This section amends AS 09.60.010 by eliminating the language "unless the civil action is contested without trial, or fully contested as determined by the court." The amendment has the effect of allowing the supreme court to determine the costs which may be allowed a prevailing party in a civil action. Unless attorney fees are authorized by statute or by where an agreement between the parties, they may not be awarded in actions for personal injury, death, or property damage relating to fault.

Section 10: Sections Repealed by this Bill

This section: (1) repeals AS 09.16, the "joint liability" statute, consistent with Section 7 of this bill; (2) repeals AS 09.17.010(c) to remove exceptions to the cap on noneconomic damages (disfigurement and severe physical impairment), consistent with Section 1 of this bill; (3) repeals AS 09.17.040(c), which allows parties to agree to compute the award of future damages under the rule adopted in the case of Beaulieu v. Elliot, and therefore requires damage awards to follow the provisions set out in Section 4 of this bill; (4) repeals AS 09.55.548(b) to eliminate repetition with Section 6 of this bill.

Section 11: Attorney Fees

This section amends AS 09.60.010, having the effect of amending Alaska Rule of Civil Procedure 82 by prohibiting the award of attorney fees to the prevailing party in certain civil actions based on fault, unless allowed by statute or by agreement of the parties.

Sections 12 and 13: Effective Date

These two sections set an effective date.

What the Public Thinks

Americans have been suing each other in recent years with such vengeance and frequency that a 1986 national survey found that nearly two of every three people admit that "suing has become part of the American way of life."[1]

But while Americans are aware of the tremendous increase in liability suits, they certainly don't like it. A number of national studies from recognized opinion experts clearly show that the American people favor major changes in the laws governing civil liability suits.

One study found that a full 69 percent are convinced that it is too easy "for people to sue for damages when they have been injured or some wrong has been done to them."[2] The vast majority believe that our system of rectifying wrongs through the courts has gotten totally out of control.

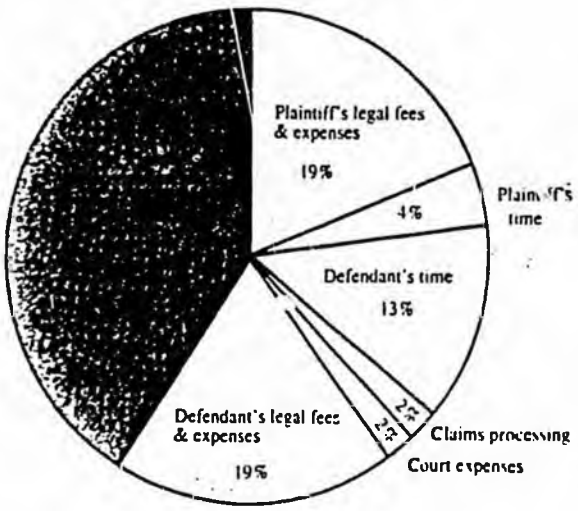
The cost of liability lawsuits in federal and state courts was between $27 and $34 billion last year. More than half of that money in non-auto cases went for the costs of litigation, including legal fees, related expenses, court costs and the value of litigants' time, according to a Rand Corporation study.[3]

Who or what's to blame? Most people point to lawyers in search of big fees, plaintiffs seeking unreasonably large financial awards, and laws that encourage people to sue.

This brochure highlights the key results of these recent studies, all showing widespread support for tort reform.

1. National representative study of over 1,000 respondents conducted for the American Tort Reform Association by Burson-Marsteller, 1986.
2. Harris Survey telephone poll of 1,243 adults nationwide, May 1986
3. Rand Corporation Study, April 1986.

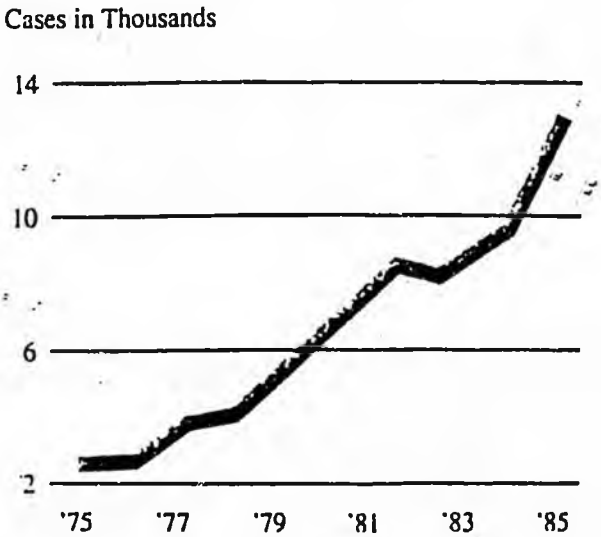
Who *Really* Benefits from Today's Tort System?



SOURCE: Rand Corporation, April 1986: costs and compensation paid for Average Non-Auto Lawsuits in 1985.

Product Liability Cases in Federal District Court

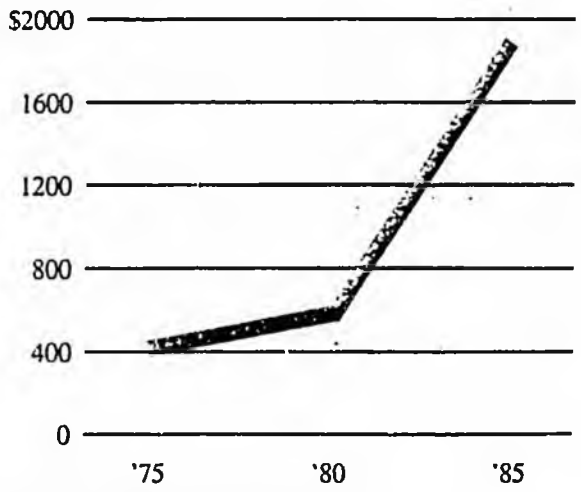
Increase in Lawsuits Filed in Federal Courts



SOURCE: Administrative Office of the United States Courts

Average Product Liability Jury Verdict

Dollars in Thousands



SOURCE: Jury Verdict Research, Inc.

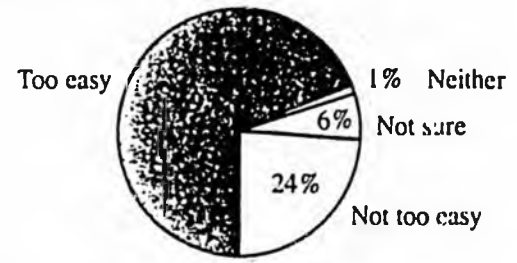
What is Causing the Liability Crisis?

	TOTAL	MALE	FEMALE
	1002 (100%)	504 (100%)	498 (100%)
Suing has become part of the American way of life	62%	61%	63%
Many frivolous lawsuits are being brought to court	54	53	56
Lawyers are trying to get rich from lawsuits	48	53	42
Courts and juries are too generous with the lawsuits awards	40	46	34
Many companies make dangerous products and deserve to be sued	24	23	24

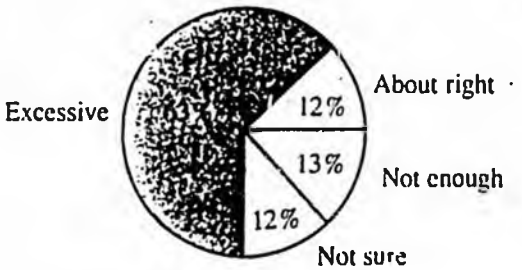
SOURCE: American Tort Reform Association, June 1986

Harris Survey: It's Too Easy to Sue, and Settlements Too High

Too Easy to Sue for Damages?

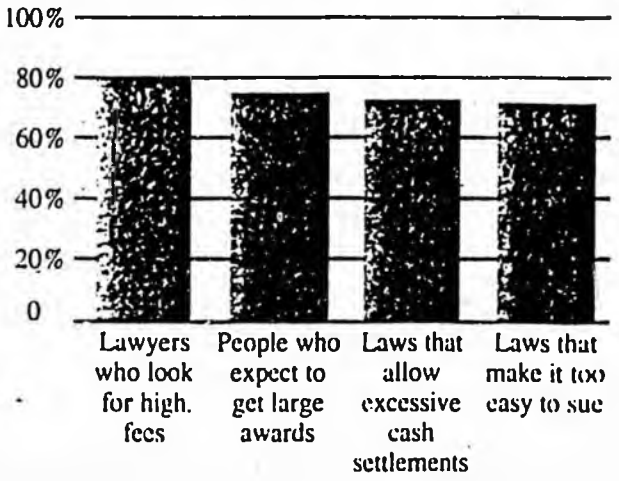


Cash Settlements Size Excessive?



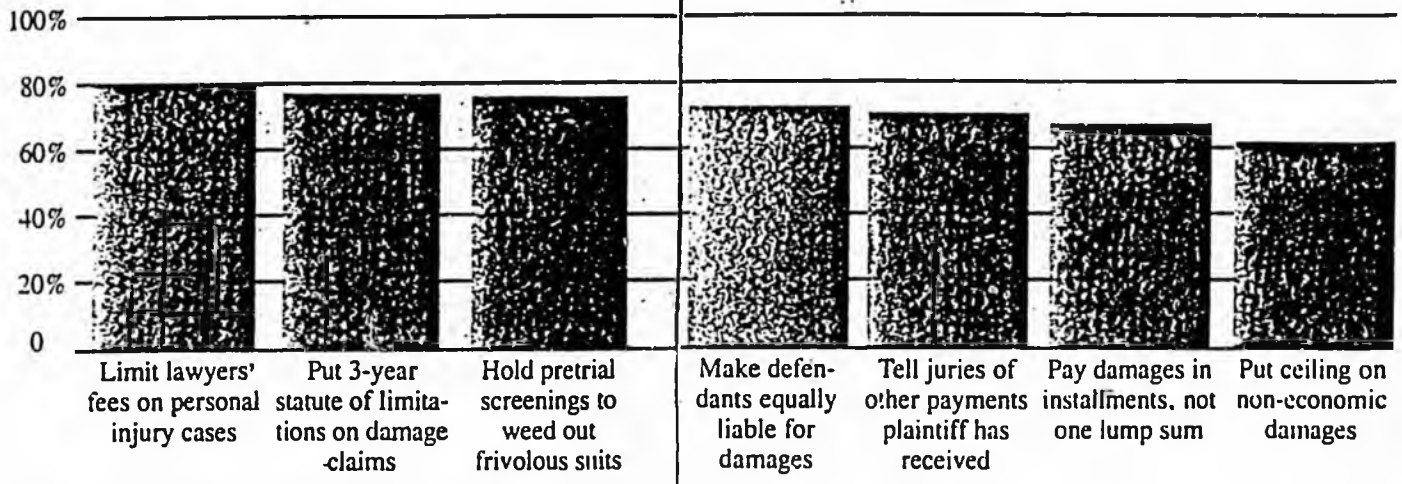
SOURCE: Harris Survey, May 1986

Factors Cited as "Very" or "Somewhat" Responsible for Increase in Lawsuits



SOURCE: Harris Survey, May 1986

A Call for Reform



SOURCE: Northwest Strategies, Seattle, Washington March 1986; a survey of Washington state residents.

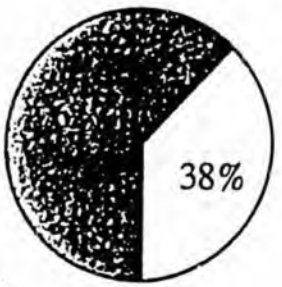
Percentage of Americans Who Agree with Proposals To...

	TOTAL	MALE	FEMALE
	1002 (100%)	504 (100%)	498 (100%)
Change how lawyers are paid so that they don't automatically get a share of the awards given by a jury	74	77	72
Limit amount people collect for pain and suffering to $250,000	66	67	66
Make the person who files and loses a lawsuit pay the legal fees of the defendant	58	65	52

SOURCE: American Tort Reform Association, June 1986

Voters Say Yes to Reform

In 1986, California voters overwhelmingly approved a ballot proposal to modify the doctrine of joint and several liability for non-economic damages. By a nearly 2-1 majority, the voters agreed that the liability of each party in a lawsuit should be limited only to the share of damages for which they were found responsible. The California Attorney General estimated that state and local governments will save as much as several million dollars a year because the voters adopted Proposition 51.



In California, referendum to modify joint and several liability passed by 62% of the voters.

LAW OFFICES OF

Camarot, Sandberg, Hunter & Smith

AN ASSOCIATION OF PROFESSIONAL CORPORATIONS

HENRY J. CAMAROT
MARK A. SANDBERG
RANDOLPH W. HUNTER
RICHARD J. SMITH

CARR-GOTTSTEIN BUILDING, SUITE 500
310 "K" STREET
ANCHORAGE, ALASKA 99501

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276-6363

ALASKA INSURANCE LAW AND NEWS LETTER

PUBLISHED WHENEVER THE SPIRIT MOVES US

A Survey of Recent Cases Affecting the Insurance Community Doing Business In Alaska

REFORM SCHOOL

Well, we have been tort reformed! A copy of the bill is attached. You may want to detach it and read along as we take a tour through the brave new world which those fun loving folks in Juneau have brought us:

1. Non-economic damages: The cap that isn't. The much heralded cap on non-economic loss isn't much of a cap at all. We suspect it will be the rare case in which it will be applied.

First of all, it only applies to actions "for personal injury based on negligence." Does that mean it does not apply in products liability cases? It sure looks like it.

Also, the cap does not apply to "damages for disfigurement or severe physical impairment." What does that mean? Who knows! Maybe it means that the cap only applies to back cases. We don't know.

2. Punitive damages. The Act raises the standard of proof from preponderance of the evidence to clear and convincing evidence, whatever that is, for punitive damages. We suspect that one has always needed clear and convincing evidence to get punitive damages anyhow.

3. Damages resulting from commission of a crime. You don't have to pay convicted felons if they get injured in the course of their crime.

4. Award of damages: back to the future.

(a) General verdicts are out. Verdict forms will apparently be itemized according to the statute, although we would note that the itemization says nothing about disfigurement or severe physical impairment.

Also, the Act refers to future wages which the plaintiff "could have been expected to earn." Does this mean housewives have no claim for loss of earning capacity? We don't know.

(b) Beaulieu is out. We are now a reduction to present value state although, interestingly enough, the statute does not say that non-economic loss gets reduced. More sloppy drafting, more work for lawyers.

(c) You can still have Beaulieu if you stipulate to it. This may be a good idea for small cases but we don't expect to see it in many big ones.

(d) The plaintiff can make an interest free loan to the insurance company if he wants to. Don't expect many plaintiffs to go this route.

(e) If you find one dumb enough to make you an interest free loan, you don't have to post security if you are an authorized carrier.

(f) Payments go on even if the plaintiff dies.

(g) Failure to pay can lead to a new lawsuit. why not just court enforcement?

5. Limited liability of certain directors and officers. Except for gross negligence, directors of non-profit corporations or various other civic groups are not liable.

6. Effective contributory fault: Harned overturned? In an action based on fault, which the definitions say includes strict liability, pure comparative negligence will be applied. This was not the rule in products liability cases before. Apparently it will be now.

7. Collateral benefits. The collateral source rule does not apply if the collateral sources do not have a right of

subrogation and they exceed attorney fees, less Rule 82, in the case plus premiums paid for the benefit. Since that should be something around one-third of the total recovery, this will be a seldom invoked section of the law, especially since it does not include Social Security or life insurance.

8. Apportionment of damages: a real difference. This should be a very interesting change in the law. As we read it:

A. Ordinary joint and several liability, as we know it, is out the window.

B. Each defendant or third party defendant, including defendants who have settled, is assigned a percentage of fault. This should be very interesting since defendants will be arguing that other defendants who settled were at fault and the plaintiff, who sued those settled defendants, will be arguing that they were not. The settled defendant, of course, will not be there. That should make for interesting trials.

C. Comparative negligence is disregarded in this calculation.

D. A party who is allocated less than 50% of the total fault may not be jointly liable for more than twice the percentage of fault allocated to that party. This should make it possible for municipalities and other deep pockets to be insurable again.

Plaintiffs now have a disincentive to shotgun but defendants have every reason to add more defendants.

9. Effect of release. We have to confess. They have really got us stumped on this one. The current statute governing the effect of a release appears at A.S. 09.16.040. This one, which does not purport to repeal the other one, will appear at A.S. 09.17.090. What's more, they are identical. Apparently we now have two statutes that say the same thing.

10. Definition. Fault includes negligence or recklessness. Apparently that means that comparative negligence will diminish an award of punitive damages based upon reckless conduct. It also means strict liability, breach of warranty and several other things that we don't understand.

11. Offers of Judgment: more teeth here. For the past several years the statute governing offers of judgment by the plaintiff has been hopelessly garbled. It has now been transformed into symetry with the rule governing offers by a defendant. A plaintiff can make an offer anytime up to 10 days before the start of the trial just like a defendant may.

If a defendant makes an offer and the plaintiff doesn't beat it, pre-judgment interest goes down 5% a year. If the plaintiff makes an offer and does beat it, pre-judgment interest goes up 5% a year. This could mean 15 1/2% on some claims. Ouch!

12. Pre-judgment interest, no longer a premium for the lazy. Pre-judgment interest now runs from the day process is served or the day defendant receives written notification. No longer can a plaintiff camp on his claim for two years and have it grow 20%.

13. Costs and attorney fees allowed prevailing party: a real change. There are apparently no longer uncontested Rule 82 attorney fees. As we read this statute, it means that you can come in and pay your limits on a bad claim without paying anything for Rule 82 unless you have contested the claim. This should eliminate a major cause of uncertainty.

14. Applicability. The Act only applies to accidents that haven't happened yet. That's what "causes of action accruing after the effective date" means. For the next several years, we will have most cases proceeding under the old rules.

CONCLUSION

Well, that's it. The legislature labored mightily but gave birth to an undersized progeny. It is a masterpiece of poor drafting and ambiguity. About the only thing which appears to be certain is that no one who knew anything about tort law had anything to do with drafting it. Whether one is for tort reform or against it, this is a lousy bill.

The Tort Reform File

Unaffordable and Unavailable: The Crisis in Liability Insurance

In law, tort means wrongful doing — and for the past few years there has been an explosion in the number and cost of tort cases. The first $1 million tort verdict was awarded in 1961. In 1983, there were 360 awards for $1 million or more. Just for medical malpractice suits, the number of court claims doubled over the past six years. Nationally, the average jury award for medical malpractice cases jumped from $94,947 in 1975 to $338,463 in 1984.

Tort law is intended to resolve the disputes that arise when one person harms another. If it works properly, the tort law system not only compensates those who are wrongfully injured, but also provides incentives that encourage proper conduct.

Today, however, the tort law system has broken down. New theories have created uncertainty about what conduct will result in liability. And — exploiting these expansive theories of liability — people are filing suit in record numbers and reaping huge windfalls. A lottery mentality now infects the tort system.

Because of these developments, insurance underwriters have no way to predict the kinds or amounts of claims they may have to pay. The result: broad classes of liability insurance are now unavailable or unaffordable.

Everyone Is Affected Many businesses and even state and local governments have been forced to operate without insurance — sometimes in violation of the law. Medical practitioners are avoiding some areas of practice; companies are deciding not to develop some high-risk products (including life-saving medicines) and are taking established products off the market; and state and local governments are cutting back vital services.

Consumers also are hurt by the liability crisis. They are being denied essential services, such as health care, recreational and day care services. They also have been forced to pay the higher insurance premiums and taxes required to cover the surge in the number and size of tort awards.

Cause of the Crisis Unless physicians have suddenly become more careless, or contractors are building more faulty structures, or people are harming each other more frequently, there must be other causes of the tort law crisis. And there are several:

- There is a growing tendency to eliminate personal responsibility and risk from daily life, and to pass the buck to the most obvious and wealthy targets — government and business. Many people now believe they should be compensated for any adversity, whatever the cause.
- This shift from personal to collective responsibility has been encouraged by a fundamental change in the law. Tort law was once based on fault.

but it now primarily seeks to compensate injured parties — even if responsibility is shifted from the person most at fault (including the plaintiff) to the party with the greatest ability to pay.

- The huge court awards based on these new theories of liability have enticed thousands of new "victims" to buy a ticket (file suit) to enter the "lawsuit lottery." And the courts are clogged.

Recommendations for Reform

Reform of the tort system must balance the right of individuals to be compensated for wrongful acts with the need to set reasonable limits on liability and provide more predictability in the law. Following are key reforms enacted by some state legislatures and under consideration in many others:

- *Limit Non-Economic Damages:* Uncertainty about the damages awarded for "emotional distress" and "pain and suffering" has created a "hit-the-jackpot" mentality and prevented insurance companies from setting affordable rates. States should provide guidance to juries by establishing limits on the amount of money that can be awarded as non-economic damages.
- *Limit Punitive Damages:* Punitive damages should be reserved for cases where a defendant displays conscious and flagrant indifference to the safety of others. Limits also should be placed on the amount that can be assessed for punitive damages, with the awards set by a judge in a separate proceeding after compensatory damages have been established.
- *Eliminate Joint and Several Liability:* The doctrine of joint and several liability allows a plaintiff to require *one* of several defendants to pay the *full* amount of the award, even if only slightly at fault. Joint and several liability should be replaced with "comparative negligence," under which each defendant — and plaintiff — is liable only for the share of damages the party actually causes.
- *Make Government Standards a Defense:* Some products, such as new pharmaceuticals, cannot be marketed until approved by an expert government agency. The approval process is so comprehensive that government approval should provide a defense in a tort case, as long as all government regulations are followed and no material information is withheld.
- *Set Guidelines for Expert Testimony:* To prevent lawsuits from being decided on the basis of which party can afford to hire the most "experts," expert testimony should be admitted only when an expert possesses sufficient credentials and the testimony is corroborated by other objective evidence — such as a scientific study — that is consistent with generally accepted scientific principles.
- *Ban Frivolous Suits:* "Frivolous suits" — those with little legal merit or chance of success — often are filed to pressure a defendant to settle a case. Penalties should be assessed against plaintiffs who file such suits in order to discourage frivolous cases.
- *Limit Contingency Fees:* In some cases, especially those involving large amounts, contingency fees provide windfalls to lawyers. Contingency fees also may encourage frivolous suits to be filed, and can discourage reasonable settlements. Contingency fees should be subject to specific limits to control these abuses.

- *Enact Statutes of Limitation:* Lawsuits should be brought promptly — while witnesses' memories are fresh — and at some point a business must be able to "close its books" on a particular area of activity. Statutes of limitation should require a plaintiff to initiate a suit within a year or two after an injury. In addition, statutes of repose should be enacted to prohibit the filing of claims after a specified period of time from the date of manufacture of a product or the provision of a service, regardless of when the injury occurred.
- *Permit Damage Payments in Installments:* In cases of permanent disability, large amounts are awarded immediately to cover future medical and other costs. To make the use as well as the payment of the award both more equitable and manageable, awards for future damages should be paid on an installment basis.
- *Prevent "Double Dipping":* Legislation should prevent "double dipping" by eliminating a rule that allows plaintiffs to receive payment — for the *same* expenses — from both a defendant *and* from their insurance company or employer.
- *Return to Fault-Based Liability:* Recently, some courts have held defendants liable for *any* injury related to their activity — regardless of whether the injury was foreseeable or could have been prevented, and regardless of whether the plaintiff might have avoided the injury. Liability should be based on a standard of fault, so a defendant is liable only for the harm caused by his or her negligence, and only for injuries that could have been foreseen and prevented.

More than 30 states considered tort reform legislation in these areas during the 1986 legislative sessions. This level of activity alone gives impressive evidence of the need for reform. According to the National Conference of State Legislatures, over 25 states enacted some form of tort reform in 1986. While five states adopted comprehensive reforms which addressed most major elements of the tort system, most states acted only in limited areas of tort law. The issue of tort reform promises to be high on the agendas of most state legislatures across the nation in 1987.

Limits on Non-Economic Damages

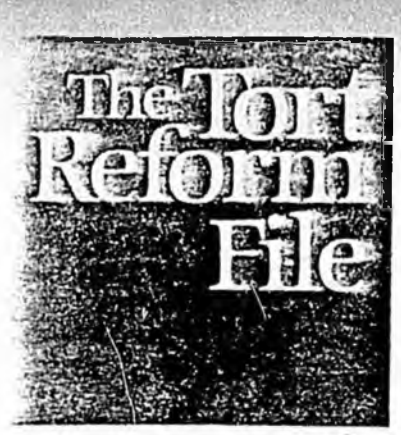
The Problem Economic damages awarded in a liability case are based on tangible or out-of-pocket expenses, while non-economic damages are awarded for intangible injuries such as "pain and suffering" and "emotional distress." So, unlike economic damages that are based on objective evidence (hospital bills, lost wages), damages for "pain and suffering" are based on subjective judgments.

Awards for non-economic damages vary widely from case to case, with plaintiffs who suffer similar injuries receiving vastly different amounts. This has led to a "hit-the-jackpot" mentality among plaintiffs and their legal counsel. And the huge awards that result have driven up the costs of litigation and liability insurance, so that many local governments and organizations as well as companies can no longer afford such insurance.

Why Reform is Needed

- Juries can — and do — award any amount they want for non-economic damages. Judges can reduce these awards only if they "shock the judicial conscience." This system makes it difficult to achieve reasonable settlements.
- It is unfair for plaintiffs suffering similar injuries to receive vastly different amounts for non-economic damages.
- Our society does not have unlimited financial resources. Juries must receive reasonable guidance in determining non-economic damages. And it's important to remember that taxpayers and insurance policy-holders ultimately pay the costs of huge, unreasonable awards.
- When legislatures establish a limit on non-economic damages, companies then have a basis for managing their business risks. And insurance companies are provided with a much-needed sense of certainty and predictability that permits them to determine rates and structure coverage.

What Should be Done **The legislature should provide guidance to juries by establishing limits on the amount that can be awarded as non-economic damages.**



Limits on Punitive Damages

The Problem Punitive damages originally were awarded to punish a party for committing a malicious or deliberately harmful act. The theory was that, by making an example of a defendant through the assessment of punitive damages, the defendant and others would presumably be deterred from engaging in such conduct in the future. Evidence was required to prove that the defendant acted with a willful disregard for the safety or interests of the injured party.

Today, the situation is totally different. The basic standards for awarding punitive damages have been eroded. Many juries are awarding punitive damages where there is little or no evidence of malicious behavior by a defendant. Punitive damages now are used to intimidate defendants and increase the size of awards, and meritless claims are often filed solely to coerce "nuisance value" settlements. A recent study by the Institute for Civil Justice found that punitive damages in Chicago increased from an average of $15,000 during 1960-64 to an average of $3.65 million during 1975-79.

Why Reform is Needed

- The application of punitive damage awards is widely misinterpreted and abused. Defendants who cause an injury — but not in a malicious or purposeful manner — are increasingly being required to pay millions of dollars in "punitive damages."
- America's legal system has a wide range of laws and penalties to deter criminal acts and punish criminal behavior. So today the key objectives of punitive damages, punishment and deterrence are now achieved through numerous other laws.
- Today's multimillion dollar punitive damage awards place a heavy burden on all U.S. citizens. Everyone bears the bulk of these payments through higher insurance premiums, tax increases and higher priced products.
- Generally, there is no limitation on either the amount awarded in punitive damages or on the number of times a defendant may be assessed such penalties. A manufacturer of a defective product may be "punished" by every judge and jury before whom a product liability suit is tried.

What Should be Done **There should be a limit on the amount of punitive damages that can be assessed against a defendant, and such damages should be set by a judge in a separate proceeding, after compensatory damages are awarded by a jury.**

Periodic Payments of Large Awards

The Problem In cases where an injury causes permanent disability, the court may award large amounts to a plaintiff for lost wages, continuing pain and suffering and *future* medical costs. These damages are ordinarily based on the plaintiff's life expectancy. In many states, the defendant is now required to pay the entire award at once, in a lump sum. This imposes an enormous financial burden on many defendants, particularly individuals and small businesses.

Such lump sum awards also pose potential problems for the plaintiffs who receive them. According to a 1980 American Bar Association (ABA) study, the great majority of plaintiffs have problems managing large lump sum awards. The ABA study found that 90 percent of the persons who had received lump sum awards of more than $100,000 had nothing left after five years.

Why Reform is Needed

- Both plaintiffs and defendants could be helped by the periodic payment of large awards, because such awards would be more equitable and manageable for both parties.
- Plaintiffs benefit from structured award payments. While some argue that an award is a plaintiff's to use as he or she pleases, the money in fact is awarded by a court to pay for specific costs. Lump sum payments, in all too many cases, are poorly managed, leaving an injured party unable to make house payments or pay medical bills.
- Most defendants fully cooperate in compensating injured parties. At the same time, periodic payments are a reasonable way to help defendants pay the award in a manner that does not destroy a defendant's life or business.
- And structured payments also help taxpayers, since plaintiffs who prematurely use up lump sum payments often turn to state and local agencies for relief.

What Should be Done **Large awards for lost wages, continuing pain and suffering and *future* medical costs should be paid on an installment basis.**

Eliminate Joint and Several Liability

The Problem In most states, injured persons who sue two or more defendants can collect the entire award from the defendant with the most money — the one with the "deep-pockets." This is the doctrine of joint and several liability.

For example, a defendant found to be only 20 percent responsible for an injury can be made to pay 100 percent of the award if the other responsible parties do not have sufficient funds. In many cases, "wealthy" defendants are included in lawsuits solely in the hope that the jury will find these defendants at least slightly responsible — thereby guaranteeing that someone will pay the judgment, no matter how large it may be.

Juries, in turn, often award huge judgments thinking that little harm is done to the wealthy parties. But this is not the case. Tremendous harm is caused to the individuals, businesses and governments that are drawn in as the "deep-pockets" defendants, and to the taxpayers and consumers who ultimately pay the costs through higher taxes, more expensive goods and services and reduced government services.

Why Reform is Needed

- Nothing is more unfair than forcing someone — a city, county, state, school, business or individual — to pay for damages caused by another party.
- The repeal of joint and several liability would result in substantial savings for state and local governments and others who now are often required to pay for damages that are caused by someone else. In California, where in 1986 joint and several liability was repealed for non-economic damages, the state Attorney General estimated that savings for the state could amount to several million dollars annually.
- Joint and several liability contributes to the overload on our court system by encouraging lawsuits that would probably not be brought but for the potential of a "deep-pocket" defendant paying a large award.
- Private citizens as well as governments and businesses ultimately pay for unreasonably high awards through higher insurance premiums and taxes — and cancelled or reduced services.

What Should be Done Fairness and an overburdened court system require that joint and several liability be replaced by the principle of "comparative negligence," under which **defendants are held liable only for the share of damages for which they are responsible — and no more.**

Collateral Source Rule

The Problem Under the collateral source rule, juries cannot be informed of any payments that plaintiffs may have already received as compensation for their injuries or illnesses. These payments can come from many different sources, including federal and state disability plans, employee wage continuation plans and federal, state and private health insurance programs.

Since a jury cannot be told about the previous payments, and thus cannot consider other compensation in computing damages, its award may be the second or third payment a plaintiff receives for the same injury. This "double dipping" raises the costs of employer and government insurance and disability plans.

Why Reform is Needed

- According to studies by the American Bar Association and the Rand Corporation, eliminating the collateral source rule would reduce court awards between 18 and 20 percent. This, in turn, would lead to lower insurance rates.
- When the collateral source rule was established, plaintiffs found even partially at fault for their injuries could not receive any compensation. Today, just the opposite is true: even if plaintiffs are found largely at fault for their injuries, in many states they can still receive more than one payment for those injuries.
- Some argue that the wrongdoers should not benefit from the fact that a plaintiff obtained insurance. Many of the people held "liable," however, are only slightly responsible for the injury. And the plaintiff may even be largely responsible for his own injury.
- In most cases, eliminating the collateral source rule would not take money away from prudent insurance owners; it will save the money of taxpayers and employees who contribute to group insurance plans.

What Should be Done To cut costs to taxpayers and insurance holders and still make sure that an injured party is fairly compensated, **the court should reduce its final judgment by the sum of the payments that a plaintiff is entitled to receive from other sources.**

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A UNIT IN THE ORIGINAL FILE.