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Except for Rosenthal's (1974) study of sixty cases, which does lend some support to the theoretical analyses, there have been no systematic empirical tests of these propositions. This paper presents an analysis of the effects of fee arrangement on lawyer behavior based on data drawn from interviews with 371 hourly fee lawyers and 267 contingent fee lawyers who worked on cases selected randomly from twelve state and federal courts.

I. THEORETICAL BACKGROUND

Lawyers are the primary mechanism connecting the citizenry to the legal order. Traditionally, they are pictured as neutral professionals who work only to advance the interests of their clients. This image has been called into question, however, by recent theoretical inquiries that focus on the economic incentives and personal goals lawyers bring to their work. Particular attention has been given to the effect of fee arrangement on the work that lawyers do for specific clients. Typically, the concern has focused on the implications of hourly versus contingent fee arrangements (see Franklin *et al.*, 1961; MacKinnon, 1964; Schwartz and Mitchell, 1970; Rosenthal, 1974; Clermont and Currivan, 1978; Danzon, 1981; See, 1984), though Johnson's (1980-81) recent discussion of the impact of fee arrangement extends the analysis to various forms of third-party payment.

The argument about fee effects typically uses a hypothetical benchmark to appraise the performance of lawyers under different fee arrangements. Johnson (1980-81: 570), for example, uses the concept of an "alter ego" lawyer—one who is motivated entirely by the client's best interest and will, therefore, provide the amount of effort a fully informed client would authorize the lawyer to make. In Johnson's words, the lawyer "will invest additional resources . . . in a given case [assuming complete information] until *maximum net benefits* are achieved for the client."

These theories suggest that hourly fee lawyers will tend to deviate from the alter ego standard by investing greater resources than is in the best interests of the client, whereas contingent fee lawyers will tend to deviate in the other direction, investing fewer resources than the client might want. The usual explanation for this postulated behavior derives from the economic incentives that lawyers who handle litigation are assumed to face. For example, an hourly fee lawyer who has surplus time is expected to spend more time on a case than the

case warrants (as measured by the alter ego benchmark) because she can charge the client for time that would otherwise produce no income. In contrast, the contingent fee lawyer with more work than time available is expected to underinvest in some cases in order to work more on other cases that promise greater financial rewards. Rosenthal's (1974) study of sixty personal injury cases in New York, the only published empirical evidence about the potential conflict of interest created by different kinds of fee arrangement, appears to support the view that contingent fee lawyers "underinvest."[1]

There are some fundamental problems with this over/under investment hypothesis. The first is that the analysis assumes too simple a model of how lawyer behavior and fee arrangement may interact. Lawyers are seen as agents who are exclusively motivated by economic self-interest and whose efforts in a given case (measured by the hours they spend) are *directly* and solely affected by the economic incentives presented by the fee arrangement under which they work. These assumptions are questionable.

While all (or most) lawyers are sensitive to economic concerns, and some no doubt fit the image of self-interested income maximizers at the heart of the over/under investment hypothesis, such a picture is a gross oversimplification. Certainly, lawyers may and frequently do temper economic interest with other competing values, including professional standards and a sense of responsibility to the client (cf. Kritzer, 1984). Thus, hourly fee lawyers may be well aware of the costs to the client of their services and incorporate the client's financial concerns into their time-allocation plans, even if formally they are free to bill as many hours as the case demands. On the other hand, contingent fee lawyers are not necessarily going to take short cuts and omit important activities just because, on the narrowest cost-benefit calculus, they themselves may not gain as much from the marginal effort in this case as in another they are handling. Even if they were tempted to do so, the necessity to secure client consent to follow certain courses of action would limit such inclinations.[2]

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[1] This situation arises because there is a tendency for the return per hour of lawyer time to decrease rapidly after a certain threshold is reached. For example, a lawyer might be able to get a $6,000 settlement after 20 hours of work; going to trial might double the recovery but might easily require another 40 hours of work. In this example, assuming a one-third contingent fee, the settlement would yield an hourly rate of $100 while going to trial would produce an hourly rate of $67.

[2] A client's ability (or inability) to pay a substantial fee may check the amount of effort the lawyer devotes to the case. Furthermore, hourly fee

Furthermore, when economic incentives do have an impact on lawyer effort, the effect may be less direct than the literature implies; fee arrangement may affect other factors, which themselves directly influence effort. If such is the case, it is impossible to understand fully the significance—or lack thereof—of a fee arrangement unless one takes into account the mediating effect of the other factors. Thus, it has been suggested that clients' attitudes toward the amount of time lawyers spend on cases should differ with the fee arrangement they employ. Where the lawyer is hired on a contingent fee, the client, it is said, should exercise control to be sure that *enough* time is spent on a case (Rosenthal, 1974). Where an hourly fee is used, however, clients are advised to make certain that lawyers do not put in *too much* time (Wessel, 1976). Were clients actually to follow such advice, fee arrangements would play a role in determining lawyer effort, but only through their influence on the nature and degree of the control exercised by clients.

The second problem with the over/under investment hypothesis is with the idea of using the "alter ego" lawyer's effort as the benchmark against which to measure contingent fee versus hourly fee hours. The additional resources that Johnson's alter ego lawyer decides to invest are measured by the marginal "costs to the litigants"—with more resources invested as long as their expected return is greater than those costs (Johnson, 1980-81: 570). This is, in principle, a relatively straightforward proposition with respect to the hourly fee lawyer. But for the client who has retained a lawyer on a contingent fee basis it is less satisfactory because there are no marginal costs to the litigant. Johnson's conclusion that the client's gains in such a circumstance are greatest when the recovery is greatest simply reflects the fact that lawyer hours are not a cost to such a client.[3]

Thus, we do not believe that the concept of the alter ego lawyer is helpful in analyzing the relative amounts of effort hourly fee and contingent fee lawyers devote to cases. An alternative approach to looking at the question of the impact of

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lawyers may have other clients they charge at a higher rate (or who are repeat clients), and they will not overinvest on client A's case because they would prefer to spend more time on client B's.

[3] This analysis represents something of a simplification because the client typically must pay expenses in addition to the contingent fee, and each marginal increase in time may involve some marginal increase in expenses. However, we have shown elsewhere (Kritzer *et al.*, 1984) that in most cases expenses represent less than 10% of the overall lawyer's bill.

fee arrangement on lawyer effort is to start with the simple hypothesis that if the argument about over and under investment is correct, we would expect a contingent fee lawyer to expend less effort than an hourly fee lawyer, *all other influences on effort being held constant.* If such an effort gap could be found, it would lend support to concerns about too much or too little effort, though one would not be able to state definitively whether the contingent fee lawyer was underinvesting, the hourly fee lawyer was overinvesting, or some combination of the two was occurring.[4] Nonetheless, we would be much further along in our efforts to understand how fee arrangement affects lawyer effort. This is the analysis that v -esent below.

next two sections describe the data and methodology we h ised, followed by the results of our analysis of the rel ıip between fee arrangement and lawyer effort.

II. DATA

The data used in our analysis are drawn from court records and from hour-long interviews with the lawyers involved in the cases represented in the court records. Since we are interested in lawyer behavior, the lawyer rather than the case is the unit of analysis, and each case may be included more than once if interviews were conducted with more than one lawyer in that case.[5] The interviews were conducted about two years after the close of the case discussed. Even though the attorneys were

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[4] We should point out that the "services" provided by the contingent fee lawyer may differ in important ways from those of the hourly fee lawyer. First, the contingent fee lawyer is providing a "risk-bearing" service. That is, a part of the contingent fee can be seen as payment for assuming the risk that there will be no (or very low) recovery in the case; alternatively, one might argue that the risk is a part of the overhead that the lawyer must bear, and hence the effective hourly rate must include that element of overhead. Second, the contingent fee lawyer virtually never receives any compensation until the case is completed and thus can be said to provide a financing service; while it is not uncommon for hourly fee lawyers to defer billing until a case is concluded (we have no specific information on the frequency of this practice), it is likely that on the average, the financing aspect of the hourly fee lawyer's charge is significantly lower than for the contingent fee lawyer.

[5] There are a relatively small number of cases where more than one respondent is included for the same side of a case. Replicating the analyses "within" each side while randomly excluding the "extra" cases produced no change in our findings (see Trubek *et al.*, 1983b: II-103). When we contrast the two fee types, there is more of a problem since there are many cases with both a contingent fee plaintiff's lawyer and an hourly fee defendant's lawyer. However, we believe this is a nonproblem because the thrust of our findings is that the regression models for the two fee arrangements are different, and the inclusion of respondents from the same case should tend to pull the two equations together; thus we have, if anything, understated the differences in the regression coefficients.

asked to review their case files, the interview information may have been influenced to some degree by the recall process. The cases are drawn from twelve courts in five federal judicial districts: Eastern Wisconsin, Eastern Pennsylvania, Central California, New Mexico, and South Carolina. This analysis sample includes interviews with 371 hourly fee lawyers[6] and 267 contingent fee lawyers from cases randomly selected from the twelve state and federal courts.[7] Detailed information on the data collection can be found in Kritzer (1980-81), Kritzer *et al.* (1981), or Trubek *et al.* (1983b).

In order to analyze the data we had collected, we needed to deal with a number of "missing data" problems. First, we had to drop a substantial number of respondents (and thus cases) from the analysis. Naturally, we could not include cases where we lacked information on the number of hours the lawyer spent on the case (79 respondents). We also decided to drop cases where the respondents could, or did, not supply us with a money value for the amount at stake (our "stakes" variable—388 respondents).[8] The result of our decision to drop cases with "missing" stakes data is that the regression subsample used below differs from our overall lawyer sample.

A comparison of the included and excluded cases showed that on many parameters the regression subset is not significantly different from the overall sample. However, there are some differences worth noting: the set of cases that have monetary stakes information and are thus included in the regression sample (1) are weighted more heavily toward tort and contract cases and include fewer divorce, regulation, and public law cases; (2) contain more state cases; and (3) include a higher percentage of lawyers who represent plaintiffs and work on a contingent fee basis. Our conclusions are drawn only from this subset of cases and should be interpreted accordingly.[9]

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[6] A small number of lawyers in our sample (about 1%) were paid on some combination of percentage and time; they were treated as hourly fee lawyers for purposes of the analysis below (see Clermont and Currivan, 1978).

[7] Data were originally collected on 1649 cases; from these cases, we obtained hour-long, detailed interviews with 1382 lawyers (plus 430 very brief interviews covering additional cases in the sample; see Kritzer, 1980-81: 520, for more detail on why this was done).

[8] We felt that stakes were sufficiently important in explaining hours that an analysis which omitted this variable would be of little value (and we were unable to find a way to fill in missing data on stakes). As we discuss below, we needed the stakes variable to adjust for a methodological problem inherent in data on litigation.

[9] We did not have data on all the other variables for all the cases that remain in the regression subset. Since we could not eliminate all cases with missing data and retain an adequate sample, we estimated these missing items using means or medians. We omitted 26 respondents for whom we had

Although our analysis follows previous work in focusing on two types of fee arrangement—hourly fee and contingent fee lawyers—there are at least three "pure" types of fee arrangements for litigation-related work: the hourly fee, the contingent fee, and the flat, or fixed, fee, which is set in advance of the work.[10] By and large individuals, who are usually plaintiffs,[11] hire lawyers on a contingent fee basis (with the major exception of divorce cases); organizations usually hire lawyers on a straight hourly basis. Only a small proportion of cases—typically small, simple ones involving individuals or small organizations—involve flat fee arrangements. Reflecting their relative scarcity in practice, the incidence of flat fee cases in our sample was too small for separate analysis.

III. METHODOLOGY

The methodology used in our analysis first tests the assumption that if the type of fee arrangement had no effect on the amount of lawyer effort, we should find that, controlling for the other factors that influence lawyer effort, hourly fee and contingent fee lawyers spend the same amount of time on a case. The basis of that test, and of the rest of our analysis, is a general model of the time allocation process. The model on which the analysis is based includes five clusters of variables: (I) the process of interaction among the parties, (II) case characteristics, (III) participant characteristics, (IV) participant goals, and (V) processing and case management characteristics. These clusters include a total of 30 variables. The individual variables are described in capsule form in Table 1; more detail may be found in the Appendix.

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missing data items we did not feel that we could "fill in." To avoid artificially depressing the variance in our data, we added a normally distributed random number to each of the means or medians that replaced missing data. Missing data were filled in this way for 1% or fewer of our cases except for the lawyer specialization variable, where 4% of the respondents had missing data.

[10] A fourth arrangement, which few lawyers admit to using, might be described as "what the case is worth" (i.e., a subjective judgment regarding what the client is willing to pay). In addition to the "pure" types of fee arrangements, there are many combinations (e.g., hourly fee adjusted for results, which combines the hourly and the contingent arrangements). These may or may not be made explicit to the client.

[11] An early study of litigation suggested that individuals were usually defendants (Wanner, 1974; 1975). A more recent analysis indicates that if uncontested collections cases and divorce cases are omitted and if insurance companies are treated as the real defendant in tort cases where insurance is present, individuals are almost always plaintiffs (Grossman *et al.*, 1982).

Table 1. Summary Descriptions of the Variables in the Lawyer Effort Model

Cluster	Variable	Type	Description	means (and standard deviations) hourly	means (and standard deviations) contingent	expected direction[a]
PARTY INTERACTION (measures of pretrial activities by the other side)						
1	Pleadings	count[b]	number of pleading documents filed by other side	1.47 (1.13)	1.30 (1.29)	+
2	Motions	count	number of motions initiated by other side	0.83 (1.19)	0.86 (1.60)	+
3	Discovery	count	number of discovery events (depositions, motions, etc.) initiated by other side	2.14 (3.13)	2.18 (3.21)	+
4	Briefs	count	number of briefs filed by other side	0.70 (1.30)	0.62 (1.37)	+
CASE CHARACTERISTICS						
5	Stakes[c]	lawyer's estimate	lawyer's estimate of what her client should have been willing to accept or to do to settle the case	$11,449 ($7,334)	$14,390 ($6,587)	+
6	Complexity	lawyer's estimate	lawyer's subjective estimate of the complexity of the case (five-point scale)	2.39 (1.11)	2.53 (1.19)	+
7	Duration	count	number of days from filing to termination	422.84 (283.48)	418.97 (295.46)	+
PARTICIPANT CHARACTERISTICS						
8	Client Type	dummy	1 for individuals; 0 for organizations (as indicated by the court record)	0.29 (0.45)	0.34 (0.37)	−
LAWYER CHARACTERISTICS						
9	Specialization	factor score	indicator of degree to which the case fell within an area that the lawyer considered to be her specialty	0.08 (0.90)	0.06 (0.85)	+
10	Law School Performance	factor score	indicator of lawyer's performance based on rank in class and participation on law review	0.05 (0.69)	−0.03 (0.65)	−
11	General Experience	count	number of years lawyer has been practicing law	11.46 (8.93)	10.03 (9.06)	−
12	Litigation Experience	—	proportion of time devoted to litigation	68.31 (27.39)	66.26 (23.95)	−
13	Personal Capacity	factor score	measure based on items taken from Robinson and Shaver's (1969: 102-5) scale	0.04 (0.67)	−0.04 (0.65)	−
14	Craftsmanship	lawyer's estimate	lawyer's sense of professional craftsmanship (three-point scale)	2.51 (0.69)	2.50 (0.68)	+
PARTICIPANT GOALS						
Client Goals						
15	Get Most/Pay Least	dichotomy	client sought to get the most or pay the least (coded 1); client did not have this goal (coded 0)	0.44 (0.50)	0.32 (0.47)	+
16	Get Fair/Pay Fair	dichotomy	client sought to get a fair amount or pay a fair amount (coded 1); client did not have this goal (coded 0)	0.32 (0.47)	0.49 (0.50)	−

Table 1
(continued)

Cluster	Variable	Type	Description	means (and standard deviations) hourly	means (and standard deviations) contingent	expected direction[a]
Lawyer Goals (as measured by reasons lawyer took the case)						
17	Challenge	factor score	lawyer took case because it presented a challenge	−0.09 (0.85)	0.03 (0.88)	+
18	Public Service	factor score	lawyer took case because it provided an opportunity to serve the public or because of sympathy for the client	−0.15 (0.71)	0.06 (0.67)	0
19	Professional Visibility	factor score	the case would increase the lawyer's community standing or improve her position in the firm	0.03 (0.72)	0.05 (0.68)	+
20	Making Money	factor score	the case was taken because of the amount of money that could be earned	−0.08 (0.59)	0.25 (0.66)	−
21	Service to Regular Client	dichotomy	the lawyer took the case to provide service to a regular client	0.62 (0.48)	0.16 (0.36)	0
PROCESSING AND CASE MANAGEMENT						
22	Type of Court	dichotomy	federal court (1); state court (0)	0.56 (0.50)	0.45 (0.50)	0
23	Settlement Discussions	dichotomy	did occur (1); did not occur (0)	0.90 (0.30)	0.90 (0.30)	−
24	Trial	dichotomy	case did go to trial (1); case did not go to trial (0)	0.12 (0.32)	0.12 (0.32)	+
25	Pretrial Events SOP	factor score	use of standard operating procedures for pretrial activities such as pleadings, motions, and discovery	0.01 (0.99)	−0.64 (1.01)	−
26	Estimating Case Value SOP	factor score	use of standard operating procedures for estimating the value of the case	−0.02 (0.97)	−0.05 (1.02)	−
27	Plan for Motions	dichotomy	lawyer used a plan for motions (1); no plan used (0)	0.19 (0.40)	0.13 (0.34)	−
28	Plan for Settlement	dichotomy	lawyer used a plan for obtaining a settlement (1); no plan used (0)	0.70 (0.46)	0.68 (0.47)	−
29	Plan for Discovery	dichotomy	lawyer used a plan in conducting discovery (1); no plan used (0)	0.60 (0.49)	0.64 (0.48)	−
30	Client Control and Participation	factor score	client sought to exercise control over the lawyer's activity and to participate actively in decision-making regarding the case	0.20 (0.72)	−0.23 (0.71)	+ or −

[a] A "+" indicates that a positive relationship is expected; a "−" indicates a negative relationship; and a "0" indicates that the direction of the relationship is not hypothesized in advance.

[b] "Count" indicates that the variable was a simple count of some type of event or some other discrete entity (e.g., days—for duration).

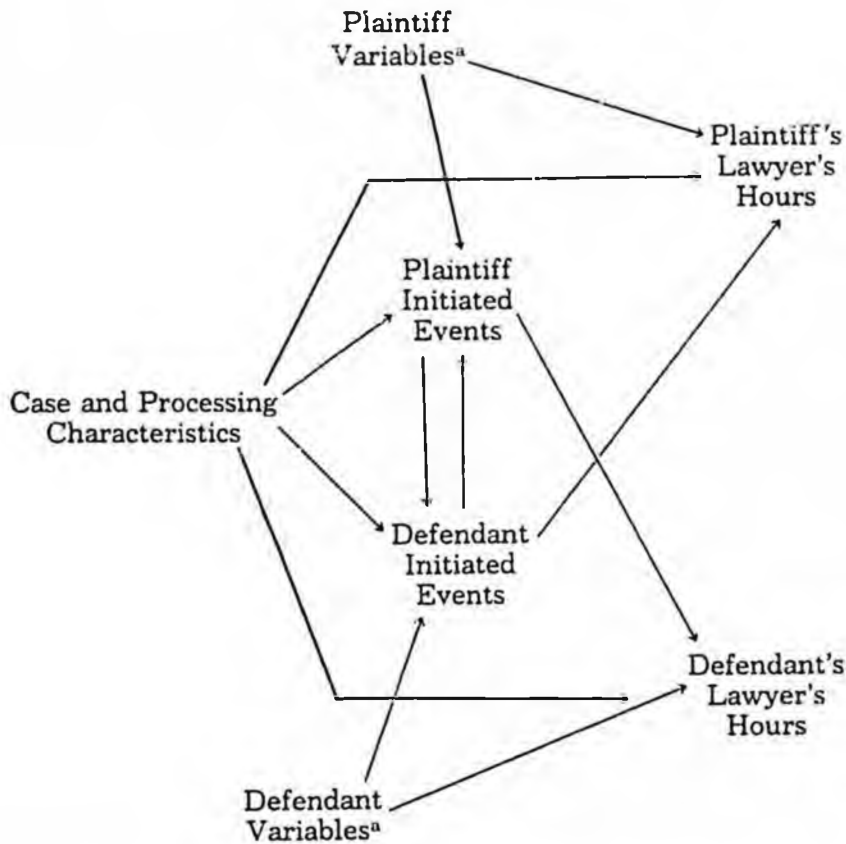
[c] In the actual analysis, stakes was adjusted for nonlinearity; the particular adjustment used was to take the square root of stakes.

Although common sense would suggest that the amount at *stake* in the case should be the most important determinant of the amount of time spent on the case by lawyers, we do not treat stakes as the *primary* determinant of the level of lawyer effort (although we do recognize its importance and include it as one of the case characteristics).[12] Lawyers often fail to spend

[12] At the start of our research, we did see stakes as the primary factor, with the other variables serving as modifiers of the basic relationship (Trubek, 1980-81). See Trubek *et al.* (1983b) or Kritzer *et al.* (1984) for a discussion of how this view came to be modified.

as much time on a case as the stakes may seem to warrant because the case settles before that effort has been expended. As we see it, therefore, stakes do not push the investment process along; rather they tend to place a cap on it.

Figure 1. Interaction Model of Lawyer Effort



[a] The "party" variables include nature of participants, participant goals, and case management indicators.

It is not the stakes but the action of side A that is the primary determinant of the action of side B, and vice versa. Figure 1 suggests an image of this action-reaction model. Each lawyer's effort is a function of (1) the other side's action, (2) case and processing characteristics, and (3) "party" variables (i.e., goals, characteristics, and management efforts). A full analysis of this model would seek to account for each side's level of lawyer effort, each side's "initiatives," and each side's

goals and management decisions. The notion of interaction built into this model is intuitively pleasing because it is consistent with dispute processing in an adversary process like the American civil justice system. Because our purpose is to explain the "end variable," effort, we need focus only on the linkages in the model leading directly to the hours lawyers put in.[13]

We tested our theoretical model by linear regression analysis.[14] This statistical technique allows us to measure the

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[13] The analysis of initiatives would be greatly complicated by the two-way linkage shown in Figure 1. It would also require a type of data set that is almost impossible to obtain (see Kritzer, 1980-81: 506, 520-21).

[14] Before applying linear regression, we checked our independent variables for curvilinear relationships with the dependent variable, hours worked. The only variable for which curvilinearity appeared to be a significant problem was stakes. A curvilinear form made intuitive sense because one would expect, for example, that the difference between the time taken by two cases, one with $2,000 at stake and the other with $10,000 at stake, would be greater than the difference in the time taken by two cases, one with $102,000 at stake and the other with $110,000 at stake. A number of transformations were examined to adjust for this curvilinearity. Using the square root of the "raw" stakes measures seemed to work best; thus, all the analyses reported below use the square root of stakes rather than the original value.

We also checked our data for multicollinearity, outliers, and heteroscedasticity and found all three. We examined all our predictor variables for possible multicollinearity (high intercorrelations) and found problems only for our original standard operating procedure indicators (which included separate indicators regarding SOPs for estimating case value, discovery, motions, and pleadings). The SOP variables used in the analysis, (25) pretrial events SOP and (26) estimating case value SOP, were factor scores created in order to alleviate this problem (we started with four SOP indicators).

To examine the impact of outliers (occasional "big cases" picked up by our random sampling procedure) on our results, we performed the regression analysis with and without the outliers in the data set. Outliers were defined as those cases requiring more than 500 hours of lawyer time, involving more than $250,000, taking more than 1500 days from filing to termination, or having more than 20 discovery events, 10 motions, or 10 briefs. For the hourly fee lawyers the inclusion or exclusion of the outliers had minimal impact on our results, but for the contingent fee lawyers the impact of outliers was clearly noticeable. For the sake of consistency, we omitted outliers for both hourly and contingent fee lawyers.

The last problem we had to deal with was heteroscedasticity, a violation of the assumption in regression analysis that the variance of the equation "error term" (i.e., the difference between the observed and predicted values of the dependent variable) be constant for all systematically identifiable subsets of observations. Heteroscedasticity tends to lower severely the power of significance tests. Common sense suggests that one should expect a greater range of predictive error for big cases than for small cases: this is consistent with the notion that stakes serve to "cap" the level of investment of time (and money) in a case. To adjust for the heteroscedasticity in our data, we applied an adjustment factor to each observation; this yielded a set of "corrected" regression equations. The specific adjustment used was to divide all of the variables for each case by the square root of stakes. For more detail on the rationale for the procedure, see Hilton (1976: 95-100). For most analytic purposes, the "corrected" results were employed, and it is these results that we generally report below.

independent effect of each explanatory variable holding the effect of the other variables constant. The dependent variable is lawyer's hours. The independent variables are the variables in the clusters specified in our model. It is important to note that the number of lawyer hours we report in our analysis below represents estimates based on our statistical model. Since we could not obtain samples with identical cases (except for fee arrangement), we have "created" such cases statistically using linear regression.

It became clear almost from the start of our analysis that hourly fee lawyers behaved rather differently from contingent fee lawyers—so differently, as reflected in the coefficients of many of our dependent variables, that it is statistically inappropriate to include fee arrangement as just another variable in our regression equations.[15] We thus estimated two separate equations—one for hourly fee lawyers and the other for contingent fee lawyers. The amount of variance explained by the models was very similar for the two sets of lawyers. As shown in Table 2, R^2 is .494 for hourly lawyers and .525 for contingent fee lawyers.[16] Also, three clusters of variables have important influences on hours for each group; two of these are the same for both types of lawyers (party interaction and participant goals). However, the third important variable type differs for the two (processing decisions for hourly fee lawyers and case characteristics for contingent fee lawyers). The

[15] If it were not for the fact that the coefficient sets for hourly and contingent fee lawyers differed significantly, we could have tested the hypothesis that one group of lawyers spent significantly more time than the other by simply adding a dummy variable for fee arrangement to the equation. In the course of the analysis, we did this just to see what would happen; the t-statistics for the corrected and uncorrected forms (606 degrees of freedom) were 0.35 and 0.41, respectively, neither of which indicates statistical significance.

Given that the coefficients are in fact different for the two subgroups of lawyers, the effort gap will vary depending upon the specific values the other predictor variables take on. Consequently, one cannot speak of a single value for the effort gap, but must talk about the effort gap for a given situation. If there were only one predictor variable, say stakes, then one could talk about ranges of stakes where the gap does exist and about ranges where there is no gap. See Rogosa (1980) or Friedrich (1982) for more detail on the issues involved. Suffice it to say that there is no way to vary systematically the 30 variables we use; consequently, we will focus on a more limited set of situations.

[16] Since our goal in assessing the overall fit is to look at the "best" fit we can get, we have used the R^2 from the uncorrected (ordinary least squares) regression estimates. Because of the mathematics of the correction for heteroscedasticity, the uncorrected estimate of the equation will always yield a better fit for the equation than will the "corrected" (weighted least squares) regression estimates (see Hilton, 1976: 100). On the other hand, the corrected estimates yield the best information regarding the significance of the contribution of individual variables or groups of variables.

relative importance of the influence of the different explanatory variables is also often substantially different. These differences can be seen in Table 3, though we will defer discussion of the specific differences until later.

Table 2. Summary of Regression Results for Hourly and Contingent Fee Lawyers

Main Group Subgroup	df	Hourly[a]				Contingent[b]			
		F	p	R^2 change	R^2 change per df	F	p	R^2 change	R^2 change per df
I. PARTY INTERACTION (A)	4	11.01	0001	05506	.015	4.43	.0018	05530	014
II. CASE CHARACTERISTICS (B)	3	7.37	0001	02679	.009	13.97	0001	.11602	039
III. NATURE OF PARTICIPANTS	7	2.48	0170	.02289	.005	1.05	3983	.02290	.003
C. Client Type	1	0.26	6123	.00034	.000	4.70	.0312	.01467	.015
D. Lawyer Characteristics	6	2.65	.0158	02098	.003	0.40	.8762	00756	.001
IV. PARTICIPANT GOALS	7	11.04	.0001	.10194	.015	2.67	.0111	.05843	.008
E. Client Goals	2	15.41	.0001	04063	.020	3.64	.0229	.02395	.012
F. Lawyer Goals	5	9.28	.0001	.06117	.012	2.15	.0606	.03352	.007
V. PROCESSING AND MANAGEMENT	9	6.52	0001	07748	.009	0.74	.6740	.02072	002
G. Processing Decisions	3	6.36	.0003	.02517	.008	1.09	.3561	.01016	.003
H. Case Management	6	7.85	.0001	06216	.010	0.71	6457	.01321	.002
R^2			.49362				.52535		

[a]N = 371
[b]N = 267

These differences mean that the cases in our samples for the two types of fee arrangements are not generally equivalent, making a comparison between the two groups, other things being equal, more difficult. We make our initial hourly fee/contingent fee comparison, therefore, using three separate estimates: we estimate (a) the time expended by both groups on the "average" contingent fee lawyer case (i.e., the difference between the hours spent by the two groups when each of the explanatory variables is set at its mean value for contingent fee lawyers); (b) the time spent by both groups on the average hourly fee lawyer case (estimated the same way); and (c) the time spent by both groups on the "average" case for the two groups of lawyers combined.

Before presenting the results of these procedures, we must discuss a final methodological complication. As we said earlier, contingent fee lawyers usually represent plaintiffs. Hourly fee lawyers are somewhat more evenly divided: in our sample 71 percent of the hourly fee lawyers represent defendants. This difference raises the question of whether our efforts to measure the effects of fee arrangement might reflect, at least in part, differences between how plaintiffs' and defendants' counsel approach cases. Since contingent fee defendants' counsel are

rare or nonexistent, we cannot carry out the analysis with strict controls for side. We can, however, compare three groups—contingent fee lawyers, hourly fee plaintiffs' lawyers, and hourly fee defendants' lawyers—to try to sort out this question. If hourly fee plaintiffs' lawyers more closely resemble hourly fee defendants' lawyers than contingent fee lawyers, we can tentatively attribute the difference more to fee arrangement than to side.[17]

Table 3 presents, in addition to regression results for both sets of lawyers, the equivalent results for hourly fee lawyers broken down by side. Unfortunately, the implications of the breakdown are not clear. In part this reflects the small sample size for hourly fee plaintiffs and collinearity problems (i.e., correlations among the independent variables) that appear to exist *within* these two subgroups.[18] The results for hourly plaintiffs' lawyers appear to fall somewhere between those of hourly defendants' lawyers and contingent fee lawyers. For some variables, hourly plaintiffs' lawyers are closer to hourly defendants' lawyers while on others they are closer to contingent fee lawyers. Consequently, although our observed effects may reflect some influence of side, we can say with a high degree of confidence that there is a fee arrangement effect in addition to any effects of side.[19]

[17] One might at first glance be concerned that the results we have presented represent the peculiarities of personal injury litigation since common wisdom is that contingent fees and personal injury cases "go together." This is in fact true, but in a different way than is commonly believed. The table below shows tabulations for the number of respondents by area of law, fee arrangement, and side (for hourly fee lawyers).

	Torts only	Contract only	Both Tort and Contract	Neither Tort nor Contract
Contingent Fee	210	64	20	42
Hourly Fee Plaintiff	14	90	4	35
Hourly Fee Defendant	142	95	15	54

As the table shows, while most tort plaintiffs hire lawyers on a contingent fee basis, many cases not involving torts are handled by contingent fee lawyers as well (see also MacKinnon, 1964: 25-28). Thus, the results reported above for contingent fee lawyers do not simply reflect the peculiarities of personal injury litigation.

[18] The problem of multicollinearity accounts for some of the apparently bizarre results in Table 3 (e.g., the large negative coefficient of the trial variable for hourly plaintiffs' lawyers).

[19] This conclusion is reinforced by a global hypothesis test, also known as a Chow test (see note 26 below). The test showed that hourly fee plaintiffs' lawyers differed in a statistically significant way from both of the other two groups. The significance tests were done with both corrected and uncorrected data:

Table 3. Detailed Regression Results for Hourly and Contingent Fee Lawyers

	Contingent		All Hourly		Hourly Plaintiff		Hourly Defendant	
	b	std. error	b	std. error	b	std. error	b	std error
I. PARTY INTERACTION								
A. Party Interaction								
1. Pleadings	-2.004	1.684	-2.675	1.875	-4.274	2.782	-4.248	3.022
2. Motions	.145	1.744	-1.085	1.739	5.650	4.151	-.412	.027
3. Discovery	2.865***	0.891	2.731***	0.832	4.527**	1.787	4.225***	1.046
4. Briefs	4.119*	2.262	8.851***	1.912	4.205	4.589	7.590***	2.201
II. CASE CHARACTERISTICS								
B. Case Characteristics								
5. Stakes	.310***	0.048	.232***	0.051	.234**	.086	.203**	.062
6. Complexity	5.963***	1.798	3.780**	1.465	20.729***	4.222	1.777	1.612
7. Duration	.012*	.005	.013*	0.006	-.002	.018	.001	.007
III. NATURE OF PARTICIPANTS								
C. Client Type								
8. Individual/Organization	-9.440*	4.354	-1.949	3.843	-15.742*	8.134	-5.506	4.531
D. Lawyer Characteristics								
9. Specialization	2.455	2.143	1.872	1.794	-8.048	4.738	3.420	2.014
10. Law School Performance	2.710	2.733	3.442	2.118	-1.336	4.291	6.076**	2.578
11. General Experience	-.038	0.182	-.009	0.179	-.135	0.458	-.070	0.205
12. Litigation Experience	-.036	0.069	.037	0.062	.034	0.128	.068	0.073
13. Personal Capacity	1.144	2.354	-1.226	2.388	-10.770	7.238	1.950	2.694
14. Craftsmanship	-.052	2.170	7.026**	2.357	6.637	6.761	9.447***	2.702
IV. PARTICIPANT GOALS								
E. Client Goals								
15. Get Most/Pay Least	-9.931*	4.359	-18.352***	3.718	-22.539*	13.644	-21.165***	4.223
16. Get Fair/Pay Fair	0.983	3.551	-20.498***	4.259	-13.909*	7.855	-27.496***	5.665
F. Lawyer Goals								
17. Challenge	2.540	2.089	.909	1.898	0.176	5.983	3.659	2.124
18. Public Service	2.944	2.483	-11.017***	2.309	-3.252	4.993	-13.550**	2.805
19. Professional Visibility	0.620	2.578	6.165***	2.043	-5.463	6.087	8.180**	2.363
20. Make Money	3.165	2.480	1.165	2.043	10.020	6.916	0.741	3.022
21. Service to Regular Client	-13.238**	5.119	3.214	3.394	-14.267	9.423	11.037**	4.088
V. PROCESSING AND MANAGEMENT								
G. Processing Decisions								
22. State/Federal	0.341	4.161	14.116***	3.373	0.583	8.785	13.314***	4.005
23. Trial	-.055	6.705	4.637	5.714	-52.295**	21.483	2.372	5.971
24. Settlement Discussions	10.842	6.094	3.022	5.739	15.318	17.935	-1.371	6.895
H. Case Management								
25. Pretrial Events SOP	0.966	1.708	2.676*	1.505	-2.644	3.844	1.763	1.773
26. Estimating Case Value SOP	0.972	1.562	1.397	1.590	-4.251	3.746	.045	1.870
27. Plan for Motions	-11.389	6.725	11.109**	4.029	6.603	11.443	9.127**	4.429
28. Plan for Settlement	-3.467	3.755	-7.281*	3.671	-3.711	8.942	21.423***	3.910
29. Plan for Discovery	-1.179	3.466	15.921***	3.325	5.066	16.545	-9.131*	3.993
30. Client Control and Participation	1.750	2.404	-4.691*	2.192	2.936	4.916	-6.804**	2.519
CONSTANT	-3.335		-21.473		-36.993		-19.098	

*p<.05 **p<.01 ***p<.001

		corrected		uncorrected	
	df	F	p	F	p
Contingent versus (hourly plaintiff)	31/313	1.509	.0441	2.039	.0013
Hourly defendant versus (hourly plaintiff)	31/309	2.274	.0002	2.005	.0011

IV. RESULTS

Our estimates[20] of the number of hours an hourly fee lawyer and a contingent fee lawyer will spend on the three prototypical cases—the average hourly fee case, the average contingent fee case, and the overall average case—are shown in Table 4. As can be seen, the differences are not substantial. Nor is the direction of effect consistent. For the average contingent fee case, the contingent fee lawyer is expected to spend slightly more time than the hourly fee lawyer (51 versus 48 hours). For the average hourly fee case, the hourly fee lawyer is expected to spend substantially more time (51 versus 42 hours) than the contingent fee lawyer. The overall average is a reflection of the other two combined—the hourly lawyer spends somewhat more time, but not as much more as for the hourly fee average case (50 versus 46 hours).

Table 4. Predicted Number of Hours for the "Typical" Case

	Hourly Fee Lawyer	Contingent Fee Lawyer
"Average" Hourly Fee Case	50.6	42.1
"Average" Contingent Fee Case	47.9	50.7
Overall "Average" Case	49.5	45.7

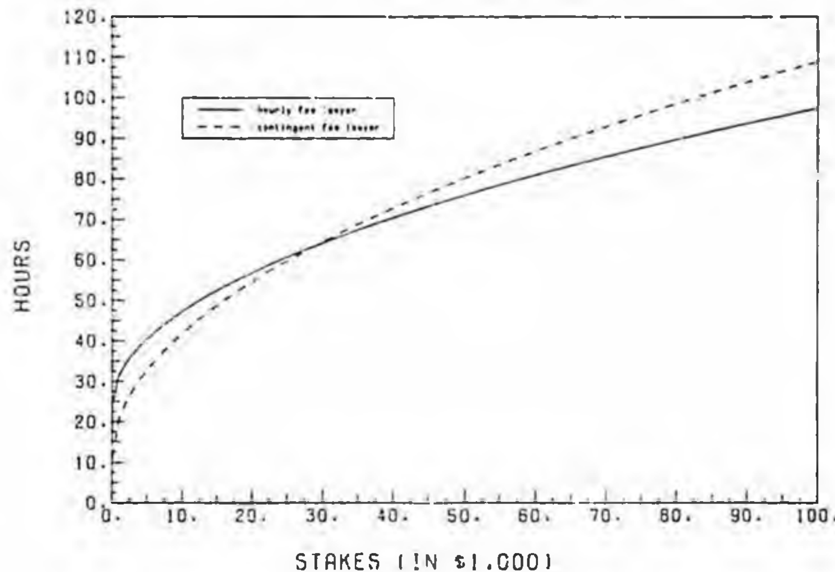
When we disaggregate the impact of fee arrangement by size of stakes (holding all other variables at their mean value for both types of fee arrangement taken together), the interesting pattern shown in Figure 2 appears.[21] The solid line represents our estimate of the average time investment of hourly fee lawyers, controlling for the other variables in our model, and the broken line represents the estimate for

[20] In making our estimates, we have retained our original model rather than discarding the nonsignificant variables in Table 3. We have chosen to do this for theoretical reasons; namely, we believe that our basic model is correct on theoretical grounds, and we prefer not to risk the problems created by misspecification arising from the omission of variables, particularly since there is less danger from misspecification by inclusion than from misspecification by exclusion (see Deegan, 1974; 1976).

[21] We have selected stakes as the case characteristic to vary because it seemed to us that in most discussions of litigation, the first question that is typically asked is, "what's at stake?" Moreover, most discussions relating to "access to justice" raise the question of "modest" cases (typically under $10,000), and the problem of providing legal services and other dispute processing services in such cases (see, for example, Johnson *et al.*, 1978).

contingent fee lawyers.[22] What Figure 2 suggests is that contingent fee lawyers put in less effort for small cases than do hourly fee lawyers, but they put in *more* time for "big" cases. Such behavior would be economically rational. The contingent fee lawyer's potential return is closely related to the potential recovery (i.e., stakes), and if a greater effort with a "big" case will substantially increase the recovery, lawyers would be behaving rationally in expending more effort.

Figure 2. Expected Lawyer Time by Stakes



Before we can draw any conclusions with confidence, we must see whether the differences shown in the figure are statistically significant.[23] To do this we relied upon the

[22] The reason that the lines curve even though the regression equation is linear is that the predictive equation uses the square root of stakes, whereas Figure 2 uses the untransformed version of stakes.

[23] There is another problem with this interpretation as well. While it is rational for the contingent fee lawyer to spend more time on a big case than she would spend on a small case, it is not altogether clear why she would spend more time than the hourly fee lawyer. It may be that the contingent fee lawyer spends more time on big cases because she does not have to justify her time expenditure to the client and can behave in a risk-neutral fashion while the hourly fee lawyer has clients who are more likely to be risk-averse and thus unwilling to risk having to pay for all the time that the lawyer might reasonably spend on the case. The problem with this explanation is that the hourly fee lawyer is very likely to be representing an organization, which, as a "repeat player" (see Galanter, 1974) in the litigation game, should behave in a risk-neutral fashion. Also, one could argue that it is the contingent fee lawyer who should be risk-averse, since the lawyer stands to receive no compensation if she loses the case (though if she has no other cases to work on, the value of the lost time is minimal).

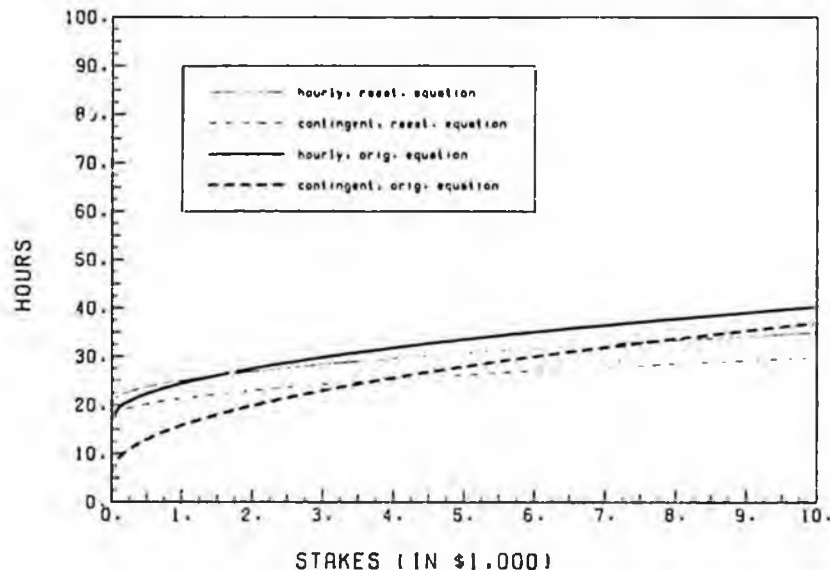
sampling errors of the estimated means for lawyer hours for $1,000 increments in stakes (from zero to $100,000). These sampling errors are a function of the deviation of the particular stakes value from the mean of stakes; the sampling errors are smallest near the mean and increase rapidly as the distance from the mean increases. Let us denote the estimated mean of lawyer hours for fee lawyers as $\hat{\mu}_H$ and its sampling errors as $\hat{\sigma}_H$; the corresponding estimates for contingent fee lawyers are $\hat{\mu}_C$ and $\hat{\sigma}_C$. The test statistic for a given value of stakes is a t-statistic:

$$t = \frac{\hat{\mu}_H - \hat{\mu}_C}{\sqrt{\hat{\sigma}_H^2 + \hat{\sigma}_C^2}}$$

A separate test statistic is computed for each value of stakes.

Using the test, we obtain significant differences only for stakes of $6,000 or less. At the last point of statistical significance, $6,000, the gap in lawyer effort is about 7 hours—32 hours for hourly fee lawyers versus 25 hours for contingent fee lawyers. To look more closely at the stakes range for which fee arrangement does have a significant effect on overall hours, we recomputed the value for the two curves using the mean values for cases $10,000 and under. The revised curves, shown as the heavy lines (solid for hourly, broken for percentage) in Figure 3, are essentially the same as for the equivalent portion

Figure 3. Expected Lawyer Time by Stakes for Small Cases



of Figure 2, since the shape of the curve is determined by the coefficient for stakes. We then reestimated the regression equations using $10,000 and under cases only, and once again recomputed the curves (shown as the lighter pair of lines in Figure 3). This pair of lines differs from the other pair in two regards. First, they are virtually parallel to one another (i.e., the gap between the lines changes little as stakes move from zero to $10,000). This is because there is little difference in the stakes coefficients in the $10,000 and under regressions. Second, they rise at a much slower pace. Elsewhere we have reported that we found little or no relationship between effort and stakes when the analysis is limited to cases involving $10,000 or less (Kritzer *et al.*, 1984), and this is what is showing up here. Nonetheless, for both pairs of curves, the line for contingent fee lawyers falls below that for hourly fee lawyers, which is consistent with our finding that there is an "effort gap" for cases in the lower stakes range.

Although we have found a statistically significant difference in effort only for cases with relatively modest amounts, this finding is not unimportant. First, as we have reported elsewhere (Trubek *et al.*, 1983a), the median case in state courts (based on cases terminated in 1978), where well over 95 percent of civil cases are filed (cf. Flango *et al.*, 1983: 5), involves about $4,500 (even after eliminating "small claim" type cases involving less than $1,000). Thus, our analysis indicates that for something over 50 percent of the civil suits for money damages filed in the United States, lawyers working on a contingent fee basis would put in significantly less time than would lawyers working on an hourly fee basis.[24] Second, as we noted in our discussion of the significance test we employed, the power of the test is greatest in the range in the vicinity of the mean, and thus the lack of significant differences for larger cases may be an artifact of the reduced power of the test.

The absolute size of the gap is not great—7 hours. In relative terms, however, it is sizable—nearly 22 percent of what hourly lawyers spend on a typical $6,000 case. Should we be concerned about this difference? The answer depends on whether the time differential makes a difference in case

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[24] Some lawyer activity produces costs other than fees; for instance, medical examinations unconnected to treatment or the stenographic and travel costs of depositions. If such costs were generally relevant in small cases, which we doubt, plaintiffs might secure larger net recoveries with lawyers who did less for them if the difference in effort avoided such costs.

outcome.[25]

Whether or not the "effort gap" is important in terms of outcome, it is clear that fee arrangement has an important impact on lawyer behavior. The kinds of variables influencing lawyers differ depending on the fee arrangement, even though the overall ability of our model of lawyer effort to account for that effort was about the same for hourly fee and contingent fee lawyers.[26] These differences were summarized in Table 2 (which shows the relative influence of the variable clusters). Let us now turn to a more detailed examination of the results shown in Table 3 (looking at the coefficients for contingent fee lawyers and the overall coefficients for hourly fee lawyers).

Both groups of lawyers are influenced by party interaction variables and by participant goals. However, there are major differences *within* the clusters (i.e., which individual variables are important and how important they are). For example, the variable in the party interaction cluster that has the biggest impact for hourly fee lawyers, the number of briefs filed by the other side, also has the largest impact for contingent fee lawyers, but the impact is only half as large in the latter case. In the case characteristics group, all the variables are significant for both groups, but the impact of both stakes and complexity is larger for contingent fee lawyers. Few of the nature of participants variables have an influence for either group of lawyers, but the ones that do are different. Client type is significant for contingent fee lawyers while craftsmanship is significant for hourly fee lawyers. Participant goals are much more important for hourly fee lawyers, both in terms of the number of statistically significant coefficients and in terms of the magnitude of the effects of the individual variables. For example, both the indicators of client goals are significant for hourly fee lawyers, whereas only one is significant for contingent fee lawyers (and that one is about half the size of the corresponding coefficient for hourly fee

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[25] We have conducted some analyses of case outcomes (see Kritzer *et al.*, 1985) and have been unable to detect any relationship between outcomes and effort for contingent fee lawyers. This analysis has not explored, to date, the influence of relative effort (i.e., the impact of the opposing party's lawyer's effort).

[26] Even though the differences are quite clear, it is worthwhile to test formally the hypothesis that the set of coefficients for hourly fee lawyers differs from the set for contingent fee lawyers. This was done using the method described by Specht and Warren (1976), which is also known as the Chow test. The test was done for both the corrected and uncorrected form of the equation. Both tests produced highly significant F statistics (30 and 576 degrees of freedom), 2.118 for the corrected form ($p < .001$) and 1.378 for the uncorrected form ($p < .01$).

lawyers). None of the processing and management variables are significant for contingent fee lawyers whereas most are significant for hourly fee lawyers; furthermore, the values of the coefficients differ sharply for the two groups.[27] The one variable that was expected to have different effects for the two groups of lawyers, client control, has the expected effect for hourly fee lawyers, but has no significant influence (though the sign is in the predicted direction) for contingent fee lawyers.[28]

The time allocation of hourly fee and contingent fee lawyers is dependent on different factors. Contingent fee lawyers appear to be highly sensitive to the potential productivity of their time and are less affected by craft-oriented factors. This effect can be seen in two variables: craftsmanship and response to opposing party's briefs. The contingent fee lawyer does spend time in response to the opposing side's briefs, but that response involves half as much time per brief as the response of hourly fee lawyers.[29] While the hourly fee lawyer is strongly influenced by commitment to craftsmanship, the contingent fee lawyer is not. On the other hand, the level of effort of contingent fee lawyers goes up at a faster rate as the level of stakes increases than that of hourly fee lawyers. In other words, the contingent fee lawyer appears sensitive to the potential return to be achieved from a case, which is closely related to the stakes. The hourly fee lawyer's return from a case is not as tied to stakes, and other types of considerations (e.g., the client's goals, the nature of the forum, etc.) have a greater influence.

Before turning to our conclusions, we should briefly explore the *side* versus *fee arrangement* question as reflected in the results shown in Table 3. As we noted previously, the effect of some variables is dissimilar for hourly fee defendants' and plaintiffs' lawyers while for other variables it is the contingent and hourly plaintiffs' lawyers who have dissimilar

[27] We should note that the difference in significance cannot be attributed to the smaller sample size for contingent fee lawyers. With one exception, even if the contingent fee lawyer sample were as large as the hourly fee sample (and everything else were unchanged), the coefficients would not differ significantly from zero; the one exception is *plan for motions*, and there the sign of the coefficient is different.

[28] One variable that we have not considered in this analysis is area of law; one might expect that defense lawyers in personal injury cases would differ from other hourly fee lawyers. Where we included area of law as a variable, we found that it exerted no significant influence over and above the effects represented by the other variables in the model (Kritzer *et al.*, 1984).

[29] We should note, however, that this might be a "side" effect; as shown in Table 3, the contingent fee coefficient is virtually identical in magnitude to that for the hourly plaintiff, though the latter is not statistically significant.

coefficients. To be more specific, we find substantial differences based on side for court (state versus federal), plan for settlement, client control and participation, and briefs; we find substantial differences based on fee arrangement for discovery events, stakes, and client goals (get most/pay least and get fair/pay fair). For this latter set, the differences are consistent with what the arguments about fee arrangements would lead one to expect: contingent fee lawyers are more sensitive to stakes (which determine their expected return), put in less time on discovery (i.e., try to reduce their time), and are less concerned with their clients' goals. At the same time, the side-based dissimilarities tend to muddy the picture: e.g., where we had strong theoretical reasons to expect contingent fee lawyers and hourly fee lawyers to be influenced differently by client control and participation, the differences we find seem to be side-related; although we found that contingent fee lawyers put in less time than hourly fee lawyers responding to discovery, when it comes to briefs, the differences that we seem to find are between defendants' lawyers and plaintiffs' lawyers (irrespective of fee arrangement). Despite this "haziness," Table 3 shows some clear differences between hourly and contingent fee lawyers, and those differences make theoretical sense.

V. CONCLUSIONS

Simple hypotheses about the relationship between fee arrangements and the way lawyers handle civil cases are misleading, at best. Where such models predict that, other things being equal, contingent fee lawyers would always spend less time on a case than hourly fee lawyers, our data show that this effect occurs only in cases involving less than $10,000; above that level (if anything) the opposite effect appears to be occurring. Moreover, where simple models suggest that fee arrangements affect lawyer behavior directly, we have found that the effects, when they exist, are more indirect and work through other variables, which themselves must be taken into account before one can understand what difference fee arrangements will make in any particular case.

Second, our analysis suggests that even if contingent fee lawyers and hourly fee lawyers spend similar amounts of time on cases, the factors that affect time allocation differ. Thus, contingent fee lawyers seem to be more sensitive to the productivity of their time and are less influenced by purely craft-oriented considerations. As the amount of money at stake

in a case goes up, the contingent fee lawyer seems to be willing to invest relatively more time in cases.

More than anything else, our study points to the need for additional conceptual and empirical work on fee arrangements before anything definitive can be said about the policy issues that are typically addressed in the literature. We have pointed out that the assumptions underlying some of the criticisms of the contingent fee are questionable. Even if contingent fee lawyers do spend less time on cases than would hourly fee lawyers, the client is still benefited by a low cost, low risk opportunity to pursue a claim which would otherwise be unavailable. When one finds, as we did, that the alleged effort gap may not always exist, there is further reason to question the policy conclusions that have been drawn so far.[30]

This rationale does not lead to an unqualified defense of the contingent fee against the criticisms that have been leveled at it. We do find an effort gap for many of the cases brought in civil courts. But we do not know whether this gap affects case outcomes, nor do we know whether any lesser outcomes can be justified by offsetting advantages of the contingent fee to the client. Thus, while the study clarifies some empirical and policy issues in the debate over fee arrangements, it certainly does not settle them.

APPENDIX: VARIABLE MEASUREMENT

The specific indicators for each of the variables that our model suggests would be important in accounting for lawyer effort and their construction have previously been reported in detail (see Kritzer *et al.*, 1984). Here we simply summarize the indicators used for each of the clusters.

The variable to be explained is the number of hours that the lawyer(s) reported having worked on the case; if more than one lawyer within a firm had worked on a case, we combined the time for all of the lawyers to arrive at a single figure.

The independent variables were grouped into five separate clusters. The first cluster of explanatory variables was designed to measure *party interaction*. As indicators of interaction, we used counts of each of four types of court events that were initiated by the *other* side; these indicators were chosen because a principal vehicle of the action-reaction process is the formal initiation of activities such as discovery and motions (both procedural and substantive). Our

[30] Another policy question concerns the propriety of the fees earned by contingent fee lawyers in "big" cases (see Grady, 1976). Our analysis does not speak directly to that question.

assumption was that each event required a response that would result in the expenditure of lawyer time. Four separate measures were created by counting four distinct types of events: *pleadings* (1),[31] *nondiscovery motions* (2), *discovery events* including depositions, interrogatories, discovery motions, and the like (3), and *briefs* (4).

The second cluster of explanatory variables measures *case characteristics*. These include measures of the amount of money at stake, the complexity of the case, and the length of time from the date of filing to the date of termination (through judgment or dismissal by whatever means and/or for whatever reason). We have already noted the reasons why we expected *stakes* (5) to be an important determinant of the time invested. The implications of *complexity* (6) also appear intuitively obvious: cases vary in the ease with which questions of law may be answered and proof made. The more complex the law involved, or the more difficult the problems of proof, the more time it should take to conduct the litigation. Our measure of complexity was based on lawyer responses to a question in which they were asked to rate the complexity of the case on a five-point scale. Finally, we expected that the length of time a case took from the filing of the complaint to the termination of the suit would have an independent effect on the number of hours lawyers put in. Cases that stretch over long periods of time may require a lawyer periodically to refresh her memory and may also lead her to "find" things to do. We measured *duration* (7) as the number of days that elapsed from the filing of the case to its termination.

Our third cluster of independent variables deals with the *nature of the participants* (i.e., the lawyers and their clients). We classified clients—*client type* (8)—as individuals or organizations because the literature suggests (Galanter, 1974) that organizations will devote more resources to litigation than individuals. This may, at least in part, reflect the ability of organizations to subsidize legal fees by deducting them as a business expense from taxable income, which is not ordinarily possible for individual litigants.

With respect to lawyers, our information was more extensive. We created six separate indicators designed to measure variation in lawyer characteristics. *Specialization* (9) measures whether the case in our sample fell within the lawyer's specialty or not. *Law school performance* (10) is the lawyer's self-report performance as a law student (i.e., rank in class and participation on the law review). Amount of *general experience* (11) is the number of years the lawyer had been practicing law. *Litigation experience* (12) is the proportion of the lawyer's time devoted to litigation. *Personal capacity* (13) is a measure of the lawyer's feelings of efficacy based on a standard measure. Lastly, *craftsmanship* (14) is the likelihood (self-reported) of spending extra time to make marginal improvements on legal documents; the more likely this was, the higher the "craftsmanship" score. We expected the first five lawyer characteristic variables, which measure ability and self-confidence, to be inversely related to the amount of time lawyers spent on cases. More experienced,

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[31] The numbers and letters in parentheses are variable numbers and subset flags that we use to index the tables.

specialized, and confident lawyers should not have to spend as much time on cases as attorneys who were newer to the field of law, the courtroom, or to practice in general. The craftsmanship variable was expected to work the other way. One would expect lawyers who are more oriented toward "craftsmanship" to spend more time on their cases, other things equal.

Our fourth cluster of independent variables relates to the *participants' goals*; these we measured for both lawyers and clients using data from the lawyers. We asked lawyers what they thought their *clients' goals* were in the case. The "goals" variable, in a sense, modifies the "stakes" variable. We expected the lawyer whose clients wanted to get the most (or pay the least) to put in more time on a case than the lawyer in an otherwise identical case whose client only wanted "fairness." We assumed that those clients (about 24% of our respondents' clients) who mentioned neither "*get most/pay least*" (15) nor "*get fair/pay fair*" (16) but did mention something else (in response to the open-ended question that we had asked) were primarily concerned with goals other than money.

Since lawyers may have their own motives, which might affect the amount of time they spend on cases, we also asked our respondents why they had taken the case in question. From their answers, we constructed five *lawyer goal* variables designed to measure the predominance of different factors in the lawyer's decision to take the case. These are:

> *challenge* (17)—did the case present a challenge; was it intellectually interesting?
>
> *public service* (18)—did it provide an opportunity for service to the public; was it taken because of sympathy for the client?
>
> *professional visibility* (19)—would the case increase the attorney's community standing, improve her position in the firm, create publicity for the firm?
>
> *making money* (20)—was the case taken primarily for the amount of money the lawyer would earn?
>
> *service to regular client* (21)—did the lawyer take the case simply to service a regular client?

We felt that variations in these goals were likely to affect hours worked, but we did not have strong expectations concerning the nature of some of the other goals. For example, we thought that the professional visibility and challenge goals might lead to more hours than the making money goal, but we had no *a priori* expectations about the direction of the "public service" variable's effect.

The final cluster of variables we constructed related to the processing and management of the case. During a case a number of key *processing decisions* are made which might affect lawyer effort. The decision whether to file in *state or federal* (22) court, assuming a choice exists, can have an effect because different courts may have different rules and norms that affect the amount of effort required to process a case. Decisions to engage in *settlement discussions* (23) and to take a case to *trial* (24)[32] may also have an impact on lawyer effort.

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[32] The trial variable is taken from the court record and indicates whether a trial was started, even if the case settled during trial.

We expected lawyers to vary in the *case management* techniques they used and that these differences might affect the hours they put in. We used three indicators: standard operating procedures (SOPs), plans, and client control. We thought that the lawyers who developed standard operating procedures (e.g., the use of preprinted forms, computer programs, and the like) for *estimating case value* (26) and for *pretrial events* (25) would be able to reduce the number of hours spent on a case, other things being equal. Explicit planning should also increase lawyer efficiency and thus decrease time spent: *plans for motions* (27), *plans for settlement* (28), and *plans for discovery* (29) indicate whether or not the lawyer reported planning in advance for the activities in question.

We thought *client control and participation* (30) would influence hours spent, but that the effect would differ for hourly fee lawyers and contingent fee lawyers. Following Johnson (1980-81), we thought that hourly fee clients would most often want to reduce the hours spent by their lawyers and contingent fee clients would try to increase the time spent by their lawyers. For these reasons we expected that a high level of client control for hourly fee lawyers would reduce the number of hours those lawyers worked on a case, other things equal. In contrast, we expected that for contingent fee lawyers high client control would lead to an increase in the number of hours the lawyer would work on the case (see Rosenthal, 1974). We measured the client control variable using the lawyers' descriptions of (a) reporting procedures to the client and (b) the client's participation in the key decisions in the case.

Our complete model includes the dependent variable "hours" and the 30 independent variables that we thought might explain variation in hours expended. In developing our model, we had to rely on "empirical feel" as well as on existing theory since the available theory was incomplete and largely untested. Table 1 sets forth all the variables described above, including measurement method, summary statistics, and the expected direction of the relationship (0 designates variables for which we had no expectation of the direction of the possible effects).

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ABOUT THE AUTHORS

WILLIAM L.F. FELSTINER is Senior Behavioral Scientist at the Institute for Civil Justice, Rand Corporation, Santa Monica, California.

HERBERT M. KRITZER is Professor of Political Science at the University of Wisconsin-Madison. His major research is civil justice, and in recent years he has authored or coauthored articles in *American Bar Foundation Research Journal*, *UCLA Law Review*, *Law & Society Review*, *Journal of Politics*, *Judicature*, *Justice System Journal*, *American Behavioral Scientist*, *Policy Studies Journal*, and *Law and Contemporary Problems*. He is currently working on an analysis of the negotiation process in ordinary civil litigation.

AUSTIN SARAT is Professor of Political Science at Amherst College and for 1985-86 will be a Visiting Fellow at the Centre for Socio-legal Studies at Oxford University. He has published articles on the emergence and transformation of disputes, access to justice, and the costs of civil litigation. He is currently studying lawyer/client interaction, the transmission of legal ideology, and the generation and processing of products liability and mass injury litigation.

DAVID M. TRUBEK is Voss-Bascom Professor and Director of the Institute for Legal Studies at the University of Wisconsin-Madison. He served as the Director of the Civil Litigation Research Project, and has published on disputes processing, social theory and law, public interest law and public advocacy, and third world legal studies.

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Punitive Damages and the Civil Justice System

The Case for Reform and a Plan of Action

National Association of Independent Insurers

Punitive Damages and the Civil Justice System

The Case for Reform and a Plan of Action

National Association of Independent Insurers

The National Association of Independent Insurers, founded in 1945, is a non-profit trade association of 500 property-casualty insurers, comprising companies of every size and type. Its members write approximately 40 per cent of the auto insurance in the U.S., a quarter of the homeowners coverage, and lesser portions of other property-casualty lines.

Lowell R. Beck, President

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I. Introduction

There is growing consensus that we are in need of substantial civil justice reform in the United States, and rightly so. We are presently experiencing unprecedented growth in the number of lawsuits and their attendant costs. In 1982 alone, the federal courts faced 26,000 more civil cases than in the previous year, a 14 per cent increase. The explosion of civil cases and the consequent docket backlog have resulted in substantial costs to taxpayers just to process these suits. The Institute for Civil Justice (ICJ), a nonprofit research group dedicated to analyses of various problems in the civil justice system, estimated that the cost to taxpayers to fund cases in 1980 exceeded $380,000,000. The backlog reflects fundamental problems in our civil justice process. The system simply is not working well. Cases are taking too long to reach resolution, at a tremendous cost to the parties and, ultimately, to society. The majority of the U.S. citizenry is being turned off by what it perceives as a litigation system perpetuated by and for the benefit of its primary participants, i.e., lawyers and a litigious minority of plaintiffs.

The civil backlog has been accompanied and indeed may be caused by major problems within our personal injury law. It is these defects in the civil justice system which command our attention. The liberalization of product liability law, abuse of the contingent fee system, the development of bad faith litigation, the spreading of pre-judgment interest statutes, and the crisis in medical malpractice have all combined to bring turmoil to our civil justice system. In many respects we have lost our focus on the fundamental purposes of the civil litigation structure: justice, fairness, and equitable compensation.

Perhaps nowhere is the need for tort reform greater than in the law of punitive damages. Punitive or exemplary damages are those damages which may be recovered in addition to a compensatory award where the defendants' conduct was willful or wanton. The number and amount of punitive damages awards have reached mind-boggling proportions. Seven and eight-figure awards, which were unheard of in the not too distant past, have become relatively common. The number and size of punitive awards in Cook County, Illinois doubled from the late 1970s to the early 1980s. As a result, the total amount awarded to plaintiffs increased 400 per cent. The surge in punitive verdicts has been documented and criticized in a plethora of commentaries.

The outbreak of punitive awards and its direct and indirect effects on society may be attributed to severe inequities within the law of punitive damages. Standards of conduct warranting the assessment of punitive verdicts have been dramatically liberalized. Those standards also vary considerably from state to state, creating uncertainty as to obligations and liabilities. Many courts have discarded the once prevalent prerequisite of a compensatory award and the requirement that exemplary damages bear a reasonable relation to the compensatory award. The vagueness and diversity within and among the standards for punitive conduct exemplify the lack of coherent rationale for these damages in today's civil justice system. Due to the absence of a consistent rationale, punitive awards have continued to grow in number and size. Insufficient standards and the unbridled nature of the awards have caused an explosion in punitive assessments. Plaintiffs' lawyers seeking to boost their contingency fees emotionally exhort jurors to "punish" the corporate defendant. The punitive damage award is open-ended, and may be reversed or reduced on appeal only where contrary to the manifest weight of the evidence. The result: a windfall for the plaintiff and his attorney, a windfall for which we all must ultimately pay.

The crisis in punitive damages law has tremendous importance for all of us. The costs incurred by society through application of the doctrine far outweigh the minimal benefits achieved. The most common rationales offered for punitive damages are punishment and deterrence. By punishing the defendant and deterring him and others from similar action, society is supposed to benefit. But as the following analysis reveals, these purposes are no longer really served through the law of punitive damages as it is applied today. Huge verdicts against product manufacturers and their insurers mean that the public, the intended beneficiaries of the doctrine of punitive damages, pays the ultimate price through higher costs for consumer products, services and insurance premiums.

A brief analysis of various aspects of the punitive damages doctrine in the U.S. illustrates the compelling need for reform.

II. The Law of Punitive Damages in the U.S.

Historical development

Punitive damage awards had their origin in 18th century England. It was there that the courts began to recognize, in limited circumstances, the availability of damages in addition to compensatory awards. Three theories have been proffered for the genesis of these additional exemplary awards:

Courts reluctant to grant new trials due to excessive damages began to justify their affirmance based on the defendant's malice, or willful or wanton conduct.

Punitive damages evolved as a means to compensate a plaintiff for damages which were formally uncompensable under the law at that time.

Various gaps in the criminal law caused the need for the evolution of a form of punishment in civil cases.

Actually all three strands of thought combined to play an important role in the development of the doctrine in the United States. Under American jurisprudence, punishment and deterrence serve as the predominant purposes, though substantial conflict exists among the states as to the proper justification for punitive awards.

Modern Rationale and Application

Today punitive damages may be recovered, in addition to compensatory awards, in the vast majority of states. Only four states (Louisiana, Massachusetts, Nebraska and Washington) as a rule prohibit punitive damages. These states authorize exemplary awards only in a limited number of statutorily prescribed circumstances (e.g., wrongful death actions).

The forty-six states that allow punitive damages differ substantially in their application of the concept. It is generally conceded that punishment and deterrence are the purposes of exemplary damages, yet a survey of purposes proffered in each jurisdiction for punitive awards reveals that the rationales are far from uniform. Though punitive damages are not supposed to compensate, but to punish and deter, four jurisdictions have limited punitive damages and the circumstances warranting their assessment in such a manner that they have been interpreted as treating these damages as compensatory in nature.

1. The **Connecticut** Supreme Court has long adhered to the view that the purpose of punitive damages is neither punishment nor deterrence, rather they are designed to provide additional compensation for the plaintiff's injuries. Thus punitive awards "may not exceed the amount of the plaintiff's expenses of litigation, less taxable costs." *Collens v. New Cannan Water Company*, 234 A.2d 825 (Conn. 1967).

2. **Georgia** Code Ann. Section 103-2002 provides: "In every tort there may be aggravating circumstances either in the act or intention, and in that event the jury may give additional damages either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff." This section provides additional damages to compensate for wounded feelings or to deter, but **not** for both purposes. Georgia does not allow punitive damages in the traditional sense, but allows limited additional recovery, usually for "injured feelings." *Smith v. Miliken*, 276 S.E.2d 35 (Ga. 1981).

3. **Michigan** similarly provides additional exemplary damages "to compensate for the plaintiff's injured feelings." But the state has specifically prohibited the use of punitive damages for the purpose of punishing the defendant. *Jackovich v. Bureau Inc.*, 326 N.W.2d 458 (Mich. 1982).

4. **New Hampshire** still adheres to its traditional distaste for punitive damages. This state, like Michigan, provides additional compensation, not to punish or deter, but to increase compensatory damages "to compensate for the vexation and distress caused the plaintiff by the character of defendant's conduct." *Rahaim v. Psaras*, 448 A.2d 401 (N.H. 1982).

The diversity of purposes of punitive damages does not end with these four states. Disagreement

exists among the remaining forty-two punitive damage states as to whether punishment, deterrence or both rationales will support punitive awards. In Alaska, Georgia, Idaho, Maine, Oregon, Rhode Island and Utah, deterrence provides the sole basis for a punitive award. Delaware on the other hand authorizes punitives solely for the sake of punishment. The remaining jurisdictions espouse both rationales. Finally, note that in the "deterrence" jurisdictions, courts are further divided as to whether general or specific deterrence is the goal. In Arizona, Georgia, New Jersey and Rhode Island, controlling decisional authority lists deterrence as intended only for the defendant, while the remaining jurisdictions hold that general deterrence is the aim of punitive damages.

Standard of Conduct

Many of the problems with punitive damage awards stem from the uncertainty in each jurisdiction as to the conduct necessary for a punitive award. Note the vague standards permeating the various delineations of punitive damages among the several states:

Alabama: "malice, willfulness, or wanton and reckless disregard rights of others," *Ex Parte Smith*, 412 S.2d 1222 (Ala. 1982).

Alaska: "outrageous... acts done with malice or bad motives or a reckless indifference to the interests of another," *Stum, Ruger & Co., Inc. v. Day*, 594 P.2d 38 (Alas. 1979).

Arizona: "gross, wanton, malicious, and oppressive conduct...," *Salt River Valley v. Giglio*, 549 A.2d 162 (Ariz. 1976).

Arkansas: "malice,... willfulness, wantonness, or conscious indifference to consequences," *Satterfield v. Rebsamer Ford, Inc.*, 485 S.W.2d 192 (Ark. 1972).

California: "oppression, fraud or malice," Cal. Code Civ. pro. §3294.

Colorado: "fraud, malice or insult, or a wanton and reckless disregard," Colo. Rev. Stat. §13-21-102.

Connecticut: "reckless indifference... or intentional and wanton conduct," *Collens v. New Cannan Water Co.*, 234 A.2d 825 (Conn. 1967).

Delaware: "wrongful act...committed willfully and wantonly," *Malcolm v. Little*, 295 A.2d 711 (Del. Super. 1972).

Florida: "malice, moral turpitude, gross negligence to the rights of others, wantonness, oppression, outrageous aggravation or fraud," *Stinson v. Center*, 416 So.2d 1183 (Fla. Supp. 1982).

Georgia: "willful misconduct, malice, fraud, wantonness, or oppression," *General Refractories Co. v. Rogers*, 239 S.E.2d 795 (Ga. 1977).

Hawaii: "willful, malicious, wanton or aggravated wrongs... (or) reckless indifference," *Goo v. Continental Cas. Co.*, 473 P.2d 563 (Haw. 1970).

Idaho: "wanton, malicious, or gross and outrageous (acts)," *Gandall v. Ganz*, 537 P.2d 65 (Id. 1975).

Illinois: "fraud, actual malice, deliberate violence or oppression... gross negligence... or wanton disregard," *Kelsay v. Motorola*, 284 N.E.2d 353 (Ill. 1978).

Indiana: "fraud, malice, gross negligence or oppression," *Hibschman v. Batchelor*, 362 N.E.2d 845 (Ind. 1977).

Iowa: "malice,... (indifference) or feeling toward the person injured," *Meyer v. Nottger*, 241 N.W.2d 911 (Iowa 1976).

Kansas: "fraud, malice, gross negligence or oppression," *Newton v. Hornblower, Inc.*, 582 P.2d 1136 (Kan. 1978).

Kentucky: "wanton, reckless, malicious, or offensive (acts)," *Harrod v. Fraley*, 289 S.W.2d 203 (Ky. 1956).

Maine: "intentional, wanton, malicious, reckless, or grossly negligent (acts)," *Oliver v. Martin*, 460 A.2d 594 (Me. 1983).

Maryland: "fraud, malice, evil intent or oppression," *General Motors v. Piskor*, 352 A.2d 810 (Md. 1976)

Michigan: "malice, willful, or wanton misconduct, carelessness, or negligence," *Bailey v. Graves*, 309 N.W.2d 166 (Mich. 1981).

Minnesota: "willful indifference to the rights or safety of others," M.S.A. §549.20.

Mississippi: "willful and intentional wrong, or... gross negligence and reckless negligence," *Seals v. St. Regis paper Co.*, 236 So.2d 388 (Miss. 1970).

Missouri: "whether defendant did a wrongful act intentionally without just cause or excuse," *Musselman v. Anheuser-Busch*, 657 S.W.2d 282 (Mo. 1983).

Montana: "oppression, fraud, or malice, actual or presumed," Mont. Code Ann. §27-1-221.

Nevada: "oppression, fraud or malice, express or implied," Nev. Rev. Stats §42.010.

New Jersey: "actual malice... or wanton and willful disregard," *Sandler v. Lawn-A-Mat Co.*, 358 A.2d 805 (N.J. 1976).

New Mexico: "maliciously intentional, fraudulent, oppressive... reckless... or wanton (acts)," *Loucks v. National Back*, 418 P.2d 191 (New Mex. 1966).

New York: "malice, fraud, oppression, insult, wanton or reckless disregard," *Le Mistral, Inc. v. Columbia*, 402 N.Y.S. 2d 815 (1978)

North Carolina: "fraud, malice... reckless indifference... oppression, insult, rudeness, caprice, willfulness," *Newton v. Standard Fire Ins. Co.*, 229 S.E.2d 297 (1976).

North Dakota: "oppression, fraud, or malice, actual or presumed," N.D.C.C. §32-03-07.

Ohio: "intentional, reckless, wanton, willful and gross acts or... malice," *Rubeck v. Huffman*, 374 N.E.2d 411 (Ohio 1978).

Oklahoma: "oppression, fraud or malice, actual or presumed," 0.S.A. tit. 23 §9.

Oregon: "aggravated disregard of the rights of others," *Senn v. Bunick*, 594 P.2d 837 (Ore. 1979).

Pennsylvania: "malicious, wanton, reckless, willful, or oppressive conduct," *Franklin Music v. ABC*, 616 F.2d 528 (3rd Cir. 1979).

Rhode Island: "willfulness, recklessness or wickedness," *Shorman v. McDermott*, 329 A.2d 195 (R.I. 1974).

South Carolina: "malice, ill will, conscious indifference to the rights of others," *Tug v. Allstate Ins. Co.*, 251 S.E.2d 194 (S.C. 1979).

South Dakota: "oppression, fraud, or malice, actual or presumed," S.D.C.L. §321-3-2.

Tennessee: "fraud, malice, gross negligence or oppression," *Inland Container Corp. v. March*, 529 S.W.2d 43 (Tenn. 1975).

Texas: "wanton and malicious (act)," *Ogle v. Craig*, 464 S.W.2d 95 (Tex. 1971).

Utah: "malicious and willful conduct or knowing and reckless indifference," *Behrens v. Raleigh Hospital*, 675 P.2d 1179 (Utah 1983).

Vermont: "willful and wanton or fraudulent tort," *Shortle v. Central Vermont Public Service Corp.*, 399 A.2d 517 (Vt. 1974).

Virginia: "actual malice or. . . recklessness or negligence," *Jordan v. Sauve*, 247 S.E.2d 739 (Va. 1978).

West Virginia: "intentional wrong or malice, willfulness, or wanton disregard," *Addair v. Huffman*, 195 S.E.2d 739 (W.Va. 1973).

Wisconsin: "wanton, willful or reckless disregard," *Jeffers v. Nysse*, 297 N.W.2d 495 (Wis. 1980).

Wyoming: "aggravated disregard of another's rights," *Sears v. Summit Inc.*, 616 P.2d 765 (Wyo. 1980).

The diverse verbiage among the relevant standards is consistent only in that something more than simple negligence must be proved. Gross negligence will support a punitive award in most jurisdictions. Apart from these general guidelines, jurors are confronted with the broad and often ambiguous language ("moral turpitude, evil intent, caprice, malice") contained in the various statutory and common law definitions. At this point, the vague guidelines combine with emotional pleas from plaintiff's counsel and lead, in some cases, to runaway awards.

In most states the standard of conduct is delineated in controlling Supreme Court precedent. However, eight states have statutorily prescribed the requisite conduct for punitive awards. The statutes generally accord in that they allow punitives "where the defendant has been guilty of oppression, fraud, or malice, actual or presumed," (South Dak. Comp. Laws Section 21-3-2). The statutory definitions tend to be simpler, less cumbersome and more easily applied than their common law counterparts. Therefore, one positive reform in punitive damage law would entail the enactment of coherent statutory specifications in other states.

Guidelines for the Amount of Awards

The Demise of the Reasonable Relation Rule

Though juries receive only very broad guidelines as to punitive conduct, they are given even less guidance in determining the amount of the exemplary award. The problem arises from the difficulty in assessing with accuracy the amount necessary to punish and deter a particular defendant. One previous guideline for punitive verdicts was the requirement that they bear a reasonable relation to the compensatory damages awarded. A majority of states, however, have now rejected this once prevalent rule. Opponents of the reasonable relation rule argue that a large verdict to punish and deter should be available even though actual damages may be relatively insignificant. The reasonable relation rule, however, does serve as one check on outrageous and unwarranted verdicts. The answer to the problem in assessing punitive damages lies not in scuttling the reasonable relation rule but enacting more precise and reasonable limits on punitive awards. One such limit could consist of a monetary cap, or a specified ratio to compensatory damages.

Wealth of Defendant

One of the most controversial and problematic aspects of punitive awards is the use of defendants' wealth as a measure for punitive verdicts. Currently jurors in most jurisdictions are instructed to consider the wealth of the defendant in assessing a punitive award. Proponents of this instruction argue that a "punishing" verdict cannot be entered absent evidence of the defen-

dant's financial status. But this deceptive logic ignores the tremendous problems created for corporate defendants by the rule, undeniably punishing them for their profits. The overkill presently underway in punitive awards against major corporations punishes not only those defendants but their consuming public as well.

It is argued that the trial and appellate courts' power to reduce or reverse an excessive punitive award provides a check on excessive punitive damage verdicts. The courts' authority has, in some cases, served as a check on excessive punitive damage awards. This safeguard, however, is limited by the presumption of validity which attaches to every verdict. Particularly in jurisdictions abrogating the reasonable relation rule, appellate courts will set aside a verdict only where it shocks the conscience of the court or utterly lacks support in the trial record.

Prerequisite Actual Damages

Other departing limits on punitive awards involve the once formerly uniform prerequisite of the recovery of actual damages. Jurisdictions have divided in the past on the question of whether nominal damages alone may support a punitive award. The majority of of states addressing the question have by now held that nominal damages will support a punitive count (Alaska, Georgia, Colorado, Florida, Idaho, Kentucky, Maryland, Missouri, Montana, New Jersey, New Mexico, North Carolina, Oklahoma, New York, South Carolina). The clear trend is toward the majority "nominal is sufficient" rule. More importantly, it should also be noted that four states (Montana, Florida, New Jersey, West Virginia) have gone even further by dispensing entirely with the requirement of actual damages.

Punitive and Vicarious Liability

The lack of coherent rationale for punitive awards is exemplified by, in addition to the mixture of purposes enunciated by the states, the application of punitive damages to vicariously liable tortfeasors. Punishment and deterrence cannot logically stand as coherent rationales for punitive awards against one who never even committed the tort. Yet the universal rule holds that vicariously liable tortfeasors may be required to pay punitive damages. A bare majority of the states follow the Restatement rule which provides that vicariously liable tortfeasors may be liable for punitive damages only where the tortfeasor ratified or authorized his agent's conduct. But a growing and substantial minority of jurisdictions follow the so-called liberal approach, holding employers equally vulnerable to compensatory and punitive awards. The application of the punitive damages doctrine in the vicarious liability setting provides ample food for thought with respect to the punitive damages doctrine in general. There is no reasonable basis for assessing punitive damages against a vicariously liable defendant who did not ratify or authorize his agent's conduct.

Realistically does the possibility of a punitive award affect an employer's choice of employee or the instructions given to that agent? The answer has to be in the negative. Why then, do we allow assessment of punitives against a vicariously liable tortfeasor? This is the type of fundamental inquiry we must make in order to restore reason and balance to our civil justice system in general, as well as in the law of punitive damages.

Punitive Damages and Product Liability

Conceptual incompatability also pervades the awarding of punitive damages in product liability cases. First, note that the law of product liability itself has been liberalized substantially in recent years. We have, in many respects, evolved from fault evaluation into an absolute liability system.

According to the Institute for Civil Justice, product liability judgments accounted for almost one-fourth of the entire amount awarded to plaintiffs in the 1970s. This liberalization of product liability law, combined with the same trend in punitive damage law, has led to tremendous problems for American manufacturers and their insurers. The admissability of the corporate defendant's wealth has further contributed to the escalation in punitive product liability verdicts. Add to this the fact that a product liability manufacturer may be hit with a string of punitive damage judgments for a single act or course of conduct, as evidenced by the asbestos cases. As a result the price tag of many American-made products includes an increase due to product liability verdicts, defense costs and product liability insurance premiums.

All this has occurred in spite of the initial conceptual incompatability of punitive damages and product liability actions. Most product suits are grounded on strict liability, which involves no consideration of the wrongfulness of the defendant's conduct. Punitive damages, however, are supposed to punish the defendant and deter him and others from similar conduct. Once again, we see the rationale of punishment and deterrence is no rationale at all.

An analysis of the laws of product liability and punitive damages, separately and as they interrelate, reveals the need for reform. More important than the theoretical inconsistency of granting punitive damages in strict product liability suits is the aggregate harm inflicted on our manufacturing and consuming sectors by recent trends in punitive awards. Undoubtedly we need a forum to redress injuries caused by defective products. We must, however, consider whether the present law, with respect to product liability punitive damages, really serves the public interest. Is not deterrence already achieved through the panoply of substantial compensatory damages available to product liability plaintiffs and the costs to defend such cases? We need to strike a more reasonable balance between the need to compensate injured consumers and the interests of society as a whole.

Inconsistent standards and multi-million dollar punitive product liability verdicts provide no additional incentive to make safer products. They do, however, result in higher prices of consumer goods. One of the more serious effects of the wave of punitive damages and product liability suits is the passing of the costs to the consumer. In addition, as the cost of product liability insurance policies increases, the cost is reflected in the products of all manufacturers, not just those hit by major punitive product liability awards.

Insurability of Punitive Damages

Another problem resulting from the liberalization of the law of punitive damages is the growing trend toward holding them insurable. The majority rule holds that punitive damages are included in the standard "all sums" policy, and their insurability violates no public policy. In this respect we see again that the purported rationale for punitive damages will not hold water. How can punishment and deterrence be achieved when a wanton tortfeasor can pass his liability onto his insurance carrier?

Cases holding for insurability generally are based on (1) the reasonable expectations rationale; (2) the fact the insurer could have excluded such coverage; and for (3) the unlikelihood that the denial of coverage for punitive damages would deter anyone. A more recent and admittedly realistic rationale espoused by the Montana Supreme Court holds that absent coverage for punitive damages, many policies would become worthless in light of the recent explosion of punitive claims.

First Bank v. Transamerica Insurance Corp., 679 P.2d 650 (Mont. 1984). Note there is no technical legal basis for this holding, but it merely reflects a philosophy that punitives have become so common and so costly that insurance companies should bear the risk.

A shrinking minority of courts has denied insurability since neither punishment nor deterrence would be served by holding punitive damages insurable. The leading case denying coverage noted the "especially strong public policy reasons for not allowing socially irresponsible defendants. . .to escape. . .punishment." *Northwestern National Cas. Co. v. McNulty*, 307 F.2d 432, 441 (5th Cir. 1962).

The public interest is no more served by the insurability of punitive damages than by the explosion of the awards themselves. Holding punitive damages insurable in no way answers the problem of punitive awards, and in many respects exacerbates the turmoil. As a result, the insurance pool must absorb the added cost.

Bad Faith Suits

Punitive damages and bad faith suits present perhaps a greater threat to the insurance industry than any other civil justice problem. The ongoing liberalization of the general law of punitive damages combined with the explosion of insurance bad faith litigation have resulted in a tremendous increase in the number and amount of awards assessed against insurers in bad faith suits. "Bad faith" allows a cause of action by the insured or a third-party claimant if the carrier violated what the courts have termed the insurer's duty of good faith and fair dealing. Through the recent development of the bad faith action, insureds may receive substantial awards where their insurer denies their claim in "bad faith."

The genesis of the bad faith action occurred in third-party excess liability suits. Then the cause of action was extended to first-party insureds who were wrongfully denied benefits under their policy. Cases around the country cited with approval California decisions imposing strict claim standards on insurers, and assessing severe punitive damages for a breach of that duty. The final step taken in California and other states allowed a third-party a direct cause of action for bad faith against an insurer for a violation of a state unfair claims practice statute. *Royal Globe Insurance Company v. Superior Court*, 23 Cal.3d 880, 592 P.2d. 329, 153 Cal. Rptr. 842 [1979]. Until *Royal*, bad faith causes of action were available only to a first-party insured or a third-party via assignment. *Royal*, however, held that the California Unfair Claims Practices Act could trigger a direct action against the insurer for bad faith by a third-party claimant, despite the fact that the insurer's contractual duty runs only to the insured. In addition, the *Royal* court held that a single prohibited act could serve as a basis for suit, though the law indicated a course of unfair conduct was necessary to constitute an unfair claims practice.

Royal and its progeny in several jurisdictions at least required that the insureds' liability be determined prior to the initiation of the bad faith suit by the third-party. The Montana Supreme Court recently discarded this requirement by holding that the third-party action may be filed and tried before, concurrent with, or after liability has been determined. "We see no problems with the possibility of contrary findings in the two actions. . . .Public policy calls for a meaningful solution." *First Bank v. Transamerica Insurance Company*, 658 P.2d 1065 (Mont. 1984). The meaningful solution suggested here means that an insurer may be liable for refusing to settle a claim which in fact proves to be invalid.

Under various bad faith theories the insured or third-party claimant may recover damages for economic loss, pain and suffering or emotional distress, and last but not least, punitive damages.

It is the punitive awards which have caused vexatious problems for many insurers. Most states recognize the first and/or third-party suit as sounding in tort rather than in contract, and thus allow the assessment of punitive damages in such cases. Five jurisdictions which characterize bad faith suits as contractual in nature have followed the common law rule that punitive damages may not be recovered in contract actions, and denied them in bad faith suits (Iowa, Kansas, Michigan, Oregon, South Dakota). Unfortunately, three states have held that the contractual nature of a bad faith suit provides no bar to punitive damages (Idaho, Indiana, Mississippi).

The judicial genesis and liberalization of bad faith remedies present tremendous problems for insurers, and ultimately their policyholders. Insurers walk a tightrope between paying valid claims and weeding out fraudulent demands. Carriers now face claims handling standards tantamount to strict liability. Any incorrect denial of a claim, whether reasonable or unreasonable, opens the door to substantial extracontractual damages. Ambiguous standards of conduct in unfair claims practice statutes and the general "bad faith" guideline serve as an open invitation to litigation. Case law has failed to differentiate reasonable and unreasonable insurer conduct. Failure to toe the line subjects insurers to huge punitive awards over and above full compensatory damages. Underwriting becomes a nightmare, if not impossible under such circumstances.

Theoretically, something in addition to bad faith must be shown in order to justify punitive awards. That is, the plaintiff must show the insurer's actions demonstrated not only bad faith, but also recklessness, malice, etc., so as to support a punitive verdict. Realistically in jurors' minds it is a very short jump from bad faith to malice. As with the bad faith standard in general, jurors and insurance companies are left with extremely vague guidelines. Malice, recklessness, etc., "may be inferred from the circumstances of the case." *Richardson v. Employers Liability Assurance Corp.*, 25 Cal. App.3d 232, 245, 102 Cal. Rptr. 547, 556 (1972). The difference between bad faith and malicious behavior justifying punitive damages is ignored in practice. The point is jurors and defendants alike lack sufficient guidelines as to what constitutes punitive conduct. This lack of standards, the trial lawyers' emotional pleas to the jury, and evidence of the defendant's wealth have all combined to produce the present explosion of bad faith punitive damages claims.

A crucial, yet unsettled factor in many bad faith punitive damages verdicts has proved to be admission of evidence of the insurer's wealth. Witness *Neal v. Farmers' Insurance Exchange*, 582 P.2d 980 (Cal. 1978): "(A)n award equal to one week's earnings was required to effect the necessary punishment." Such evidence theoretically comports with the punishment rationale of punitive damages. The ultimate impact of admission of such evidence, e.g., outrageous verdicts, rather than justifying admission of such evidence, reveals the need for abolition of punitive damages in bad faith cases.

Commentators from the plaintiff's bar have hailed the "social reform potential of punitive damage awards in bad faith cases." Judicially sanctioned bad faith punitive awards have been applauded as serving a most desirable regulatory function. Such comments are on target at least as to the fact that we now have courts regulating the insurance industry's claim practices.

Is this is a desirable way to establish regulatory policies? It is well known that courts lack the factfinding, oversight and implementation capabilities of legislatures and administrative agencies, as well as the constitutional authority to set social regulatory policy. Undeniable negative fiscal impact results from judicial regulation of insurance claims practices. First, insurers spend substantial time and money (as much as $9,000 per case) to avoid or defend against judicially created bad faith punitive damage claims. The actual cost of punitive verdicts along with defense and avoidance costs must be absorbed by the company, eventually funneling down to the

insurance pool. Perhaps the greatest economic impact however, entails increased settlements. Increasingly, companies pay claims based less on their validity than on the realistic possibility of a bad faith suit. They must choose between settling a claim for more than it is worth or facing the economic realities of a bad faith suit. Like consumers injured by defective products, policyholders wrongfully denied coverage deserve a forum for redress for their injuries. But the recent snowballing of bad faith litigation has presented a compelling need for restoration of the rule of reason to the claim handling scenario.

In terms of public policy, it is impossible to justify the punitive damages windfall to the bad faith plaintiff when such a cost is borne by the aggregate insured public. The law of punitive damages needs to strike a better balance between the interest of the insured, the insurer and society in general. Punitive claims have become more of a problem than a solution to the claims practice issue. The solution lies not in *ad hoc* judicial regulation, but in the strengthening of legislative and administrative controls through unfair claims practice statutes. Illinois and other states have enacted so-called penalty statutes providing for an award of attorney's fees and a monetary penalty against an insurer for wrongfully denying policy payments (See Ill. Rev. Stat. Ch. 173 Par. 767, in appendix). In some states these statutes have been held as constituting an insured's exclusive remedy, thereby barring an action for punitive damages. The enactment of similar statutes, particularly if amended to include exclusivity clauses, could be a meaningful solution to the problem of first-party bad faith and punitive damages by providing a remedy to aggrieved claimants without the unreasonable societal cost of windfall punitive awards. These reforms would strike a more reasonable balance in the claims handling scenario. Along with the strengthening of bad faith penalty statutes, such laws should be amended to prohibit third-party causes of action as enunciated in *Royal Globe.*

III. The Case for Reform

The staggering increase in the number and amount of punitive damages and the problems caused thereby have led many judges, lawyers, legislators, and industry leaders to call for reform in the law of punitive damages. In terms of political theory, the status quo of punitive damage law pours concentrated benefits to the plaintiff's bar, and spreads costs to the public. The beneficiaries include the individual plaintiffs and, more importantly, the effective plaintiff trial lawyers who have a vested interest in liberal punitive damage law. Thus we have a substantial group of vocal and powerful lawyers seeking to protect their interest in liberal punitive damage law. However, those who pay the disbursed costs of these awards often have no idea that such costs are hidden in the price of their consumer products and insurance policies.

Various members of the trial bar in opposing punitive damage reform argue:

1. ***Punishment and deterrence provide valid bases for the present doctrine.*** Note however, that eight states have already rejected these rationales and the remaining states dif-

fer in the weight to be given each factor. There is a surprising lack of evidence as to the extent to which large punitive verdicts really deter.

In the vicarious liability setting and where held insurable, there is no way a punitive award can punish or deter, nor can multiple punitive awards assessed against a product manufacturer. Assuming *arguendo* that punishment and deterrence do provide a coherent rationale, is it not apparent that the costs to society outweigh the benefits, while the plaintiff's bar stands as the principal beneficiary?

2. ***There are gaps in the criminal justice system which allow certain types of egregious conduct to go unpunished.*** Concededly, not every socially reprehensible act falls within the purview of criminal law. But determination as to the proper standards of behavior, particularly for corporations, is the legislature's responsibility. The judiciary lacks the necessary factfinding and oversight capabilities required to determine and implement guidelines for corporate conduct. Some have nevertheless attempted to regulate major product manufacturers and insurers through the punitive award. It is the busi[illegible] of the legislature to clearly differentiate between the permissible and the impermissib[illegible] to set reasonable penalties. The judiciary has neither the authority nor the ability to effectively fill in the gaps in the criminal code.

3. ***The punitive award constitutes a strong silent consumer advocate and social reform mechanism.*** This presents a distorted view of punitive damages. Exemplary damages evolved to provide, in limited cases, punishment and deterrence. Now they are supposed to effect major social reform! It must be remembered that social reform and consumer advocacy, like determinations as to punishable conduct, are supposed to occur in the legislature, rather than the courtroom. The use of judicially imposed punitive damages on a case-by-case basis, without the benefit of coherent policy foresight or perspective can ha[illegible] only deleterious effects on the U.S. economy.

4. ***Existing controls on punitive verdicts are sufficient.*** Leaders of the plaintiff bar have argued that there are sufficient guidelines for the jury at trial and the appellate court on review so as to prevent excessive punitive awards. But we have seen how vague the standards for punitive conduct are. Juries are merely told to consider the wealth of the defendant and award enough to punish him. The appellate courts have authority to reverse an excessive award but will only do so if contrary to the manifest weight of the evidence.

The irrationality of the social reform rationale speaks for itself. Whatever benefits from punitive damages (questionable punishment and deterrence) are far outweighed by the disadvantages, to-wit:

1. ***Punishment has no logical place in the civil law, whose historical function is compensation, not punishment.*** This theoretical inconsistency, however, is overshadowed by the real problems caused by having civil courts determine what conduct warrants punishment and how much punishment should be be inflicted on a case-by-case basis.

2. ***The modern array of available compensatory remedies provide total compensation to the plaintiff.*** Injured parties may now recover for pain and suffering and emotional distress as well as every type of pecuniary loss. There is no need, as there arguably was under the common law, for an "extra" assessment to compensate for generally uncompensable damages.

3. ***The impact of the full spectrum of modern compensatory damages sufficiently deters a defendant and others from similar conduct.*** The size of modern compensatory verdicts and the tremendous cost of defending a lawsuit in the 1980s add up to a substantial fiscal impact on defendants. The additional assessment of punitive awards provides only an insignificant deterrent function.

4. ***Punitive damages as awarded under present law violate a number of constitutional provisions.*** Liability for compensatory damages is sufficiently delineated in case law, and their amount is governed by the plaintiff's actual damages incurred. But the insufficient guidelines for jurors in determining liability for punitive damages and their amount lack the precision required by due process. In addition, as courts use defendants' wealth as a measure for punitive damages, the more prosperous defendant is made to suffer an award much greater than a less affluent defendant, for the same conduct, in violation of the equal protection mandate.

5. ***There is a woeful lack of adequate standards as to the conduct warranting a punitive damage penalty.*** Case law provides no workable standard against which a defendant may judge his or her conduct, or a jury may make a judgment thereon. For this reason, emotion plays an even greater role in the jurors' decision. Vague guidelines as to what constitutes "punitive" conduct and the proper amount in a given case, coupled with the open-ended nature of punitive awards, have led to excessive, inconsistent and unpredictable verdicts.

6. ***Punitive damages amount to a windfall for the plaintiff and his attorney.*** Exemplary awards are designed to punish and deter for the public good. The plaintiff receives complete reimbursement for his injuries through a compensatory award. No logical reason exists for allowing the plaintiff and his attorney to collect the punitive award. The plaintiffs' bar through contingency fees frequently exceeding thirty three per cent, has a vested interest in liberal punitive damages law. Their lobbying, rather than the rule of reason, is one major cause for retention of the doctrine in modern jurisprudence.

7. ***The increasing frequency of punitive awards in turn affects the settlement process particularly in the product liability and bad faith scenarios.*** Insurance companies must frequently choose between settling a claim for more than it is worth or face the economic severities of a punitive verdict.

8. ***Though punitive damages allegedly punish and deter for the good of society, the cost to society of present punitive damage law far outweighs any benefit from deterrence.*** Huge punitive awards which are designated to benefit society funnel back down to haunt the American consumer. The ripple effect of individual awards has an adverse effect on the business climate. A substantial portion of the price tag on consumer products and insurance policies represents past, present and future punitive damage liabilities.

The above list points out a number of flaws in our system of punitive damages. Clearly the overall problem lies in the system itself. It is those flaws that command our attention and call for a meaningful solution. The scales of justice are out of balance. Punitive damages serve no valid purpose and indeed have primarily adverse effects on society. Then why not eliminate, or at least reform the concept? Two compelling forces resist change with respect to punitive damages. First, plaintiffs' lawyers naturally oppose reforms due to their interest in the status quo. Second, punitive damages have become embedded in our legal system, and are thus supported by the

doctrine of *stare decisis*. In fact, a number of courts such as the Wisconsin Supreme Court have expressed a desire to eliminate punitive damages but have refused to do so because of *stare decisis*. Neither *stare decisis* (or "the status quo for the sake of the status quo"), nor the benefits accruing to trial lawyers justifies retention of a doctrine lacking fundamental legal basis, and which simply on balance does more harm than good to society. The status quo must yield to fundamental insight and the rule of reason.

IV. In Search of a Balance

The foregoing analysis reveals the need for reforms in the law of punitive damages. A number of remedies have been offered in search for coherence, stability, fairness and reason in the civil justice system.

1. ***Total abolition of punitive damages.*** The fundamental flaws inherent within the present application of punitive damages justify total abolition of these awards. Eight U.S. states have already rejected the traditional notion of deterrence based punitive damages. Realistically, due to the trial bar's influence, this option may be politically impossible to achieve. But the interests of society do call for this better reasoned result. It is time to reconsider who benefits from punitive damages, who pays for them, and whether this system has any reasonable basis.

2. ***Payment of punitive awards to the state.*** Since punitive damages are designed to punish the defendant for society's benefit, and not to punish the plaintiff, there is no basis for awarding them to the plaintiff and his attorney. As the plaintiff has been made whole through compensatory damages, society should obtain the benefit of the punitive award. Punitives are penal in nature and like other penal assessments should be paid to the state rather than a private litigant and his lawyer.

3. ***Bifurcated trials.*** One of the critical problems with punitive damages lies in the fact that jurors are given few guidelines as to the proper punitive amount. They receive prejudicial evidence of the defendant's wealth prior to determining his liability for the compensatory and punitive award. One solution to this problem lies in the proposal for bifurcated punitive damages trials. In phase one of the trial, the trier of fact would determine the defendant's liability for punitive damages. In the second phase, if the defendant was found liable for a punitive award, the judge would set the proper amount. Allowing the jury to determine liability for punitive damages, but have the judge set the specific amount, would produce many benefits. First, the procedure would preclude presentation to the jury of evidence of the defendant's wealth during the liability phase of the trial. Second, it would prevent needless trials on punitive awards where no actual damages were found by the jury and actual damages are prerequisite for a punitive award in that jurisdiction. Third, trial judges are better equipped than juries

to ascertain the proper punitive award in a given circumstance, due to their knowledge, experience, and lesser vulnerability to an emotional, eloquent plaintiff's lawyer.

4. ***Statutory limits on punitive awards.*** An even more effective and reasonable resolution to the runaway verdict problem would be to establish a cap on punitive awards. Such a cap could limit punitive awards to, for example, no more than the compensatory award, or a specific monetary amount, i.e., $100,000, or, no more than 25 per cent of the compensatory damages or $5,000, as has been proposed by Project Justice. Note that providing a cap would retain the punishment and deterrence principles of punitive damages, while restraining the excessive awards. The cap would eliminate the volatile open-ended nature of punitive verdicts.

5. ***Multiple awards.*** Under present law a string of cases based on one particular wrong or course of conduct can all result in a punitive verdict. Yet according to the proponents of punitive damages, the initial punitive award should adequately deter and punish the defendant for his wrong. Punishment and deterrence are not further served by multiple punitive awards. This is particularly true with respect to product liability defendants, who have suffered the most under the multiple award rule. Additional punishment of defendants through multiple awards only results in punishment to society. Punitive damages should thus be awarded only once for any particular act or course of action.

6. ***Beyond a Reasonable Doubt.*** The uncertainty and vagueness clouding the punitive damage award point to the need for a higher standard of proof for a punitive award than mere preponderance of the evidence. A plaintiff seeking punitives should have to prove the defendant's liability beyond a reasonable doubt, or at least by clear and convincing evidence. Adopting such a standard would provide more fairness in the process and help the jury differentiate more clearly between merely negligent conduct and actions justifying a punitive award. One state has already adopted this type of reform. Montana *HB-363*, enacted in 1985, requires that punitive damages can only be based on clear and convincing evidence.

7. ***Contingent fee reform.*** The crisis in the contingent fee system is perhaps best represented by the Bhopal, India incident. Plaintiff lawyers flocked to the disaster area in an effort to drum up business. In our society those unable to afford an attorney deserve access to an advocate in order to obtain just compensation. Abuse of the contingent fee system has, however, led a number of commentators to call for reform of our presently unlimited contingent fee system. One way to resolve the problem with contingent fees would be to totally prohibit payment of a contingent fee out of a punitive award. In the alternative, a sliding scale contingent fee system would provide a check by decreasing the percentage going to the plaintiff's attorney as the plaintiff's total award increases. Three states, California, Florida and New Jersey, have already adopted this approach. The sliding scale at least introduces a reasonable check on contingent fee abuse.

8. ***Vicarious liability.*** The inherent incompatability of punitive damage awards with vicarious liability mandates reform in this regard. Punitive damages should be imposed on a principal for the acts of his agent only when the principal ratified or authorized the specific conduct. Only in this instance can a punitive award foster any deterrence or punishment. Such a limit would bring balance and reason to punitive damages in the vicarious liability setting.

V. Call to Action

Fundamental changes are needed in the civil justice system to do away with present inefficiencies and excessive verdicts. The financial structure of the insurance industry and other corporate entities is in jeopardy. Few companies can afford to ignore the implications of current trends in tort litigation. It is up to leaders in the insurance industry and other businesses to inform the public of the need for substantial reform of the civil justice system. Substantial tort reform cannot be accomplished through any single solution. But we must not be deterred by those who say that reform cannot be achieved. Effective pressure on the system can be generated through coordination of efforts. The strength of the plaintiff's bar and the doctrine of *stare decisis* are not insurmountable.

Rather than responding to modern tort law in a defensive posture, rewriting policies and reforming claims practices, insurers should join with other industry leaders and assume a more proactive stance. How well insurers respond to the current civil justice law crisis will determine the future success and viability.

VI. Coalitions

The cornerstone of an effective tort reform strategy must include the strength of coalitions. The sustained cooperative efforts of broad-based coalitions provide the most effective tool for improvement in our civil justice system. The benefits of the cooperative approach speak for themselves. Coalitions foster the exchange of information and avoid duplication of efforts. Most important, coalitions allow for the pooling and concentration of resources and a more intelligent concerted attack. Legislators respond much more positively to the voice of a broad base and widely supported political opinion rather than a single interest group.

Project Justice in Illinois provides an excellent example of how an effective tort reform coalition can evolve. The Project Justice coalition includes representatives from business, manufacturing, health care, construction, and the professions in addition to the NAII, the Alliance of American Insurers, the American Insurance Association, and other insurance industry representatives. Their aim is to resolve many of the problems within the Illinois civil justice system. The coalition serves largely as an informational network to promote cooperation and coordination of resources.

Project Justice formed several task forces to deal with the tort reform issues of greatest concern, including:

1. Pre-judgment interest and punitive damages;

2. Professional malpractice and health care costs;

3. Alternative dispute resolution mechanisms;

4. Product liability and municipal liability;

5. Various litigation issues such as class actions, discovery abuse, and forum shopping;

6. Litigation costs.

One major obstacle impeding current tort reform efforts is the lack of public awareness of the extent which deficiencies in the civil justice system negatively impact on their daily lives. Project Justice thus established a public affairs subcommittee to promote greater public awareness and understanding of the problems within the civil justice system as well as possible solutions.

The first issue confronted by Project Justice was a pre-judgment interest bill introduced in Illinois in 1983. A number of coalition members testified against the measure, revealing the broad opposition to the bill, and this, plus valuable data from the Institute for Civil Justice contributed to the demise of the proposal.

Project Justice illustrates the potential of coalitions as a tort reform mechanism. Other tort reform coalitions are now active or are being planned in California, Florida, Georgia, Indiana, Kansas, Louisiana, Mississippi, Minnesota, Michigan, Pennsylvania, and other states.

The NAII took a leadership role in the formation of the Punitive Damages Reform Coalition, an intra-industry tort reform coalition which includes the Alliance of American Insurers, the American Council of Life Insurers, the American Insurance Association, and the Farmers Insurance Group. The participants in this coalition, formed in 1984, agree that a united industry effort holds the key to the success of legislative tort reform initiatives. At the end of 1984, the coalition resolved to attempt to abolish punitive damages where possible or at least initiate reforms. The coalition targeted a number of states for possible legislative action in 1985 and outlined proposals for reform in the law of punitive damages.

Substantial consensus exists as to the need for tort reform. There is also considerable agreement as to various specific reforms in the area of punitive damages. There is, however, diversity of opinion as to strategy and as to more specific reforms. This can have only deleterious impact on any reform effort. The insurance industry must develop a consensus on punitive damages. It is therefore a cornerstone of NAII's tort reform strategy that broad-based and cohesive coalitions must be developed to provide inter and intra-industry consensus on punitive damages.

VII. NAII Model Legislation—The Flexible Approach

In addition to its participation in various coalitions, NAII has formulated a number of model

laws addressed to punitive damages reform on a state-by-state basis. Model laws have several advantages. If enacted, they foster uniformity and consistency among the various jurisdictions. They also can unite interested groups behind a single reform bill and prove to be politically successful. But in light of (1) the number of proposals for the reform in punitive damages; (2) the number of sponsoring groups; and (3) the diverse political climates among the several states, it appears that commitment to a single model bill would be a detriment to the reform effort. Rigidly adhering to a single tort reform proposal may imply a non-conciliatory posture. In certain jurisdictions various components of the model may not be needed, or may be politically impossible to achieve. The key therefore lies in a united effort behind a diverse and flexible approach. This philosophy underlies the NAII's fundamental legislative strategy. A number of legislative proposals have been formulated which will be introduced in accordance with particular problems and needs in particular states.

The essential components of NAII model legislation (reproduced in the appendix) include:

1. Abolition of punitive damages if possible;
2. Requiring that plaintiffs prove defendants' punitive damage liability beyond a reasonable doubt or at least by clear and convincing evidence;
3. Mandating that liability for punitive damages be determined by the jury but the amount set by the judge;
4. Limiting punitive damages to an amount not to exceed the compensatory damages awarded;
5. Directing that punitive awards be paid into the state's general revenue fund; and
6. A prohibition on the assessment of attorney fees against a punitive damages award.

Note that Project Justice has also drafted legislation (see appendix) which would (1) limit the amount of punitive damages to 25 per cent of the compensatory award or $5,000, and (2) establish a sliding scale contingent fee system. The NAII and Project Justice statutes provide for flexibility to adapt to given problems and political climates in particular jurisdictions.

VIII. Rounding Out the Reform Effort

A successful tort reform strategy requires not only the commitment of broad-based coalitions supporting essential components of reform measures, but also a well-rounded attack on a variety of fronts. Coalitions and model legislative activity mark only the beginning of NAII action directed toward reform in punitive damages and other problem tort areas. NAII has also sponsored a number of inter-association meetings and seminars on the issue of punitive damages. Such meetings reap a number of tangible and intangible benefits. They foster the exchange of information and sow the seeds of more effective coalitions. Most important, however, they draw together an industry which is disunited relative to the magnitude of this problem.

The most successful of such conferences thus far was the NAII House Counsel/Punitive Damages Seminar in April, 1985. The seminar focused on the impact of punitive damages on the insurance industry, and included a number of enlightening speakers In addition to its membership in specific tort reform coalitions, NAII also participates in a number of other groups directly or indirectly interested in civil justice reform. Such groups include (1) the Defense Trial Lawyers Task Force on Litigation Cost Containment, composed of insurance claims executives, defense attorneys and others sharing concern as to rising litigation costs; and (2) Insurance Arbitration Forums, Inc., which is dedicated to the use of arbitration, mediation and other alternatives to litigation. NAII interaction with such groups provides, like NAII's punitive damages seminar, an exchange of information with respect to punitive damages and general tort reform.

Getting the information out is the primary purpose of the NAII *Litigation Reporter*. The *Litigation Reporter*, written and published by the NAII staff, summarizes major tort and insurance case law as well as developments in the tort reform effort. First, the *Reporter* explains cases of major impact to the insurance industry, including appeals in which NAII participates as *amicus curiae*. Second, it describes the activities of tort reform oriented groups such as Project Justice Illinois. Third, the publication tracks developments on the research side of the reform effort, particularly current and past studies conducted by the Institute for Civil Justice. The *Reporter* also includes NAII staff research products and other notes of tort reform interest.

As stated above, another way in which NAII has assumed a leadership role in the insurance industry and taken the initiative with respect to civil justice reform includes participation in an *amicus curiae* capacity in a number of major punitive damages cases. As Ellis J. Horvitz, noted California appellate advocate, has pointed out, in the past the insurance industry lagged behind and was disunited and unorganized in its amicus activity. To fill this void the NAII has spoken as industry leader, in support of the insurance point of view, in a number of major supreme and appellate court cases. The impact of any amicus activity is inherently difficult to assess with precision. Yet it is clear that in light of the substantial volume of law being handed down from the appellate and supreme courts, there must be a strong voice for the insurance industry in cases of major importance to its members and their policyholders.

The final element of NAII's punitive damages strategy is the development of factual data to support industry initiatives in tort reform. Perusal of the regional case law reporters reveals the magnitude of the punitive damages problem and the need for reform. Yet there is an unfortunate lack of hard statistical evidence as to the specific number and aggregate amount of punitive awards in the U.S. and their resultant impact on society.

Concrete data as to the extent of the punitive problem is vital to support a successful reform effort. To develop the consensus required to break the status quo hammerlock of the trial bar, the citizenry and their legislators must be educated with unequivocal data as to the actual effect on our society of runaway punitive verdicts. Thus NAII has supported the research efforts of organizations such as the Rand Corporation's Institute for Civil Justice, the Defense Research Institute and the All-Industry Research Advisory Council.

The importance of tort reform in the 1980s led the NAII to include it on its agenda at the NAII's Annual Meeting in San Francisco in November of 1984. The topic discussed was, "Courts and their Economic Impact: What Price Justice?" The noted speakers on this subject represented a variety of backgrounds and points of view, and effectively illustrated compelling considerations with respect to civil justice reform. Donald Schaffer, Sr., Vice President, Secretary and General Counsel of Allstate Insurance Company, noted that many substantial tort reforms in the last

twenty years have been promulgated by the judiciary. Mr. Schaffer raised the fundamental question as to when legislative inaction justifies judicial activism, a question underlying many judicially promulgated tort "reforms" including comparative negligence and bad faith causes of action. Such judicial activism often occurs without foresight as to the ultimate effect on society, due to the courts' limited investigative and policymaking capabilities.

Fred Graham, Law Correspondent for CBS News, candidly spoke of the problems within the legal system itself. Such problems include continuing and unchecked growth in the number of lawyers, which in turn exacerbates current trends toward excessive litigiousness. The growing number of attorneys has a tremendous impact in expanded litigation and liberal tort law. As a result major sections of the legal system itself have been resistant to tort reform efforts thus far. Such sectors, particularly the plaintiff bar, must be dealt with for any tort reform to succeed.

Finally, Ellis J. Horvitz (Horvitz & Levy, Encino, CA), pointed out that trends toward liberality in judge-made tort law reflect increasing concern for a source of compensation for plaintiffs and decreasing interest in the issue of fault. Such decisions may also be attributed to the lack of insurance background on the part of judges, who may fail to grasp the ultimate effects caused by a given holding. The comments of Mr. Horwitz, *et.al.*, were compelling in that they effectively illustrated the major factors which culminated in the tort law debacle witnessed by the 1980s.

IX. Conclusion

We are experiencing unprecedented growth in the number and amount of punitive damages awards. The open-ended nature of the awards, the eloquent plaintiffs' attorneys with a vested interest through the contingency fee system, the demise of all reasonable limits on punitive verdicts and a growing deep pocket mentality have combined to produce grossly excessive punitive damages awards. There no longer exists any coherent rationale for the application of punitive damages in the U.S. The doctrine's negative impact far outweighs its advantages. The only beneficiaries of the status quo are the individual plaintiffs and their attorneys. The deterrence originally fostered by less frequent and more moderate awards has evolved into punishment imposed on society by the runaway awards of the 1980s.

The verdicts in product liability and bad faith cases are particularly troublesome. Insurance companies, manufacturers and consumers can no longer ignore the aggregate negative impact on U.S. society of the cost of punitive damages. Neither the plaintiffs' bar nor the doctrine of *stare decisis* should prevent changes called for by the rule of reason and the damage done to society through the status quo. Conceptually there must be a point at which punitive damages begin to do more harm than good to society. Realistically we have crossed that line.

How well insurance companies react to the punitive damages problem and other deficiencies in the civil justice system will in many respects determine their future. Serious tort reforms can only be realized through a comprehensive attack on many fronts by broad-based coalitions. The changes of tomorrow can only be born in the initiatives of today through the coordinated efforts of coalitions and organizations such as the NAII.

Appendices

Sample Statute I

Punitive Damages

1. In any civil action where counts for punitive or exemplary damages are included, or in any separate action for punitive or exemplary damages, the plaintiff shall have the burden of proving the defendant's liability for such damages beyond a reasonable doubt, and the amount of such damages shall not exceed an amount equal to the judgment entered against any such defendant for actual damages.

2. Liability for punitive or exemplary damages shall be determined by the jury. The amount of such damages shall be established by the judge.

3. All punitive or exemplary damages recovered shall be paid into the state general revenue fund. The provisions of this act shall not be construed to grant the state or any political subdivision thereof a cause of action to recover punitive or exemplary damages, nor may the state or any political subdivision thereof be a party to any action in which punitive or exemplary damages are sought; except however, the state shall have a right to an action to collect such damages after determined payable by the judgment of a court of record.

4.(a) Upon motion of the defendant and after a hearing, should the court determine that a claim for punitive or exemplary damages was brought without reasonable or just cause or excuse and without knowledge of sufficient facts and evidence to reasonably entitle the plaintiff to a judgment for such damages, or if a claim for punitive or exemplary damages is maintained after it is reasonably evident that there are insufficient facts and evidence to reasonably entitle the plaintiff to such damages, the court may award to the defendant such costs, expenses and reasonable attorney fees as the court deems fair and equitable and may grant judgment therefore against either the plaintiff or the plaintiff's attorney or both.

(b) In the event the motion in Section 4(a) is not granted to the defense, should the plaintiff proceed with the action and fail to recover, the costs of the defense including attorney's fees shall be assessed against either the plaintiff or the plaintiff's attorney or both.

5. In no event shall attorney's fees be assessed against awards for punitive damages.

6. This act shall not apply to causes of action which arise prior to its becoming law.

7. This act shall take effect immediately upon its becoming law.

Sample Statute II

Damages Other Than Compensatory Damages

1. (a) In any civil action where counts for damages other than compensatory damages as hereinafter defined are included, or in any separate action for damages other than compensatory damages, the plaintiff shall have the burden of proving the defendant's liability for such damages beyond a reasonable doubt, and the amount of such damages shall not exceed an amount equal to the judgment entered against any such defendant for actual compensatory damages.

(b) "Compensatory damages" are defined as those which will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury.

2. Liability for damages other than compensatory damages shall be determined by the jury. The amount of such damages shall be established by the judge.

3. All damages other than compensatory damages recovered shall be paid into the state general revenue fund. The provisions of this act shall not be construed to grant the state or any political subdivision thereof a cause of action to recover such damages, nor may the state or any political subdivision thereof be a party to any action in which such damages are sought; except however, the state shall have a right to an action to collect such damages after th y are determined payable by the judgment of a court of record.

4. (a) Upon motion of the defendant and after a hearing, should the court determine that a claim for damages other than compensatory damages was brought without reasonable or just cause or excuse and without knowledge of sufficient facts and evidence to reasonably entitle the plaintiff to a judgment for such damages, or if a claim for damages other than compensatory damages is maintained after it is reasonably evident that there are insufficient facts and evidence to reasonably entitle the plaintiff to such damages, the court may award to the defendant such costs, expenses and reasonable attorney fees as the court deems fair and equitable and may grant judgment therefore against either the plaintiff or the plaintiff's attorney or both.

(b) In the event the motion in Section 4(a) is not granted to the defense, should the plaintiff proceed with the action and fail to recover, the costs of the defense including attorney's fees shall be assessed against either the plaintiff or the plaintiff's attorney or both:

5. In no event shall attorney's fees be assessed against awards for damages other than compensatory damages.

6. This act shall not apply to causes of action which arise prior to its becoming law.

7. This act shall take effect immediately upon its becoming law.

Sample Statute III

Punitive Damages

1. In any civil action where counts for punitive or exemplary damages are included, or in any separate action for punitive or exemplary damages, the plaintiff shall have the burden of proving the defendant's liability for such damages beyond a reasonable doubt, and the amount of such damages shall not exceed an amount equal to the judgment entered against any such defendant for actual damages.

2. Liability for punitive or exemplary damages shall be determined by the jury. The amount of such damages shall be established by the judge.

3. Upon motion of the defendant and after a hearing, should the court determine that a claim for punitive or exemplary damages was brought without reasonable or just cause or excuse and without knowledge of sufficient facts and evidence to reasonably entitle the plaintiff to a judgment for such damages, or if a claim for punitive or exemplary damages is maintained after it is reasonably evident that there are insufficient facts and evidence to reasonably entitle the plaintiff to such damages, the court may award the defendant such costs, expenses and reasonable attorney fees as the court deems fair and equitable and may grant judgment therefore against either the plaintiff or the plaintiff's attorney or both.

4. In no event shall attorney's fees be assessed against awards for punitive or exemplary damages.

5. This act shall not apply to causes of action which arise prior to its becoming law.

6. This act shall take effect immediately upon its becoming law.

Sample Statute IV

Punitive Damages

1. Punitive or exemplary damages shall not be recovered in any civil action.

2. This act shall not apply to causes of action which arise prior to its becoming law.

3. This act shall take effect immediately upon its becoming law.

State Chart of Major Issues

State	Punitive Damages May Be Awarded	Punitive Damages Insurable	Punitive Damages Insurable If Liability Is Vicarious	Duty To Defend	Punitive Damages Allowed In Wrongful Death Suits	Government Bodies' Liability Includes Punitives	Reasonable Relation To Compensatory Damages
Alabama	yes	yes	yes	yes	yes	no	no
Alaska	yes				no	no	no
Arizona	yes	yes	yes	yes	yes	no	yes
Arkansas	yes	yes	yes	yes	yes		yes
California	yes	no	yes		no	no	yes
Colorado	yes	no			no	no	yes
Connecticut	yes	yes	yes	yes			
Delaware	yes				no		yes
Florida	yes	no	yes	yes	yes	no	no
Georgia	yes	yes	yes	yes	no		yes
Hawaii	yes				no	no	
Idaho	yes	yes	yes	yes	yes	no	yes
Illinois	yes	no	yes		no	no	no
Indiana	yes	no	yes			no	no
Iowa	yes	yes	yes	yes	yes	yes	yes
Kansas	yes	no	yes	yes	yes	no	no
Kentucky	yes	yes	yes	yes	yes		no
Louisiana	no				no	no	
Maine	yes	no			no	no	
Maryland	yes	yes	yes	yes	no	no	no
Massachusetts	no				yes	no	
Michigan	yes	yes	yes	yes	no	no	
Minnesota	yes	no			no	no	
Mississippi	yes	yes			yes	no	
Missouri	yes	no	yes		yes	no	no

State Chart of Major Issues

State	Punitive Damages May Be Awarded	Punitive Damages Insurable	Punitive Damages Insurable If Liability Is Vicarious	Duty To Defend	Punitive Damages Allowed In Wrongful Death Suits	Government Bodies' Liability Includes Punitives	Reasonable Relation To Compensatory Damages
Montana	yes	yes			yes	no	no
Nebraska	no				no	no	
Nevada	yes	no			yes	no	
New Hampshire	yes	yes	yes	yes	no	no	
New Jersey	yes	no	yes	yes	no	no	yes
New Mexico	yes	yes	yes	yes	yes	no	
New York	yes	no	yes	yes	yes	no	yes
North Carolina	yes	yes			yes	no	
North Dakota	yes	no			no	no	
Ohio	yes	no			no	no	yes
Oklahoma	yes	no	yes	yes	yes	no	no
Oregon	yes	yes	yes	yes	yes	no	
Pennsylvania	yes	no	yes		no	no	yes
Rhode Island	yes	yes	yes	yes		no	
North Carolina	yes	yes	yes	yes	yes	no	no
North Dakota	yes				no	no	no
Tennessee	yes	yes	yes	yes	yes	no	no
Texas	yes	yes	yes	yes	yes	no	yes
Utah	yes				yes	no	yes
Vermont	yes	yes	yes	yes		yes	
Virginia	yes	yes		yes	no	no	
Washington	no				no	no	
W. Virginia	yes	yes	yes	yes	yes	no	yes
Wisconsin	yes	yes	yes	yes	no	yes	
Wyoming	yes	yes			yes	no	yes

FIRST DRAFT

83rd GENERAL ASSEMBLY
STATE of ILLINOIS
1983 and 1984

INTRODUCED ____, BY

SYNOPSIS:

(Ch. 110, par. 901)

Amends the Code of Civil Procedure by adding certain provisions with respect to punitive damages in civil actions; defines the scope of punitive damages; establishes the burden of proof for punitive damages; limits recovery for punitive damages; forbids contingent attorney's fees based upon punitive damage awards; provides for punitive damages to be paid into the State General Revenue Fund; provides that the State has a cause of action to collect punitive damages after final judgment; and provides for vicarious liability where the principal or a managerial agent of the principal ratified or approved the act or acts. Effective immediately.

A BILL FOR

PROJECT JUSTICE

AN ACT to add paragraph 901 to the Illinois Code of Civil Procedure, ap roved July 1, 1982, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Add paragraph 901 to the Illinois Code of Civil Procedure, approved July 1, 1982, as amended, to read as follows:

(Ch. 110, par. 901)

PUNITIVE DAMAGES

Par. 901. Punitive damages—Limitations on recovery

§1. As used in this paragraph, 'punitive damages' includes exemplary damages.

§2. In any civil action where counts for punitive damages are included, or in any separate action for punitive damages, the plaintiff shall have the burden of proving the defendant's liability for such damages beyond a reasonable doubt.

§3. In any civil action the amount of punitive damages shall be an amount not to exceed any one of the following amounts:

(a) 25 per cent of the actual or compensatory damages which the court or jury finds that the plaintiff is entitled to recover exclusive of all costs; or

(b) $5,000.

§4. All punitive damages recovered in a civil action shall be paid into the State general revenue fund established under Chapter 127, Paragraph 140 of the Illinois Revised Statutes.

§5. No attorney may collect a contingent fee based on an award for unitive damages.

JOINT INDUSTRY RESOLUTION ON PUNITIVE DAMAGES

WHEREAS, Punitive damage awards have grown in recent years to the point where society can no longer afford to ignore their adverse impact on the civil litigation process, and

WHEREAS, The purpose of the law of civil remedies is to compensate individuals injured by the wrongful conduct of others and not to punish or deter wrongful conduct, and

WHEREAS, The law of compensatory damages is demonstrably adequate to insure that the injured plaintiff is made whole, and

WHEREAS, The most appropriate process for deciding what social conduct is punishable and who should be punished is the criminal justice system and not the civil justice system, and

WHEREAS, The success of a few plaintiffs in obtaining large punitive damage awards has led to widespread demands for punitive damages in nonmeritorious cases, and

WHEREAS, The insurance industry has a responsibility to seek improvements to the efficiency, fairness and cost of the civil litigation process on behalf of its policyholders and the general public, and

WHEREAS, Consistent with this responsibility, several model laws have been developed and advocated by insurance industry sponsors as means to reduce the adverse effects of excessive punitive damage awards and punitive damage abuses, and

WHEREAS, Even though widespread differences exist in the legal climates, demographics, political environments and public attitudes found in the several states, success in achieving meaningful punitive damages reform greatly depends on the ability of the insurance industry to speak with a united voice on various reform proposals;

NOW, THEREFORE, BE IT RESOLVED, that the undersigned insurance industry organizations strongly support the substantial limitation or elimination of punitive damages from the civil justice system, and

BE IT FURTHER RESOLVED, that where the total elimination of punitive damages is not feasible, the undersigned insurance industry organizations commit themselves to the goal of achieving meaningful punitive damages reforms, and

BE IT FURTHER RESOLVED, that no single approach will be advocated as the sole "solution" to punitive damages, but that remedial efforts will be adjusted to the particular circumstances of individual states and limited to states where meaningful reform is politically possible, and

BE IT FINALLY RESOLVED, that consideration will be given to the following categories of proposals as possible remedial approaches to punitive damages reform in the upcoming legislative sessions of the various states:

(a) Maximum limits on the number or amount of punitive damages awards that can be assessed for any single course of conduct,

(b) Limitations on the type of conduct that can give rise to punitive damages,

(c) Procedural modifications that enhance fairness in the process used to award punitive damages,

(d) Affirmative defenses to punitive damages allegations,

(e) Restrictions on attorney fees that can be collected for punitive damage awards, and

(f) Provisions requiring punitive damage awards to be paid under certain conditions to governmental units or charitable organizations.

Alliance of American Insurers
American Insurance Association
American Council of Life Insurance
Health Insurance Association of America
National Association of Independent Insurers
Farmers Insurance Group
Approved Nov. 1, 1984

Pending Reform Measures

ARIZONA

Punitive Damages/Limitations
H-2435 (Herstam, et al)
This bill would prohibit a judgment for a plaintiff to be entered which awards damages in excess of those proven based on the defendant's conduct. An exception would be made if no sooner than 60 days before filing the action, the plaintiff either served written notice on the defendant which identified the conduct and demanded satisfaction of a nature specified and which, before the filing of the action, had resulted in non-compliance by the defendant or sought to have the dispute with the defendant resolved by a hearing before any appropriate administrative body or if the plaintiff had established by creditable evidence that the defendant knew or should have known that the conduct had no reasonable support in fact or law.

Punitive Damages
S-1114 (Corpstein, et al)
This bill would: (1) provide that a jury civil action involving a claim for punitive damages would be bifurcated; (2) require the plaintiff in each punitive damage claim to prove that the defendant acted with fraud, malice and oppression; (3) provide that punitive damages recovered, except 5%, would be paid to the state general fund; (4) provide that 5% of the damages awarded would be distributed to the plaintiff and the plaintiff's counsel, in a proportion determined by the judge; and (5) provide that a defendant in a civil action involving a claim for punitive or exemplary damages could make a motion and the judge could hold a hearing, at any time after the action was commenced in a non-jury trial or after a jury finds that punitive damages could not be awarded, to determine if the claim was brought with sufficient facts or evidence to reasonably entitle the plaintiff to the damages.

CALIFORNIA

Punitive Damages Repeal
A-1739 (Felando)
This bill would repeal punitive damages in all civil actions.

Punitive Damages
A-2227 (Wyman)
This bill would require the trier of fact to take into account specific factors when making a determination as to whether a defendant is liable for punitive damages. These factors include whether the defendant has discontinued the conduct, the duration of the defendant's conduct, the financial condition of the defendant, the effect of other punishment imposed upon the defendant, and the extent to which the plaintiff's injury was the result of the plaintiff's own reckless disregard for his or her personal safety.

Punitive Damages/Bifurcated Trials
S-840 (Beverly)
This bill would provide for the bifurcation of trials in which punitive damages are claimed.

Punitive Damages Insurability
S-969 (Robbins)
This bill would authorize a local public entity to insure against liability for a claim for punitive damages.

COLORADO

Punitive Damages
H-1256 (Grant, et al)
This bill would provide that the jury, in civil actions, determine whether an injured party was entitled to receive exemplary damages for personal injury or for injury to personal or real property. The court would be required to determine the amount of exemplary damages to be awarded. The amount awarded would be limited to an amount no greater than the actual damages awarded. One-half of all exemplary damages awarded would be paid to the injured party and one-half would be paid into the Crime Victim Compensation Fund. Exemplary damages for an injury attended by insult would be prohibited.

CONNECTICUT

Damages/Study on Pain and Suffering Awards
H-5110 (Chase)
This bill would require the joint standing committees on judiciary and insurance to conduct a study on the imposition of limits on pain and suffering awards and contingency fees collected by attorneys.

Punitive Damages/Limitation
H-6578
This bill would authorize a court to award punitive damages in an amount designed to punish the defendant, but not to exceed the plaintiff's actual litigation expenses less taxable costs.

HAWAII

No-Fault/Medical Charges
S-1402
This bill would provide that no person rendering medical services for which a patient was insured under no-fault motor vehicle insurance could charge a fee for a service which was higher than the amount the physician would charge for the same service if the patient were not insured. Any insurer who pays a fee which violates this provision could bring an action against the violator for the amount of the overcharge. In addition, the insurer would be awarded attorneys' fees and costs and could be awarded for not more than $10,000 in punitive damages for each overcharge. Administrative penalties of not more than $10,000 could also be imposed on the violator.

ILLINOIS

H-01788

H-02203

Unfair Claim Settlement Practices/Punitive Damages
S-60 (D'Arco)
This bill would provide that a court could allow punitive damages where it appears that an insurer has been unreasonable and vexatious in refusing to pay a claim.

Punitive Damages/Unfair Practices
S-726 (Berman)
This bill would provide for assessing fees for the attorneys of insureds and beneficiaries in successful ac-

tions against insurers and would provide that no order to cease and desist directed to any person, or subsequent administrative or judicial proceeding to enforce the same would in any way relieve or absolve the person from any administrative action against the license or certificate, civil liability under common law or criminal penalty arising out of the methods, acts or practices found unfair or deceptive. In addition, the bill would provide for punitive damages where an insurer has committed an unfair claims practice.

S-01068

S-01208

INDIANA

Punitive Damages/Maximum Awards
H-1297
This bill would limit the amount of punitive damages awarded in a civil action to three times the amount of actual or compensatory damages awarded.

IOWA

Punitive Damages/Financial Condition of Defendant
H-197 (Platt)
This bill would provide that in a civil action in which exemplary or punitive damages were sought, unless the plaintiff produced evidence of a prima facie case of liability for exemplary or punitive damages, or ordered by the court, the plaintiff could not conduct discovery of and could not introduce evidence of the profits of the defendant gained by virtue of the alleged wrongful conduct or the financial condition of the defendant.

Punitive Damages/Financial Condition of Defendant
S-203 (Drake)
Same as H-197, reported above.

KANSAS

Punitive Damages
H-2457
This bill would: (1) require that a civil action including a claim for punitive damages be bifurcated; (2) prohibit punitive damages from being assessed if compensatory damages were not awarded, if only nominal damages were awarded or if no actual damage was found by the trier of fact; (3) provide that punitive damages would not be levied in certain other cases; (4) provide that the plaintiff in a civil action including punitive damages would have the burden of proving the defendant's culpability beyond a reasonable doubt; (5) provide that it must be proven that the defendant acted toward the plaintiff with willful misconduct, fraud or malice; and (8) provide that 95% of the punitive damages awarded would be credited to the state general fund and the remaining 5% to the plaintiff.

Punitive Damages
S-110
This bill was amended on 3/7/85. This amendment would delete the provisions relating to professional liability and provide that in any action in which punitive damages were recoverable, the trier of fact would determine whether the damages would be allowed. If the damages were allowed, a separate proceeding

would be conducted to determine the amount of damages. No award of punitive damages could exceed the lesser of: (1) 25% of the annual gross income earned by the party against whom the damages were awarded; or (2) $3,000,000. In addition, the total amount of damages recoverable for pain and suffering by a claimant for personal injury in a medical malpractice liability action could not exceed $250,000.

LOUISIANA

Punitive Damages/Actions Against Insurers
S-316 (Kelly)
This bill would provide that an insurer would owe a duty of good faith and fair dealing to its insureds and would authorize the award of exemplary damages for violations of that duty.

Punitive Damages/Civil Cases
S-325 (Kelly)
This bill would provide that exemplary damages could be awarded in certain civil cases if it was proved that the conduct of the defendant was intentional, fraudulent or was in wanton or willful disregard of the injured person's rights. The award could be three times the amount awarded for general and special damages.

Punitive Damages/Actions Against Insurers
S-326 (Kelly)
This bill would create a duty of good faith and fair dealing between insurers and any person with whom they contract for insurance and award to insureds or plaintiffs exemplary damages in amount not to exceed three times any award for general or special damages when the insurer was found to have arbitrarily or intentionally violated the duty. The award of exemplary damages would be granted in lieu of any other penalties which could be granted when the award was found to be in excess of those penalties.

MINNESOTA

H-00500

MISSOURI

Punitive Damages/Employees
H-382 (Scoville, et al)
This bill would provide that any insurance company duly authorized to do business in this state could provide insurance coverage for liability for punitive or exemplary damages assessed against the insured as the result of acts or omissions, intentional or otherwise, of the insured's employees, agents or servants, or of any other person or entity for whose acts or omissions the insured is or could be liable without the actual prior knowledge of the insured.

MONTANA

Punitive Damages/Limit
H-363 (Marks) **Enacted as Chapter 507, Laws 1985.** Approved 4/16/85, effective 4/18/85.
This law provides that a jury could not award exemplary or punitive damages unless the plaintiff has proved all elements of the claim by clear and convincing evidence. Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence; it is more than a preponderance of evidence, but less than beyond reasonable doubt.

Punitive Damages/Amount
H-400 (Grady)
This bill would provide that a jury could not consider a defendant's financial worth when determining the amount of exemplary or punitive damages to be awarded.

Punitive Damages/Limit
H-511 (Hannah)
This bill would provide that punitive damages could be awarded to a plaintiff in an amount equal to the amount of actual damages awarded to the plaintiff or $50,000, whichever is more, but would limit the damages to $500,000.

H-00533

Punitive Damages/Definition of Conduct
H-536 (Ramirez)
This bill would provide that punitive damages are allowed if the defendant has been guilty of fraud or actual malice or has violated a statute knowingly and purposely or with actual malice.

Punitive Damages/Limit
S-200 (Lane, et al)
This bill would provide that a jury could not award exemplary or punitive damages in excess of three times the amount of actual damages awarded or 5% of the net worth of each defendant, whichever is less.

NEW JERSEY

Punitive Damages/Limit
S-1112 (Hurley)
This bill would establish a limit of $100,000 on the amount of damages which may be awarded for pain and suffering.

Punitive Damages/No-Fault Law
S-2754 (Bubba)
This bill would authorize the recovery of punitive damages in an action for the payment of personal injury protection coverage benefits under New Jersey's no-fault law. If it is shown that the insurer failed or refused to pay the benefits in good faith, it would be subject to damages not in excess of twice the amount of benefits awarded to the injured party. These damages could be awarded in addition to interest, court costs and reasonable counsel fees, in the court's discretion. No punitive damages would be awarded in a dispute submitted to arbitration.

NEW MEXICO

Punitive Damages/Unfair Claims Settlement Practices
H-537
This bill would provide that punitive damages would be awarded for various unfair claims settlement practices.

Punitive Damages/Personal Injury
S-229
This bill would prohibit the award of punitive damages in any civil action except in actions for personal injury. 'Personal injury' would mean injury to the body of a human being, including death, and would include incidental claims arising from the same treatment or occurrence.

NEW YORK

Payment for Future Pain and Suffering
A-3237 (Sullivan)
This bill would provide that damages for pain and suffering in excess of $100,000 would be placed in an investment fund with the plaintiff receiving the income from that fund at least every three months for the rest of his life. The principal would be returned to the defendant upon death of the plaintiff.

WC/Punitive Damages
S-2398 (Connor, et al)
This bill would provide that an action to recover damages for personal injury, illness or death caused by the latent effects of exposure to a substance could be commenced within two years from the date of the discovery of the illness or injury, the date of death, or the discovery of the cause of the injury, illness or death, whichever is later. Punitive damages could be awarded if the plaintiff shows by clear and convincing evidence that the injury, illness or death suffered was the result of the defendant's reckless disregard for the safety of product users, consumers, or any other persons who might be harmed by the product. Punitive damages could not be awarded in the absence of an award for compensatory damages.

OKLAHOMA

Punitive Damages/Insurance Protection
H-1441 (Osborne)
This bill would authorize a person to obtain insurance protection for punitive or exemplary damages.

OREGON

Punitive Damages
H-2934
This bill would limit the liability of licensees, permitees and social hosts to third parties injured in motor vehicle accidents. The bill would define responsible business practices as a defense to liability and sets the liability limits at $50,000. In any dram shop action, punitive damages would not be recoverable unless it was proven by clear and convincing evidence that the party against whom punitive damages was sought has shown wanton disregard for the health, safety, and welfare of others. In addition, the bill would create the Liability Fund from a portion of liquor license fees, vehicle operator licenses and fines for offenses involving liquor to pay the judgment over the limit.

Punitive Damages/Civil Actions
H-2942
This bill would establish the restrictions, conditions and procedures for the award and recovery of punitive damages in civil actions. In addition, the bill would provide that punitive damages could be recoverable by an injured party in a product liability civil action according to those restrictions and conditions established.

Punitive Damages
S-550
This bill would provide that in any civil action to recover punitive damages, evidence of financial condition of the defendant could not be admitted unless there is a prima facie showing of conduct sufficient to support an award of punitive damages.

TEXAS

Punitive Damages
H-2264 (Hilbert)
This bill would provide the conditions and restrictions for the award of punitive damages, including: (1) that the plaintiff would have the burden of proving the defendant's liability; (2) that the award of punitive damages in certain cases could be prohibited; (3) that the amount of award of punitive damages could not exceed the lesser of either three times the amount of the actual compensatory damages exclusive of costs or $25,000; and (4) for the distribution of damages.

VIRGINIA

Punitive Damages/Exlusions from Coverage
S-666 (Parkerson)
This bill would exclude insurance coverage for punitive damages arising out of death or injury of any person as a result of negligence, including willful and wanton negligence.