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The Assault on Injured Victims' Rights

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THE ASSAULT ON INJURED VICTIMS' RIGHTS

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INTRODUCTION

It is doubtful whether there has been anything like the present attack on injured victims' rights in the two hundred year history of the American civil justice system. During the 1986 state legislative session, forty-one states passed legislation to restrict the rights of innocent victims to sue, and to be fully compensated for their injuries. In a few states, legislatures enacted across-the-board tort law changes overturning state common law which for generations had afforded harmed citizens a means of challenging injustice and negligence.[1]

Insurance industry advertisements suggest that recent tort legislation is the necessary consequence of an unrestrained jury system — "exorbitant awards and unpredictable results"[2] which are not only crippling the insurance industry,[3] but are, in the words of the insurance industry's most powerful ally President Ronald Reagan, "eating away at the fabric of American life."[4]

In almost every state, as well as in Congress, proposals abound to restrict the rights of innocent victims to sue and to recover for their injuries. These restrictions include: arbitrary caps on "pain and suffering" awards;[5] limitations on, or elimination, of punitive damage awards,

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1. *See* Proffer, *Coping With A Crisis*, NAT'L CONF. OF STATE LEGISLATURES, Sept., 1986, at 18.

2. INS. INFO. INST., THE LAWSUIT CRISIS (1986).

3. The insurance industry has undertaken a "massive effort to market the idea that there is something wrong with the civil justice system in the United States." NAT'L UNDERWRITER, Dec. 21, 1984, at 2. The goal, in the words of one of the industry's leading spokespersons, GEICO's chairman John J. Byrne, is "to withdraw [from the market] and let the pressure for reform build in the courts and in the state legislatures." J. COM., June 18, 1985, at 10A, col. 1.

The insurance industry has funded a $6.5 million dollar advertising campaign to convince the public a "lawsuit crisis" is responsible for the scarcity of affordable insurance among certain individuals and businesses. J. COM., Mar. 19, 1986 at 1, col. 2. Magazine and television ads include such captivating headlines as "The Lawsuit Crisis Is Bad for Babies," "Even Clergy Can't Escape the Lawsuit Crisis" and "The Lawsuit Crisis Is Penalizing School Sports."

4. President's Message to the American Tort Reform Association ("ATRA"), 22 WEEKLY COMP. OF PRES. DOC. 720 (May 30, 1986) [hereinafter President's Message].

5. Under these provisions, a passenger who became a quadriplegic after a defectively-designed jeep overturned, *see* Bartels v. City of Williston, 276 N.W.2d 113 (N.D. 1979), and a person burned and permanently disfigured by an exploding Pinto gas tank, *see* Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981), could recover for only a fraction of their actual pain and suffering over a lifetime. Some caps have been held unconstitutional. In striking down Virginia's $1.0 million legislative cap on medical malpractice awards, a Virginia federal district court held:

[T]he legislature may not mandate the amount of judgment to be entered in a

which often serve as the only effective deterrent against intentionally unsafe practices;[6] mandatory limits on contingency fees for plaintiff lawyers, without corresponding limitations on the fees of defense lawyers;[7] modification or elimination of joint and several liability, which results in penalizing the victim by precluding full recovery in the event a culpable party is unable to pay;[8] restrictions on lump sum payments;[9] repeal of the collateral source rule;[10] and relaxed liability standards, such as elim-

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trial. Such a measure not only infringes upon the right to a jury where that right applies, but, when considered in the light of the proper functioning of the legislature and the judiciary under our system of separation of powers of the respective branches, it also impermissibly interferes with the function of the judicial branch, thereby violating the separation of powers. Viewed in this light, [the cap] is clearly unconstitutional.

Boyd v. Bulala, 647 F. Supp. 781, 790 (W.D. Va. 1986).

6. Punitive damages are awarded only in the most serious cases where injury was caused by a defendant's "aggravation or outrage, such as spite or 'malice', or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton." W. PROSSER & W. KEETON ON TORTS § 2, at 9-10 (1984) [hereinafter KEETON]. For an example of statutory limits on punitive damages, see COLO. REV. STAT. § 13-21-102(1)(a) (1986) which provides:

> In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages. The amount of such reasonable exemplary damages shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party.

7. Defense lawyers, paid by the hour, may be motivated to increase their hours by conducting unnecessary discovery, filing frivolous motions, or refusing to participate in meaningful settlement negotiations until immediately before trial. Plaintiff's attorneys, usually paid on a contingency basis, have no such motivations because they are only compensated upon recovery of a claim. Furthermore, access to legal services on a widespread basis for non-wealthy individuals is made possible through the contingency fee system. *See generally* Schmidt, *Contingent Fee: Key to the Courthouse*, 92 CASE AND COMMENT 2 (1987).

James L. Gattuso of the conservative Heritage Foundation pointed out that the contingency fee system acts not only to provide injured persons who could not otherwise afford legal representation with access to the legal system, but it helps screen out baseless lawsuits. Gattuso, *Don't Rush to Condemn Contingency Fees*, Wall St. J., May 15, 1986, at 28, col. 3.

8. If joint and several liability is eliminated, any one wrongdoer's liability is limited to the "proportion of harm" attributable to that person's misconduct. This would be unfair to the victim in the event that one wrongdoer cannot or will not pay for injuries he helped to cause. The common law of joint and several liability has long recognized that it is more fair to allow an innocent victim to fully and promptly recover for injuries suffered, and to let the wrongdoers decide among themselves, after the victim is compensated, how to apportion the liability. *See* KEETON, *supra* note 6, at 328, 475. Those arguing to eliminate joint and several liability frequently overlook the fact that in virtually every jurisdiction, a defendant may be held liable in the first place only if the defendant's conduct is a substantial factor in bringing about the harm. *See* RESTATEMENT (SECOND) OF TORTS § 431 (1965). Moreover, eliminating joint and several liability requires that a legal fiction be introduced into the rules of compensation, by presuming it is possible to define precise percentages of responsibility for an indivisible injury among several wrongdoers.

9. Provisions mandating that damage awards be allocated in periodic payments penalizes those victims who are faced with large medical costs immediately after an injury and those who must make adjustments in transportation and housing. Periodic payments allow insurance companies to pocket the interest earned while the funds remain in their possession.

10. The collateral source rule serves to prevent a tortfeasor from reducing its liability by payments that the injured party has received from sources collateral to the tortfeasor. RESTATEMENT (SECOND) OF TORTS § 920A (1965) ("Payments made to or benefits con-

ination of strict liability in product liability actions.[11]

These measures are aimed at weakening the American civil justice system which, for all its embrace of noble concepts of justice, still confronts injured people with the difficult task of prevailing in court before they may recover any compensation. Surveys indicate that these measures are not supported by the American people.[12] Rather, they are part of a legislative package advocated by various special interest groups: the property/casualty insurance industry — seeking to enrich its already large profits at the expense of innocent victims; the business and professional defendants' lobbies — seeking to immunize from suit the manufacturers of hazardous goods and toxic chemicals; and the Reagan administration — pushing to federally regulate downward the decentralized state judicial system that has provided injured victims with access to justice for over 200 years. They call this package "tort reform," but it is one of the most unprincipled public relations scams in the history of American industry.

I. THE "INSURANCE CRISIS" MYTH

The "insurance crisis" has little to do with lawsuits, but everything to do with a cyclical trend in the insurance industry. This "crisis" is a self-inflicted phenomenon which last occurred in the mid-seventies, and which invariably provokes frenetic talk of a litigation explosion and calls for legislative limits on victims' rights.[13] The last cycle began several

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ferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or part of the harm for which the tortfeasor is liable."). *See, e.g.*, Folkestad v. Burlington Northern, Inc., 813 F.2d 1377 (9th Cir. 1987).

Repeal of the collateral source rule means that payments taken from health insurance, social security and other sources which have already been paid for by the consumer or taxpayers, would be used to reduce a wrongdoer's financial responsibility for injuries to consumers. This system provides a windfall to insurance companies, which have previously received payment of premiums from the victim.

11. The doctrine of strict liability ensures that the one who is responsible for bringing a dangerously defective product into the marketplace or workplace compensates those injured by the product. This approach maximizes incentives for making safer products.

Strict liability does not mean absolute liability. In a strict liability action an injured victim still carries a heavy burden. He or she must prove: (1) the existence of a defect which renders the product in question unreasonably dangerous; (2) the manufacturer's responsibility for that defect; (3) the nature and extent of plaintiff's injury; and (4) the causal connection between the defect and the injury. *See* RESTATEMENT (SECOND) OF TORTS § 395 comment b (1965). The additional proof requirements for recovery in product liability actions would increase the costs and evidentiary burdens, and generally make pursuit of legal remedies more difficult for the average victim.

12. A nationwide poll conducted for one "tort reform" group, ATRA, shows that while "[a]t first glance the public appears receptive to a broad range of solutions to the liability problem . . . focus group discussions reveal that this receptivity is easily reversed when objections to reforms are raised." *The Public Discusses the Liability Crisis*, BURSON-MARSTELLER RES. at x (June 1986). When pushed to clarify what they really could support, only two solutions could be agreed upon: "1. Educate the public on the proper use of the civil court system; and 2. Impose penalties for frivolous or nuisance suits." *Id.* at xi. The poll was conducted by interviewing a total of 1,002 American adults selected nationwide. In addition, two focus group sessions were conducted involving twenty of the "influential public," defined as heads-of-households with incomes of about $40,000 who voted in 1984. *Id.* at iii, iv.

13. J. Robert Hunter, Federal Insurance Administrator under Presidents Ford and

years ago when interest rates were relatively high. Capitalizing on higher interest rates, the industry lowered prices and insured poor risks in order to obtain premium dollars which were then invested for maximum return.[14] When interest rates dropped, and investment income decreased accordingly, the industry responded by sharply increasing insurance premiums and reducing the availability of coverage — a repeat of their similarly mismanaged performance of the mid-seventies. In fact, in all the controversy, there is remarkable agreement about the causes of the insurance industry's problems.[15] A January 1987 editorial in *Business Week* may have said it best in concluding that:

> Even while the industry was blaming its troubles on the tort system, many experts pointed out that its problems were largely self-made. In previous years the industry had slashed prices competitively to the point that it incurred enormous losses. That, rather than excessive jury awards, explained most of the industry's financial difficulties.[16]

Even through the most recent downturn the industry continued to make money. Their profits are now soaring.[17] Insurance company

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Carter, and now President of the National Insurance Consumer Organization ("NICO"), testified before Congress in 1986:

> On November 3, the Washington Post editorialized that liability insurance or the lack of it is becoming a national problem. . . . They went on to say that there must be a limit to all this, that the real beneficiaries of this may be the lawyers, and there has to be a better way of compensating those to whom reparations are due than the clumsy and expensive mechanism that exists today. That editorial was November 3, 1976, and that is my point. We are in a typical cyclical pattern of the insurance industry which is driving prices skyward. This is the insurance cycle. . . . [T]ypical bottoms were in 1965, 1975, and 1984. . . . This . . . has gone on since the early 1900's in fairly consistent patterns.

Costs and Availability of Liability Insurance: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 99th Cong., 2d Sess. 26 (1986) (testimony of J. Robert Hunter, President, National Insurance Consumer Organization) [hereinafter Hunter Testimony]. *See also* MICHIGAN HOUSE OF REPRESENTATIVES, STUDY OF THE PROFITABILITY OF COMMERCIAL LIAB. INS., (Nov. 10, 1986) ("The property casualty industry is cyclical in nature. Data show that the industry has had profitability cycles at least since the 1920's") [hereinafter MICHIGAN REPORT].

James B. Stradtner, general partner at investment bankers Alex Brown & Son, Inc., described the "boom and bust nature of the industry . . . as predictable as the tide in a three-year swing from flow to ebb." J. OF COM., May 15, 1986, at 14A, col. 1. Stradtner was also reported as saying that "the commercial insurance industry has an almost incurable penchant for 'shooting itself in the foot.'" *Id.*

14. *See, e.g.*, Hunter Testimony, *supra* note 13, at 26 ("In the early eighties they were writing the MGM Grand Hotel fire *after* the fire, [which was, in effect] retroactive liability insurance. They lusted after the cash-flow [of] liability policies. When the interest rates dropped, they lost their lust.")(emphasis added).

15. For example, Maurice R. Greenberg, President and Chief Executive Officer of American International Group, Inc., one of this country's leading property/casualty companies, told an insurance audience in Boston that the current industry problems were due to price cuts "to the point of absurdity" in the early 1980's. Had it not been for these cuts, Greenberg said, there would not be "all this hullabaloo" about the tort system. Greenwald, *Insurers Must Share Blame: AIG Head*, BUS. INS., Mar. 31, 1986, at 3.

16. *What Insurance Crisis?*, BUS. WK., Jan. 12, 1987, at 154. *See also, e.g.*, NEW MEXICO STATE LEGISLATURE, REPORT OF THE INTERIM LEGISLATIVE WORKMEN'S COMPENSATION COMM. ON LIABILITY INSURANCE AND TORT REFORM (Nov. 24, 1986); MICHIGAN REPORT, *supra* note 13; INSURANCE COMM. PENNSYLVANIA HOUSE OF REPRESENTATIVES, LIABILITY INSURANCE CRISIS IN PENNSYLVANIA (Sept. 29, 1986).

17. The property/casualty insurance industry estimates that its income after taxes for

stocks are booming on the New York Stock Exchange, and investment analysts and brokers recommend casualty insurance stock for investment.[18]

Coming out of their bottom year of 1984, the insurance industry, in conjunction with their foreign reinsurers,[19] saw a great opportunity to limit their own future payout obligations by exploiting the business community's natural eagerness for additional limitations on liability from lawsuits. So they began dramatically increasing premiums and reducing coverage, and arbitrarily cancelling policies of daycare centers, small businesses, and local governments.[20]

When businesses, professionals and governmental entities protested, the insurers proclaimed, "Don't look at us. It's those courts, those juries, those verdicts, those lawyers." And instead of saying, "Well, can you *prove* that?", these frustrated groups blindly accepted their insurers' rationale, and joined in lockstep with them to forge a powerful new lobby designed to fight for measures which would further limit their own liability for the damage they caused innocent victims.[21]

Aimed in the direction of Congress and the state legislatures, this coalition of insurance companies and corporate defense lobbies has relied on misinformation and anecdotal cases[22] to attack and destroy de-

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1986 totalled $11.5 billion. Green, *P/C Insurers Turned a Profit Last Year*, J. OF COM., Jan. 6, 1987, at 1, col. 2.

Between 1976 and 1985, the property/casualty companies had a net gain of about $81.0 billion on which they paid no federal income tax, according to the General Accounting Office. *See The Liability Insurance Crisis, Hearings Before the Subcomm. on Economic Stabilization, House Comm. on Banking, Finance and Urban Affairs*, 99th Cong., 2d Sess. 87 (1986) (statement of William J. Anderson, Director, General Government Division) [hereinafter *Liability Insurance Crisis Hearings*].

18. *See, e.g.*, Curran, *Bargains Beckon in Insurance*, FORTUNE, Aug. 4, 1986, at 217; *Analysts Bullish On Insurer Stocks*, BUS. INS., Aug. 4, 1986, at 1.

19. Reinsurance is insurance for insurance companies. The insurer pays the reinsurer a premium, in exchange for which the reinsurer agrees to share the risk with the insurer. Just as primary insurers have been raising the premiums they charge their insureds, reinsurers have been raising the premiums they charge the primary insurers. An independent study for the Michigan House of Representatives found that "reinsurance serves to amplify the [insurance] cycle." MICHIGAN REPORT, *supra* note 13, at 9.

20. A study based on a questionnaire to insurance companies, released June 9, 1986 by Rep. Peter W. Rodino, chairman of the House Judiciary Committee, demonstrates that the liability insurance industry actually paid out far less in claims than it received in premiums over the past decade, "undermin[ing] the companies' claims of massive losses and rais[ing] the specter of price-gouging and bloated profits." Address by Rep. Peter Rodino, Press Release (June 9, 1986).

21. At a January 17, 1986 press conference, a number of business, professional and insurance trade organizations announced the formation of ATRA whose sole agenda is to change this country's civil justice system.

Former Attorney General Benjamin R. Civiletti resigned as ATRA's general counsel on October 28, 1986, after ATRA made "outrageous and untrue" statements about American lawyers. *ATRA Counsel Quits Over Negative Remarks About Lawyers*, MEALEY'S LITIGATION REP. NAT'L TORT REFORM, Dec. 2, 1986, at 914.

22. Several victims whose stories have been distorted repeatedly in public statements by tort-reform proponents were brought before a congressional committee in an attempt to clear the record regarding their cases. *See Liability Insurance Crisis Hearings*, *supra* note 17. For example, Charles Bigbee, whose leg was severed after a car hit a phone booth in which he was trapped (the door jammed after he noticed the car coming towards him), testified:

I believe it would be very helpful if I could talk briefly about my case and show

cades of slow but careful progress made by state court after state court respecting the physical integrity of human beings against harm.[23] The coalition is out to convince lawmakers to view this progressive evolution not as a source of national pride, or as a source of public recognition that the weak and the defenseless sometimes get justice, but rather as a source of shame, as a source of economic destructiveness, as something that should be stopped.

II. THE DETERRENT EFFECT OF UNPREDICTABILITY KEEPS OUR TORT SYSTEM STRONG

The fundamental message of this special interest coalition is that the jury system is out of control because of the unpredictable nature of the common law and of jury awards.[24] Insurance companies dislike the civil jury system because they dislike a system in which they cannot precisely budget liability as a cost of doing business.

It is this "cost unpredictability", separate from the gradual evolution of liability principles over the generations, which constitutes the very essence of deterrence — a function of the civil justice system which is equally important to compensating the victim, and which cannot be quantified in dollars and cents. The common law of torts reflects and renews ethical and humane traditions which have led to the deterrence of unsafe practices, the disclosure of potential hazards to a wider public, and authoritative expansions of respect for human life which serve to distinguish our country from most other nations.

Our tort system provides several invaluable functions. It is the means of protection for tens of millions of Americans who are less likely to be injured because of the impact of lawsuits brought by prior victims. The prospect of tort liability deters those manufacturers, builders, doctors and other tortfeasors from repeating their negligent behavior; it provides them with a proper economic incentive to curb their damaging practices and to make their endeavors more safe.[25] Tort actions, when

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how it has been distorted not only by the President, but by the media as well. That is probably the best way to show that people who are injured due to the fault of others should be justly compensated for the damages they have to live with the rest of their lives.

Id. at 45.

23. As Prosser noted, in the tort system "change and development have come as social ideas have altered, and they are constantly continuing." KEETON, *supra* note 6, at 19.

24. For example, one industry piece states, "[w]ith no way to gauge the risk of a lawsuit or amount of a potential court award, many businesses, professionals, municipalities, manufacturers, and individuals are exposed to enormous unpredictability that makes it difficult to do business." *The Lawsuit Crisis*, INS. INFO. INST. (1986).

25. According to Prosser,

> The "prophylactic" factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.

KEETON, *supra* note 6, at 25. *See also* Williams, *The Aims of the Law of Tort*, 4 CURR. LEG. PROB. 137 (1951).

reported to millions of people through the mass media, increase public awareness about harmful products, dangerous drugs, toxins and unsafe practices and processes. The system functions to alert citizens to take their own precautions, and to inform regulators and legislators as to the advisability of broader safety laws and stronger safety standards for the prevention of harm.[26]

Finally, the civil justice system provides our society with the moral and ethical fiber that establishes the proper duties and obligations between parties in the marketplace, the workplace, the government and the community. The sources for these basic ethical/legal principles elaborating government and corporate accountability are the trial courts and appellate courts. The decisions of these courts establish limits, duties and rights to protect workers from employers, consumers from sellers, communities from corporations, citizens from governmental entities and future generations from present recklessness. Judicial decisions sow the seed of civilized behavior.

III. A Campaign of Misinformation

Why is the insurance industry so disturbed by this sensitive system? Why do they advocate taking judgment away from the judge and jury who hear the evidence and who have no personal stake in the outcome? Why do they propose to replace judicial determination with a codified system of compensation rates which can be later altered with the corruptive monies of political action committees and the special interest influence-peddling that often reaches the ears and pockets of legislators?[27] The answer must be premised on data. But the insurance industry relies on alarmist, prejudicial, and sometimes unsubstantiated, data and surveys which either belie credulity or are so manipulated and interpreted by the insurance lobby as to more closely resemble fiction than fact. Often the insurance industry ignores reliable compilations of statistics which indicate that the American tort system is *not* out of control.

We know from data around the country that machines break and chemicals burn their victims and that the cost of the casualty count in the workplace and marketplace runs into the millions of dollars annually.[28] We also know that the auto, drug, chemical and other industries which now seek greater protection from liability have been successfully taken to court over and over again for seriously injuring the American public with defective or toxic products, and that as a result of these lawsuits, once dangerous products have been made safer or removed from the

26. For example, 20 years ago, United States Senator Gaylord Nelson, relying upon data and sworn testimony from a 1965 lawsuit brought by an injured plaintiff against a major tire manufacturer, sponsored legislation which resulted in the establishment of minimum tire performance safety standards. *See* 112 CONG. REC. 9614 (1966) (statement of Sen. Nelson).

27. *See generally* Note, *Curbing Injurious PAC Support Through 2 U.S.C. § 441d*, 35 HASTINGS L.J. 869 (1984).

28. D. BOLLIER & J. CLAYBROOK, FREEDOM FROM HARM; THE CIVILIZING INFLUENCE OF HEALTH, SAFETY AND ENVIRONMENTAL REGULATION 163 (1986).

marketplace altogether.[29]

However, only a very small fraction of these injured Americans actually reach the courtroom,[30] and only about half of those who obtain jury verdicts receive or collect any compensation. This is the sober reality — even according to figures released by Jury Verdict Research ("JVR"), the legal publishing firm whose figures are widely used by the insurance industry, the United States Justice Department and other supporters of "tort reform" to demonstrate a "lawsuit crisis."[31]

In addition, statistics relied upon by tort reform proponents have often been misused or misstated, and many have been substantially discredited.[32] For example, compilations of data from the federal courts are frequently cited to evidence a United States tort litigation explo-

29. Among the well-known products which have been removed from the market are: The Dalkon Shield intrauterine device, manufactured by A.H. Robins (*see* M. MINTZ, AT ANY COST: CORPORATE GREED, WOMEN AND THE DALKON SHIELD (1979)); the Ford Pinto exploding gas tank (*see* Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981)); and asbestos (*see* P. BRODEAU, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL (1985)).

Further, a recent survey of risk managers of 232 major U.S. corporations by the Conference Board, an industry group, found that product liability suits have had a minor impact on revenues, market share, and employee retention. Rather, the study found:

> Where product liability has had a notable impact — where it has most significantly affected management decision making — has been in the quality of the products themselves. Managers say products have become safer, manufacturing procedures have been improved, and labels and use instructions have become more explicit.

Product Liability, The Corporate Response, CONF. BOARD (1987). *See also*, Lambert, *Suing for Safety*, TRIAL, Nov. 1983, at 48 (lawsuits are effective in eliminating defective products).

30. In a recent study, University of Wisconsin Professor Marc Galanter found that only a small portion of troubles and injuries become disputes and only a small portion of these become lawsuits. Of those that do, the vast majority are abandoned, settled or routinely processed without full-blown adjudication. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 5, 26 (1983). Galanter found that "a sizable minority — probably less than one-fifth — of American adults have sometime in their lives been a party to civil litigation." *Id.* at 21. Galanter's work in this area has been described as a "masterpiece in the field of social research on law," Wall St. J., May 28, 1986, at 37, col. 3.

31. *See, e.g.*, DEPARTMENT OF JUSTICE, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986) [hereinafter JUSTICE DEPARTMENT REPORT]. According to JVR, "the plaintiff recovery rate [was] 60%; 26 years ago it was also 60%. . . the rate is well under 50%." *Liability Insurance Crisis Hearings*, *supra* note 17, at 360 (testimony of Philip J. Hermann, Chairman of JVR).

32. A May 1986 report by the Ad Hoc Insurance Committee of the National Association of Attorneys General concluded:

> [T]he major assumptions and conclusions underlying the Justice Department Report . . . are substantially unsupported by the facts. The facts do not bear out the allegations of an "explosion" in litigation or in claim size, nor do they bear out the allegations of a financial disaster suffered by property/casualty insurers today. They finally do not support any correlation between the current crisis in availability and affordability of insurance and such a litigation "explosion." Instead, the available data indicate that the causes of, and therefore the solutions to, the current crisis lie with the insurance industry itself.

AD HOC INSURANCE COMM. OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, AN ANALYSIS OF THE CAUSES OF THE CURRENT CRISIS OF UNAVAILABILITY AND UNAFFORDABILITY OF LIABILITY INSURANCE, at 45 (1986) [hereinafter ATTORNEYS GENERAL REPORT]. *See also*, Farrel & Glaberson, *The Explosion In Liability Lawsuits is Nothing But a Myth*, BUS. WK., Apr. 21, 1986 at 24.

sion,[33] yet only approximately five percent of all tort filings are in federal court.[34] Increases in these filings largely can be explained by removals from state courts, and by a few epidemic product liability cases involving less than a dozen particularly dangerous products, such as asbestos, which have been the subject of recent litigation by thousands of injured persons.[35] The best available evidence demonstrates that state courts are *not* experiencing a litigation explosion.[36]

Jury verdict data released by JVR is also frequently cited as support for the insurance industry's position.[37] However, according to JVR's recent studies and JVR's chairman, Mr. Philip J. Hermann, this data does not substantiate any claim of recently escalating jury awards.[38] This is,

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33. The JUSTICE DEPARTMENT REPORT cites a 758% increase in product liability filings in federal courts between 1974 and 1985 as evidence of a "litigation explosion." JUSTICE DEPARTMENT REPORT, *supra* note 31, at 45.

Professor Galanter commented on the use of federal court data:

> The only systematic empirical base that played a role in . . . formulations [of a litigation explosion] was the statistics on the growth of caseloads in the federal courts, including the growth of appeals. Typically, only gross figures on filings were cited. The fact that little of this was full-blown adjudication was ignored. It was often assumed that what was going on in federal courts was typified by large, highly visible cases. It was further assumed that one could generalize from what was happening in the federal courts to what was happening in courts generally. . . . The literature displays little effort to offset these biases of perspective. But beginning with Barton's 1975 article [Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975)], there is a strong admixture of naive speculation and undocumented assertion. Appearing in prominent law reviews, publications in which, notwithstanding their prestige, there is no scrutiny for substantive, as opposed to formal, accuracy, these polemics were quickly taken as authority for what they asserted.

Galanter, *supra* note 30, at 62.

Galanter explained that those who erroneously have cited federal court data as the "scholarly foundation" of a litigation explosion tend to be "a narrow elite of judges (mostly federal), professors and deans at eminent law schools, and practitioners who practice in large firms and deal with big clients about big cases . . . [who] have a limited and spotty grasp of what the bulk of the legal system is really like." Galanter, *supra* note 30, at 61.

34. *See, e.g., Liability Insurance Crisis Hearings*, *supra* note 17, at 169 (testimony of Robert T. Roper, Director, Court Statistics and Information Management Project, National Center for State Courts).

35. *Id.* at 301-06.

36. *See* NATIONAL CENTER FOR STATE COURTS, A PRELIMINARY EXAMINATION OF AVAILABLE CIVIL AND CRIMINAL TREND DATA IN STATE TRIAL COURTS FOR 1978, 1981 AND 1984 (1986). The findings on torts filings are of particular interest. The increase in tort case filings between 1978-81 was only two percent, while the population for those states grew four percent during the same time period. Between 1981 and 1984 the population grew another four percent while tort filings increased seven percent. For the entire period 1978-84 total tort filings increased nine percent. The population increased by eight percent.

> "[T]here is not one shred of evidence to indicate that there is a litigation explosion in the State court system," and "I do not know where Mr. Willard [of the Justice Department] would gather that information, but we do not have it at the National Center for State Courts, and we are the clearing house for all the information."

Liability Insurance Crisis Hearings, *supra* note 17, at 169 (testimony of Robert T. Roper).

37. *See, e.g.*, JUSTICE DEPARTMENT REPORT, *supra* note 31.

38. JVR figures demonstrate that the rate of increase of jury awards has declined since 1981. JURY VERDICT RESEARCH, INC., INJURY VALUATION, CURRENT AWARD TRENDS 6 (1986) [hereinafter INJURY VALUATION]. JVR Chairman Philip Hermann has testified that: [O]ur studies do not support any claim of recently escalating jury verdict awards. The apparent reason for this erroneous impression is that a number of highly publicized news

in part, due to JVR's methodology. JVR data, cited by industry, does not reflect inflationary adjustments, and does not factor in settlements, verdicts lowered on appeal, remittiturs, bench verdicts, verdicts for defendants, or verdicts involving no money.[39] Moreover, JVR's "average jury award" figures are misused when cited to represent trends since these averages ignore "zero" verdicts and are heavily influenced by a few large ones.[40] "Median" figures are the correct measurement of typical awards,[41] and the median jury verdict has remained at approximately $8,000 in 1979 dollars since 1959.[42]

JVR figures are also used by tort reform proponents to demonstrate a surge in million-dollar-plus verdicts.[43] According to JVR figures, over the last twenty-five years there have been 2,564 million-dollar verdicts, many of which were settled for lower sums prior to appeal.[44] The claim is made that in the biggest democracy and economy in the world, this is some sort of scandal.

Since JVR figures are not adjusted for inflation, they do not account for the fact that the dollar today buys what thirty-nine cents purchased in 1969. And by JVR's admission, the rate of increase of million-dollar awards is slowing down.[45] Aside from this, in an economy with a $4.2

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articles quoting our statistics, have grossly misstated them. *Liability Insurance Crisis Hearings*, *supra* note 17, at 346-47.

39. *See* Localio, *Variations on $962,258: The Misuse of Data on Medical Malpractice*, L., MED. & HEALTH CARE, June 1985, at 126. Localio is the Director of Research at the Risk Management Foundation owned by Harvard University and the hospitals affiliated with Harvard Medical School.

40. *Liability Insurance Crisis Hearings*, *supra* note 17, at 594 (statement of A. Russell Localio).

When questioned about JVR's 1985 $1.8 million average product liability jury verdict figure, repeatedly cited by tort reform proponents (*see, e.g.*, JUSTICE DEPARTMENT REPORT, *supra* note 31, at 36; President's Message, *supra* note 4), JVR Board Chairman Hermann states that the figure "is the result of a lot of huge verdicts that distort the average, and as a result those are unreliable figures to quote." *Liability Insurance Crisis Hearings*, *supra* note 17, at 185 (testimony of Philip J. Hermann).

Similarly, JVR had reported the 1978 average jury verdict for product liability to be $1.7 million, up from $400,000 the year before and $800,000 the year after. After personally calling JVR to ask them why the jump, I discovered that it was because of a single, $127 million verdict in the case of Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981). In that case, the plaintiff was a thirteen-year-old child, who was a passenger in a Ford Pinto which was hit in a rear-end crash and resulted in a gas tank explosion. The plaintiff was burned over 90% of his body. Evidence was introduced at trial which demonstrated that Ford management knew the tanks were defective, yet chose not to recall the cars "based on the cost savings which would inure from omitting or delaying the 'fixes.' " 119 Cal. App. 3d at 777.

The judge, in denying Ford's post-trial motions, reduced the award to $3.5 million. 119 Cal. App. 3d at 772. The verdict was upheld on appeal. The JVR figure did not take into account this remittitur.

41. Localio, *supra* note 39, at 127.

42. The $8,000 figure was noted by Gustave Shubert in 1986. Address by Gustave Shubert, Director, Rand Corporation Institute for Civil Justice, before the National Conference of State Legislatures, Denver, Colorado (Jan. 4, 1986); Peterson & Priest, THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS, COOK COUNTY, ILLINOIS, 1960-1979 (Rand Corporation Institute for Civil Justice 1982).

43. *See* ATTORNEYS GENERAL REPORT, *supra* note 32, at 36-39.

44. INJURY VALUATION, *supra* note 38, at 14.

45. INJURY VALUATION, *supra* note 38, at 29.

trillion Gross National Product in 1985, 2,564 million-dollar verdicts over a twenty-five year period is a scandal *in reverse*. Given the horrendous nature and tremendous volume of injuries and illnesses resulting from corporate wrongdoing alone, there should have been more such awards.

While the available evidence indicates that courts are not experiencing a litigation explosion,[46] the debate is bound to continue until insurance companies release information in their possession showing actual payments to injured persons.[47] One suspects that if the insurance industry could substantiate their claims that people are paid too much for their injuries, they would have revealed that data long ago. Until the insurance industry furnishes this information, its allegations of excessive damage payments and its drive to drastically increase premiums must be viewed as a commercial strategy borne out of the industry's cyclical financial mismanagement of recent years.

IV. SPECIOUS HOPES: REDUCED PREMIUMS, INCREASED AVAILABILITY

According to the insurance industry, two of the purported benefits of "tort reform" were to be a reduction in the price of insurance premiums and an expansion in the availability of insurance coverage. These claims were misfounded and misleading. Changing liability laws will *not* reduce premiums. As a matter of fact, leading property/casualty companies have filed rate documents notifying state insurance commissioners that even *extensive* "tort reforms" will not reduce insurance rates.[48] Conversely, a survey of insurance departments by the National Insurance

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46. *See supra* notes 32, 33, 36, and 40.

47. J. Robert Hunter commented that:

> If the insurance companies have data that juries are running wild with their awards, why don't the companies come forward with it? Don't they have the burden of proof if they want to take away our rights? The insurance companies simply refuse to put forth the data to let us analyze it. We've been asking since last September, Where's the data?

Sherrill, *One Paper That Wouldn't Shut Up*, NATION, May 17, 1986, at 688 (quoting J. Robert Hunter).

48. Two leading property/casualty companies — Aetna Casualty and Surety Co. and St. Paul Marine Insurance Co. — recently filed rate documents notifying Florida's insurance commissioner that even extensive "tort reforms" will not reduce insurance rates. NAT'L INS. CONSUMER ORG., "TORT REFORM" A FRAUD, INSURERS ADMIT (1986). Filings which calculate the effect of the 1986 Florida tort reform law, were made by 104 insurers licensed in Florida. Out of 277 filings, 175, or 63%, showed no savings from tort reform, while none showed savings of more than 10%; *see also* NAT'L INS. CONSUMER ORG., TORT REFORM WILL NOT REDUCE INSURANCE RATES, SAY 100+ FLORIDA INSURERS (1986).

State Farm Fire and Casualty Co. notified the Kansas Insurance Department that restricting joint and several liability and limiting punitive damages would have no impact, while capping for pain and suffering would reduce rates by no more than one percent. Great American West, Inc., told the Washington Insurance Department that tort reform could well raise rates.

"The Insurance Services Office, the insurance industry group that issues 'advisory' rates, said its advisory rates would not reflect any reduction due to tort reform, and emphasized to its member companies that 'any beneficial effects of tort reform *cannot* be quantified with any degree of accuracy.' "

See also Tort-reform legislation: Did state get 'suckered', The Seattle Times, July 1, 1986, at 1, col. 1 .

Consumer Organization indicates that access to insurance is increasing in states where tort reform was not enacted.[49]

It also appears doubtful that changing liability laws will increase the availability of insurance. In many jurisdictions the opposite is happening.

In 1978, for example, Pennsylvania enacted a law immunizing all Pennsylvania municipalities from most kinds of liability suits and limiting liability for even catastrophic events to $500,000 per occurrence,[50] yet Pennsylvania cities and towns are still having their insurance policies cancelled.[51]

In Iowa, lawmakers abolished joint and several liability as applied to defendants who were less than fifty percent at fault for all cases tried after July 1, 1984.[52] Still in late 1985, forty-one Iowa counties had their liability insurance cancelled.[53]

In Ontario, Canada, most "tort reform" measures sought by the insurance industry are already law. These measures include caps on awards for pain and suffering, restrictions on the award of punitive damages and prohibition of contingency fees.[54] In addition, Ontario court rules require any unsuccessful plaintiff to pay the defendant's costs. There is no constitutional right to a jury trial in Canada, so most trials are before judges.[55] Yet the insurance industry is raising premiums for many of its customers by 400% or more, cancelling coverage in midterm and refusing to provide coverage at any price.[56]

Massive premium gouging, arbitrary cancellations and reduced coverage will be the cyclical pattern and industry strategy of the future unless the real causes of this insurance crisis — the cash-flow underwriting practices of the insurance industry — are addressed. Stop the surge and decline in this cycle and the trauma on the economic system will end, and the attack on victims' rights will atrophy.

V. PRESCRIPTION FOR REMEDY: SOME RECOMMENDATIONS FOR INSURANCE INDUSTRY REFORM

There is no doubt that reform is imperative if this insurance crisis is to be abated. However, it is not the rights of victims which must be evaluated and controlled, it is the unharnessed and grossly unscru-

49. NAT'L INS. CONSUMER ORG., SIX INSURANCE INDUSTRY FIBS (1986).

50. 42 PA. CONS. STAT. §§ 8501 - 8528 (1978).

51. *See* PENNSYLVANIA LOCAL GOVERNMENT COMM., HEARING ON MUNICIPAL LIABILITY INSURANCE, SEPTEMBER 24, 1985, REPORT, RECOMMENDATIONS AND SUMMARY OF TESTIMONY (1985).

52. IOWA CODE ANN. § 668.4 (West 1986).

53. Statement of Iowa State Sen. Lowell Junkins, before the Florida Senate Commerce Comm. (Jan. 7, 1986).

54. *See* MINISTRY OF THE ATTORNEY GENERAL, ONTARIO LAW REFORM COMM., REPORT ON PRODUCTS LIABILITY 62, 74-78 (1979).

55. *Id.* at 74, 102-04.

56. *See, e.g.,Liability Coverage Crunch May Shut Day-Care Agencies*, Toronto Star, Aug. 1, 1986, at 1; *Ski Team Can't Get Liability Insurance*, Toronto Globe and Mail, Jan. 15, 1986, at A1.

tinized insurance industry itself that should be investigated and reformed. The special privileges enjoyed by the insurance industry are largely responsible for the insurance crisis cycle. By virtue of the McCarran-Ferguson Act,[57] the insurance industry is exempt from antitrust laws.[58] It is also exempt from federal regulation and Federal Trade Commission scrutiny.[59] These exemptions should be repealed by Congress.[60]

In addition, Congress should establish a federal office of insurance to monitor the industry and to establish standards for state regulators to follow. A national industry-funded reinsurance program should be established to compete with foreign reinsurers so as to exert downward pressure on reinsurance rates and thus enable insurers to reduce their rates.

At the state level, effective insurance disclosure laws are critical. Insurance companies must be required to routinely disclose in detail and by subline — for day care centers, trucking concerns, municipalities and similar institutions — how much they take in from premiums and investment income and how much they pay out for verdicts and settlements, reserves and other expenditures. States should also establish joint underwriting authorities to provide insurance at actuarially sound rates to those who cannot get insurance in the open market during insurance cycle bottoms.

State insurance departments must be afforded more authority to regulate rates, and state laws should provide for greater consumer representation before insurance regulatory bodies. This would include establishment of state consumer advocates to directly intervene in rate proceedings as many states now authorize in utility matters.[61] State insurance departments also need greater funding and increased staffing.[62]

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57. 15 U.S.C. § 1011 - 1015 (1982).

58. 15 U.S.C. § 1013 (1982). This section provides that the Robinson-Patman Act "shall not apply to the business of insurance or to acts in the conduct thereof." Accordingly, the matter of regulation is left to state government. 15 U.S.C. § 1012 (1982). This section provides that: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." The law does retain, however, a prohibition against boycotts, coercion and intimidation. 15 U.S.C. § 1013(b) (1982). *See* St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978) (insurance companies may not boycott their insureds by agreeing to deny them coverage entirely).

59. 15 U.S.C. 1012(b) (1982) provides that: "No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . ."

60. For a discussion on the merits of repealing these exemptions, see Glover *It's Time to Repeal McCarran-Ferguson*, 1 ANTITRUST 31 (1987).

61. For example, New Jersey's law authorizes the New Jersey Public Advocate to intervene on consumers' behalf. The cost of intervention is billed back to the insurance company seeking the rate increase. 52 N.J. STAT. ANN. §§ 52:27E-1 - 52:27E-19 (West 1986).

62. State insurance departments are lacking in investigators, auditors and other professionals and cannot effectively recommend the appropriate levels of insurance rates. UNITED STATES GENERAL ACCOUNTING OFFICE, ISSUES AND NEEDED IMPROVEMENTS IN STATE REGULATIONS OF THE INSURANCE BUSINESS (1979); *see also* American Academy of Actuaries, 1986 Yearbook (Nov. 1, 1985). There are only 64 actuaries employed by state insurance

Insurance companies should be required to engage in greater loss prevention efforts as well as improvement of health and safety conditions. Presently, some insurance companies are ignoring hazards. When an insurer knows that a claim is legitimate because of a well-known specific hazard, the logical approach is not to cancel coverage, raise rates or limit recovery. The solution is to pay the claim, go back to the insured and make a hazard analysis of the product or unsafe circumstance, and then refuse to continue coverage until all hazards uncovered by the analysis are eliminated or the risk of injury is reduced by specific safeguards and warnings. Instead, the insurer typically ends up defending the hazard so as to shift liability to another party, and as a result, often avoids paying the claim, thereby reducing monetary loss for itself and its insured.

In addition, the absolute immunities enjoyed by employers under worker compensation laws gives employers little incentive for hazard prevention. In many circumstances the absolute immunity granted employers under workers compensation laws allows insured employers to violate recognized hazard prevention measures with disregard for the lives and safety of their employees.[63]

Insurance companies should also participate in experience loss rating,[64] and should be required to disclose evidence of defective products or hazardous conditions to the appropriate law enforcement and regulatory authorities.

Our industrial society produces diverse benefits but it also exposes many people to avoidable injury and disease. Society is not harmed when the rights of injured people are vindicated and when they are compensated — not as chattel — but as respected and dignified human beings. Society and its unafflicted citizens benefit from such justice and from the corresponding deterrence of careless or unsafe behavior.

The insurance industry has looked for scapegoats — victims, lawyers, juries and judges — to cover up its own instability and mismanagement. Giving up basic victims' rights will not stop premium gouging and policy cancellations. Only effective insurance reforms will stop the cyclical insurance crisis which leads to the volcanic eruptions of premiums, and the reduced availability of insurance coverage in the business,

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departments and 26 states have no actuary on staff. Aetna Insurance Company alone employs twice as many actuaries as all the states combined.

63. Bohyer, *The Exclusivity Rule: Dual Capacity and the Reckless Employer*, 47 MONT. L. REV. 157 (1985).

64. Many professionals and small businesses pay a set rate regardless of their individual claims experience. For example, competent and conscientious doctors are unjustly paying the substantial price of a minority of seriously incompetent, careless, undertrained or disabled physicians.

A 1985 report to Michigan Governor James Blanchard by former University of Michigan President Robin W. Fleming found that for claims filed between 1976 and 1984, "2.5% of physicians accounted for 19.7% of all claims and 19.3% of physicians accounted for 72.2% of all claims." A study by the Orlando Sentinel reported that in Florida, "3 percent of doctors were responsible for 48% of the malpractice claims paid in the state between 1975 and 1984. One doctor had 34 paid claims. Four others had 10 or more paid claims." Orlando Sentinel, Apr. 19, 1986 at 1.

professional and non-profit sectors. Increasing the number of obstacles injured or sick citizens must overcome in the already difficult process of prevailing in court is not a solution; it is a degradation of the just norms of the common law which have elevated care, redress, deterrence and knowledge of perils into our nation's consciousness.