EXCESSIVE LITIGATION'S IMPACT ON AMERICA'S GLOBAL COMPETITIVENESS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION
AND CIVIL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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CONTENTS

MARCH 5, 2013

EXCESSIVE LITIGATION'S IMPACT ON AMERICA'S GLOBAL COMPETITIVENESS

TUESDAY, MARCH 5, 2013

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 2:50 p.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Goodlatte, Jordan, Chabot, King, DeSantis, Rothfus, Nadler, Conyers, Scott, Cohen, and Deutch.

Staff Present: (Majority) Zach Somers, Counsel; Sarah Vance, Clerk; (Minority) David Lachmann, Subcommittee Staff Director; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. The Subcommittee on the Constitution and Civil Justice will come to order. Without objection, the Chair is authorized to declare a recess of the Committee at any time.

And I will say good afternoon to all of you. Thank you for being here. I apologize for the delay. There were votes on the floor, and we appreciate you being here.

Welcome to the first hearing of the Subcommittee on the Constitution and Civil Justice for the 113th Congress. The topic for today's hearing is Excessive Litigation's Impact on America's Global Competitiveness.

During this Congress, this Subcommittee will examine various proposals to reform our Nation's civil justice system. One of the animating factors behind all of these proposals will be how excessive litigation creates huge costs that unnecessarily burden and diminish the American economy, job creation and our global competitiveness.

The unemployment rate today remains around 9 percent. And economic growth actually contracted in the last quarter. I believe that this hearing will reveal that part of the reason for America's high unemployment and sluggish economy is the excessive cost our litigation system imposes on U.S. job creators.

Americans face the highest lawsuit costs of any developed country. Our tort lawsuit costs are at least double those of Germany, Japan, and Switzerland, and triple those of France and the United

Kingdom. According to a recent study by economists at the Pacific Research Institute, America's tort system imposes a total cost on the U.S. economy of about $865 billion per year, which is equal for the total annual output of all six New England States or the yearly sales of the entire U.S. restaurant industry. This amounts to an annual tort tax of $9,827 on a family of four, and is equivalent to an 8 percent tax on consumption or a 13 percent tax on wages.

Excessive tort costs hurt U.S. global competitiveness in at least three ways. First, excessive lawsuit costs leave less money for American companies to invest. Money that America spends on its litigation system is money that cannot be spent on research, innovation, expansion and job creation.

Second, our lawsuit system puts U.S. companies at a disadvantage when they are doing business abroad. American companies are increasingly being sued in U.S. courts for wrongs allegedly committed abroad. Many of these suits have been marred by disturbing evidence of fraud, misrepresentation, and corruption by American and foreign trial lawyers.

Third, our lawsuit system discourages foreign investment in the U.S. economy. A 2008 study by the Department of Commerce concluded that the U.S. Litigation environment harmed our competitiveness by discouraging foreign investment. This study found that for international businesses, "The United States is increasingly seen as a Nation where lawsuits are too commonplace." This discourages foreign-owned companies from expanding business and in creating jobs in the United States.

Despite the high costs of our tort system, it does not always appear that the system is promoting consumer safety or delivering fair and appropriate outcomes. In terms of safety, there is little evidence that additional tort lawsuits make Americans safer.

According to World Health Organization statistics, Americans die from unintentional injuries at a higher rate than our peers in other developed countries. And in terms of fair outcomes, the U.S. Tort system returns less than $0.50 of every tort cost dollar to injured claimants, those it was designed to help. In other words, the United States is shouldering the burden of excessive litigation costs without receiving any perceivable benefit from those costs.

Now, I look forward to the witnesses' testimony. I believe that this hearing will help shine more light on how our tort system burdens the U.S. economy, reduces job creation, inhibits capital investment, and stifles innovation. I hope that with this knowledge, we can moved forward in this Congress with civil justice reforms that enable American companies to better compete in the global marketplace and raise our productivity and the standard of living for all Americans.

And with that, I want to thank again everyone in the new year for coming to the Committee and I would yield to the Ranking Member of the Subcommittee, Mr. Nadler, from New York.

Mr. NADLER. Thank you, Mr. Chairman. Mr. Chairman, before we begin, I want to congratulate you on another Congress as Chairman of this Subcommittee.

We have jurisdiction over some of the most important matters Congress is ever called upon to consider. It is a tremendous responsibility, and I know all our Members take the responsibility very

seriously. I also want to welcome our Members from both sides of the aisle. I am sure we will have some very spirited debates, as we always do. That is appropriate. Many of the issues we tackle raise our most fundamental values. I am confident we will approach these debates with goodwill and mutual respect.

Today's hearing revisits a perennial issue before our Subcommittee; namely, the question of the impact of the tort system on our economy. It is a fair question, and one we have debated for years. At its core, the purpose of the tort system is to apportion responsibility and to allocate costs based on how each of us observes or fails to observe our legal duties to one another. When someone is harmed because of another's negligence or wrongdoing, it is fair that the person whose negligence inflicted that harm compensate the injured party. This is not a cost to society, but, rather, a transfer to the injured party. It also ensures that there was an economic incentive for all of us to be careful, to take steps needed to ensure that our products are safe, that our property is safe, that the food we sell is safe, even if those steps involve some costs. It is also a way to ensure that when someone is wrongly harmed and faces medical bills or lost work that the responsible party will pay those bills. In other countries, there is less need to resort to the courts because the healthcare system, the social safety net, and government regulation address many of those concerns. I am not sure how many of the proponents of restricting the rights of plaintiffs would prefer that approach, but it is certainly an alternative.

There have been some often cited studies that purport to demonstrate that the tort system as it is currently structured imposes a significant cost on society and on our competitiveness. Studies, most especially the series of reports by Towers Watson and the Pacific Research Institute's "Jackpot Justice," have met with a great deal of criticism, some of which we will hear today. As Judge Richard Posner has observed, "The aim of liability is to induce potential injurers to spend more on safely, and so the fact that they do spend more cannot be judged a failure to improve social welfare." And, indeed, the authors of the Towers Watson report admit, "We examine only one side of the tort system, the costs. No attempt has been made to measure or quantify the benefits of the tort system or to conclude that the costs of the U.S. tort system outweigh the benefits or vice versa." And, as Judge Posner correctly points out, there is a, "difference between a cost, which in economic terms is a reduction of the amount of valuable resources, and a transfer of wealth from one person to another that doesn't reduce the total amount of resources but merely redistributes them."

We have also heard some real horror stories about the impact on lawsuits on businesses. But we don't always get all the facts or even accurate facts. So I hope that we will continue to look at those examples carefully to make sure that we draw the correct conclusions.

Today, for example, we have as one of our witnesses, a CEO of Blitz, USA, a manufacturer of gas cans. Mr. Flick is being presented as a victim of excessive litigation and will tell the Subcommittee that his company was driven out of business by greedy trial lawyers representing people who poured gas on open flames, and that the people who were crippled, disfigured, and killed, in-

cluding small children, were not really victims, but were actually predators destroying a blameless company. What Mr. Flick's testimony does not mention is that many of these victims did nothing more than fill a chain saw; or, in the case of 3-year-old Jenna Bullen, knocked over a can. She suffered second-degree burns on 95 percent of her body. She lost her fingers, her toes, and almost all of her skin. The can exploded when leaking fumes ignited on an open flame in a hot water tank. The fact that a simple device costing only pennies called a flame arrester could have prevented these tragedies. When gas outside a gas can ignites, the gas can will explode if the flame ignites the gas inside. Flame arresters have been used for years to prevent such explosions. According to a report by Consumers Union, "Should fumes outside the can ignite as you pour or fill, a flashback is possible that could ignite the contents of the can itself. Such accidents can be prevented by a flame arrester, which we think should be legally required in all openings of containers like these. As it is, only the makers of the Jerry Jug and the Eagle Safety have bothered to provide an arrester. The Eagle Safety is a strainer-like wire mesh device in a single fill pour opening does give full-time protection." Mr. Flick understood this. He wrote a memo in which he said that within the next 2 years, his company should "develop and introduce a device to eliminate flashback from a flame source. Water heater incidents should be the test case for this. Once this is developed, we should advocate the device be standardized under ASTM's regs or law." That certainly places these accidents and Mr. Flick's victim claim in a different light. Perhaps that is why the company was ordered to pay $250,000 in sanctions for failing to produce this memo when sued by the heirs of Jonathan Green. The court found that "The settlement would not have been not less than $250,000 higher if the plaintiff would have had the document. Particularly the court finds that the 'wish list,' Mr. Flick's memo, which was not disclosed to the plaintiff, would have drastically increased the settlement value. The wish list would have hurt if not potentially eliminated the defense that they did not aid a flame arrester because it would not have been useful."

I ask unanimous consent for a copy of Mr. Flick's wish list memo be placed in the record.

This is the victim the Chamber of Commerce has held up as proof that our legal system is broken. I would suggest they find someone else.

Another of today's witnesses has this to say: "Alternative legal rules should be evaluated in terms of how they guide behavior. A straightforward normative implication of this analysis is that we should create legal rules that provide businesses incentive to invest in injury avoidance so long as the marginal costs of achieving additional safety is less than the expected marginal benefit of increased safety." I am sure that little Jenna Bullen will be interested in that theory.

I look forward to today's testimony, and I yield back the balance of my time.

Mr. FRANKS. I thank the gentleman. And his mentioned document will be placed into the record.

[The material referred to follows:]

TO: LARRY
FROM: ROCKY
RE: MY WISH LIST

8/16/05

Expectations for Gas Cans

(To be completed in next 2 YRS)

Safety – MUST HAVE Excellent ACCIDENT DATA SOON.

1. Complete certification of child resistant closure under guidelines of the PPA. (1 Year)

2. Develop & introduce device to eliminate flashback from a flame source. Water heater incidents should be the test case for this. Once this is developed we should advocate the device be standardized under ASTM reg's or laws. (2 Years)

3. PR campaign for proper use
   - Martha's CIP to include fire Marshalls
   - Internet
   - Include Consumer Advocate organizations that are publicly saying we are not responsible
   (1 Year)

Use

1. Value option spout for new EPA can
   - lower COGM than ~~$~~ 2000 or 3000
   - Push button or other trigger device
   - Able to be actuated on exist. like (2 Years)
   - ~~Able~~ Able to be actuated on exist. like

2. Complete Quick Fill – Include Body designed for this can. (1 YEAR)

3. Canadian Gas Can (1 Year)

4. Dispensing System
   A. Gravity Option
   B. Pump Option (manual)
   C Electric Pump
   D. New Can???
   (2 Years)

Other

1. Bring Corex decision to a head
   vs. other barrier options
   - What are the true costs?
   - Can we use the scrap?
   - What is the investment plan?
   (1 Year)
2. Existing Automation
   - Does it need to be upgraded prior to the EPA option?
   - Volumes required by year
   - existing capacities
   (1 Year)
3. Capacity Planning
   - Understand & participate in developing our lean strategy for the future.
   (1 Year)
4. Clear Strategies by Product & Channel (1 Year)

Additions to Gas Can Expectations 8/15

Larry -

1. Evaluate + Make Decisions on Destroy-on-Dates. (1 YR)

2. Evaluate 4 color labelling as a requirement - (3 YR)

Mr. FRANKS. And I would now yield to the distinguished Chairman of the full Committee, Mr. Goodlatte, from Virginia.

Mr. GOODLATTE. Thank you, Mr. Chairman. And I very much appreciate you holding this hearing on a very important subject. Before I give my opening statement, I would like to recognize and welcome a good friend and fellow Virginian, Professor Henry Butler, who has something in common with a former Member of this

Committee. His father and my former employer without whose help and guidance, I would not be serving in the Congress today. So he is a good representative of great work done by the Butler family in an earlier generation. And, Henry, you are always welcome here. And thank you also for the good work you do at the Center for Civil Justice Reform at George Mason Law School, another great contribution to our whole effort to address this issue.

With Americans facing high unemployment and stagnant economic growth, it is the role of every Congressional Committee to do its part to get America moving again. For the Judiciary Committee, this means, in part, doing what we can to remove the crushing burden that excessive litigation costs impose on our global competitiveness, economic growth, and our ability to create and retain jobs.

Judge Learned Hand observed that litigation is to be dreaded beyond almost anything short of sickness or death. Unfortunately, the United States has become the world's most litigious country. This litigiousness has created what amounts to a tort tax which imposes an added cost on every product Americans purchase and every service we consume.

We need a civil justice system that deters wrongdoers and fully compensates victims. But a prosperous free enterprise economy also depends on a tort system that is efficient and free of meritless litigation and excessive damage awards. As economists have pointed out, an efficient tort system produces greater trust among market participants through the fair and systematic resolution of disputes, thereby encouraging more production and exchange, creating a higher standard of living for individuals within a society. In other words, we can ensure that all injured parties have their day in court while at the same time enhancing our global economic competitiveness and creating and maintaining jobs for American workers.

Regrettably, our civil justice system is not functioning toward this end. It is not fairly compensating victims who have to wait too long to get a case to trial and receive an average of only $0.46 of every dollar spent in litigation, even when they win. And it is hurting the economy.

America's runaway litigation system harms the economy in at least four ways. First, the specter of undeserved, ruinous litigation makes it more difficult for small businesses to grow and become competitive on a global scale.

Second, even those American businesses that are large enough to compete globally are saddled with litigation liabilities that their foreign rivals do not face.

Third, America's lawsuit climate discourages foreign direct investment in the U.S. economy.

And, finally, American companies' domestic liability for their actions abroad places them at a competitive disadvantage relative to foreign competitors seeking to do business in the same foreign markets.

The real losers in all of this are ordinary Americans. American consumers are hurt in the form of higher prices, U.S. workers in the form of lower wages, and American retirees in the form of low returns on retirement accounts and pension funds. Those hurt by

excessive litigation costs include people like the former employees of Blitz, USA, the company Rocky Flint, the second witness on our panel today, used to run. At its peak, Blitz, USA produced three out of every 4 portable gas cans nationwide and employed 350 people in the small town of Miami, Oklahoma. But over the last decade, a wave of costly litigation driven by the misuse of its products by others, a misuse over which the company had no effective control, took its toll. The lawsuits finally drove the company out of business. Blitz, USA is gone. But the lesson of the devastating impact lawsuits can have on real lives and real communities lives on. I am sure that Rocky will share much more with us today about the real-life impact excessive litigation costs had on Blitz and its employees.

There has got to be a better way to solve issues with regard to technology and changes in products than to drive a good company employing 350 people out of business with lawsuits in which a large portion of the amount of money paid was not paid for economic loss and was not paid to the people who suffered, whether or not their claim was valid under the law.

I look forward to our witnesses' testimony. I believe that it will be invaluable as we move forward in this Congress with reforms to improve our civil justice system.

And, Mr. Chairman, I yield back. Thank you.

Mr. FRANKS. And I thank the gentleman.

And I would now yield to the Ranking Member of the Committee, Mr. Conyers from Michigan.

Mr. CONYERS. Thank you, Mr. Chairman. I welcome all the witnesses, particularly the one who hasn't been in this hearing room for a number of decades. We remember his father fondly, who was himself a Member of the Judiciary Committee.

Mr. HINTON. Thanks.

Mr. CONYERS. Members of the Committee, this is a hearing that may produce seriously flawed studies, that may make it difficult if not impossible to form as a basis for serious policy making. We have a number of issues before us. But I think that we need to examine whether we want to change the system and how much we want to change it. One frequently criticized component of our trial system is punitive damages. And I would like to share with you that they are very few, they are rare, and reserved for only the most harmful kinds of cases. And they are not awarded to compensate injured plaintiffs, but the purpose is to punish and deter future wrongdoing. The whole idea is to inhibit wrongdoing by knowing that these kinds of legal results are available. They are used in cases where there is either intentional misconduct or grossly negligent activity. And so I want to try to turn off some of the wrath that may come down on punitive damages.

Now, what we have found is that only about 5 percent of the plaintiffs were awarded punitive damages. And the median punitive damage award in these cases was $64,000. Punitive damages in excess of $1 million were awarded to only 13 percent of these cases. And so I want to improve the system in many, many ways. And I think that it is carefully occurring.

Another issue that could be raised is the so-called explosion of litigation. And I enjoy all of your comments on that subject. But

frivolous lawsuits, too, are also brought under this title of explosive litigation. But the frequency of tort cases in the courts to most of our surprise has steadily decreased in recent years. We found that the number of tort cases have declined by 79 percent. And tort filings continue to decline and represent only a small fraction of litigation in the United States. The National Center for State Courts shows tort cases account for 4.4 percent of all cases filed in State courts.

And so I invite you to approach these discussions that we will hear today in a fair and balanced manner. And remember the great savings that occur by the examples set by punitive damages and the fact that cases, tort cases are really on the decline and not otherwise.

I thank the Chairman for his courtesy and return any unused time.

Mr. FRANKS. And I thank the gentleman.

Without objection, other Members' opening statements will be made part of the record.

So let me now introduce our witnesses. Welcome to all of you.

Mr. Paul Hinton is the Vice President of NERA Economic Consulting. Mr. Hinton has over 15 years' experience in securities and finance litigation, commercial and contract disputes, bankruptcy and product liability cases. He has testified in litigation, arbitration, and before legislative committees such as this one. Prior to joining NERA, Mr. Hinton worked on Project Finance at Morgan Grenfell, and at the European Commission. He is a graduate of Oxford University, and has a graduate degree from the Kennedy School of Government at Harvard University. Mr. Hinton, welcome, sir.

Mr. Rocky Flick is the former President and CEO of Blitz, USA. At its peak, Blitz, USA was the producer of three out of every four portable gas cans nationwide and employed 350 people in the small town of Miami, Oklahoma. But over the last decade, a wave of costly litigation driven by the misuse of its products by others, a misuse over which the company had no effective control, took its toll. Unfortunately, lawsuits drove the company out of business in August of last year.

Professor Neil Vidmar is the Russell M. Robinson, II professor of law and professor of psychology at Duke Law School. Professor Vidmar's scholarly research involves the empirical study of law across a broad spectrum of topics in civil and criminal law. A social psychologist by training, he is a leading expert on jury behavior and outcomes and has extensively studied medical malpractice litigation, punitive damages, dispute resolution, and the social psychology of retribution and revenge. Welcome, sir.

Professor Henry Butler has been noted already, a rather famous name around here, is the George Mason University Foundation Professor of Law, and Executive Director of the Law and Economic Center as George Mason University School of Law. Professor Butler has devoted much of his career to improving this country's civil justice system through judicial education programs. Professor Butler has held prior appointments at Northwestern University School of Law, the Brookings Institution, Chapman University, the Uni-

versity of Kansas, the University of Chicago, and Texas A&M University.

Each of the witnesses' written statements will be entered into the record in its entirety, so I would ask each witness summarize his testimony in 5 minutes or less.

To help you stay within that time, there is a timing light in front of you. The light will switch from green to yellow, indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness' 5 minutes have expired.

And before I recognize the witnesses, it is the tradition of the Subcommittee that they be sworn. So if you please stand.

[Witnesses sworn.]

Mr. FRANKS. Thank you, please be seated.

And I would now recognize our first witness, Mr. Hinton. Sir, please turn on your microphone before speaking. Yes, sir, you got it.

TESTIMONY OF PAUL J. HINTON,
NERA ECONOMIC CONSULTING

Mr. HINTON. Thank you very much. I believe the microphone is on.

Thank you, Mr. Chairman and distinguished Committee Members, for inviting me here today to testify on the effects of litigation on the U.S. Competitiveness.

As was already said, my name is Paul Hinton. I am a Vice President at NERA Economic Consulting. NERA is a global firm dedicated to applying the principles of economics and finance and quantitative analysis to complex business, legal, and public policy challenges. I have coauthored a number of empirical studies that estimate the direct costs of litigation to businesses, including a forthcoming study commissioned by the U.S. Chamber Institute for Legal Reform that compares litigation costs across countries. It is the results of this forthcoming study comparing the costs of litigation in the United States with European countries and Canada that provides the basis for my testimony today.

U.S. Litigation, whether arising in tort claims or otherwise, affects the ability of American companies to compete globally by imposing additional costs. But higher direct costs of doing business are just the tip of the iceberg. Litigation also imposes indirect costs. Uncertainty created by litigation may affect companies' borrowing costs and, hence, their ability to invest, grow, and create jobs. Many foreign companies are wary of becoming embroiled in U.S. litigation, which may deter foreign direct investment, and multinational companies may choose to limit the extent of their operations in the United States.

Dealing with litigation can occupy management time, result in unproductive risk avoidance, and otherwise distort business decision making. These indirect costs imposed by the tort system reduce productivity.

The actuarial firm of Towers Watson estimates that the U.S. tort costs exceed $250 billion a year, representing 1.7 percent of GDP. Our forthcoming study expands on this body of knowledge with separate data and estimates the U.S. litigation costs are about two and a half times the average level of the four largest Eurozone

economies. That is Germany, France, Italy, and Spain. Furthermore, when compared to the least costly European countries, such as Belgium, The Netherlands, and Portugal in our study, U.S. litigation costs are estimated to be about four times as high as those countries.

Our study uses prices of general liability insurance bought by businesses in the United States, Canada, and Europe provided by the insurance broker Marsh, Inc. as a basis for estimating relative litigation costs. General liability insurance prices provide a useful basis for analysis because they reflect the costs of litigation risk even though only a fraction of aggregate litigation costs may be insured. We also examine the differences in costs of automobile third-party liability insurance and corporate director and officers liability insurance, commonly known as D&O, to provide additional insights on different litigation costs. Automobile insurance represents about half of all liability insurance in the U.S. and an even greater proportion in Europe. It follows that automobile liabilities costs constitute a significant cost of all insured liability costs. And while differences in auto liability insurance across countries means that price comparisons are not very meaningful, comparisons of claim costs in different countries reveal that on average U.S. costs in 2008 were almost four times the level in the largest Eurozone economies.

Furthermore, D&O insurance is specifically designed to cover the costs of litigation. And so it is particularly relevant here. Litigation involving directors and officers is only a small component of the overall liability costs in each country. However, the large U.S. share of the global D&O market is an illustration of how differences in legal systems can affect liability costs. According to Alliance, which is a major global insurance company, U.S. aggregate D&O premiums for 2009 amounted to between 5 billion and 6.7 billion, whereas the European aggregate was only 2 billion for an economy about the same size. However, it is important to note that European D&O costs of multinational companies in large part result from exposure to litigation in the U.S. And not to their domestic exposure. As a result, on average, domestic European D&O litigation exposure would be much less than a third of the U.S. level.

Now, simple comparisons of insurance costs may not provide a reliable basis for comparing litigation costs across countries because there are many factors that affect liability insurance rates that are unrelated to the operation of the legal system in each country. The contribution of our latest study is to separate out the cost differences due to economic factors, demographics, healthcare costs, and separate out then the effects of the legal system.

Just wrapping up—I see my time is up—I would say in conclusion that the U.S. costs are a lot higher. And, unfortunately, this means that under the assumption that countries have the same benefits to businesses of legal protection, higher litigation costs put U.S. businesses at a disadvantage competitively.

Thank you, Mr. Chairman, and distinguished Committee Members for the opportunity to testify. And I will take any questions.

Mr. FRANKS. Thank you, Mr. Hinton.

[The prepared statement of Mr. Hinton follows:]

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Testimony of
Paul J. Hinton, NERA Economic Consulting

Before the Committee on the Judiciary
Subcommittee on the Constitution
United States House of Representatives
March 5, 2013

Hearing on: Excessive Litigation's Impact on America's Global Competitiveness

Thank you Mr. Chairman and distinguished Committee members for inviting me to provide testimony today on the effects of litigation on U.S. competitiveness. My name is Paul Hinton and I am a Vice President at NERA Economic Consulting. NERA is a global firm dedicated to applying principles of economics, finance, and quantitative analysis to complex business, legal and public policy challenges. I have co-authored a number of empirical studies that estimate the direct costs of litigation to businesses including a forthcoming study commissioned by the U.S. Chamber Institute for Legal Reform that compares litigation costs across countries. It is the results of this forthcoming study comparing the costs of litigation in the United States with European countries and Canada that provides the basis for my testimony today.[1]

U.S. litigation, whether arising from tort claims or otherwise, affects the ability of American companies to compete globally by imposing additional costs. But higher ***direct costs*** of doing business are just the tip of the iceberg: litigation also imposes ***indirect costs***. Uncertainty created by litigation may affect companies' borrowing costs and hence their ability to invest, grow and create jobs. Many foreign companies are wary of becoming embroiled in U.S. litigation, which may deter foreign direct investment. Multinational companies may choose to limit the extent of their operations in the United States. Dealing with litigation can occupy

[1] The U.S. Chamber Institute for Legal Reform (ILR) is an affiliate of the U.S. Chamber of Commerce dedicated to making our nation's legal system simpler, fairer and faster for everyone. Founded by the Chamber in 1998, ILR has a comprehensive approach to reform, working to improve not only the law, but also the legal climate. The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector and region.

management time, result in unproductive risk avoidance and otherwise distort business decision-making. These indirect costs imposed by the tort system reduce productivity.

The actuarial firm of Towers Watson estimates that U.S. tort costs exceed $250 billion a year, representing 1.7 percent of the United States' GDP.[2] Our forthcoming study expands on this body of knowledge and estimates that **U.S. litigation costs are about two and a half times the average level of the four largest Eurozone economies** – Germany, France, Italy and Spain. Furthermore, when compared to the least costly European countries such as Belgium, the Netherlands and Portugal, U.S. litigation costs are estimated to be about four times as high as those countries.

Our study uses prices of liability insurance bought by businesses in the United States, Canada and Europe, provided by the insurance broker Marsh Inc., as a basis for estimating relative litigation costs. Liability insurance prices provide a useful basis for analysis because they reflect the cost of litigation risk even though only a fraction of aggregate litigation costs may be insured. We also examine the differences in costs of automobile third party liability insurance and corporate director and officers' liability insurance – commonly called D&O insurance – to provide additional insights on differences in litigation costs.

Automobile liability insurance represents more than half of all liability insurance in the United States and an even greater proportion in Europe. It follows that automobile liability costs constitute a significant portion of all insured liability costs. While differences in auto insurance coverage across countries means that *price* comparisons are not very meaningful, comparisons of *claim costs* in different countries reveal that **on average U.S. costs in 2008 were almost four times the level of the largest Eurozone economies.**

Furthermore, directors and officers (D&O) insurance is specifically designed to cover the costs of litigation. Litigation involving directors and officers is only a small component of the overall liability costs in each country; however, the large U.S. share of the global D&O market is an illustration of how differences in legal systems can affect liability costs. According to Allianz, a major global insurance company, U.S. aggregate D&O premiums in 2009 amounted to between $5 billion and $6.7 billion, whereas the European aggregate was only $2 billion for an economy of about the same size. However, it is important to note that European D&O costs of multinational companies in large part result from exposure to litigation in the United States and not on their domestic exposure. **As a result, on average, domestic European D&O litigation exposure would be much less than a third of the U.S. level.**

Simple comparisons of insurance costs may not provide a reliable basis for comparing litigation costs across countries because there are many factors that that affect liability insurance rates but are unrelated to the operation of the legal system in each country. The contribution of our latest study is to separate out cost differences due to economic factors, demographics and spending on government programs, factors which vary by country. The cost differences that remain are attributable to features of the legal environment and other unidentified factors. We find that a common law (rather than civil law) tradition, and a high number of lawyers per capita are

[2] Towers Watson, "U.S. Tort Cost Trends, 2011 Update." Released January 26, 2012.

strong indicators of the relative costs of litigation. The U.S. legal system is ranked number one by these measures and this translates into litigation costs as a percent of GDP that are larger than any other country in the study.

In conclusion, we find that the United States has much higher litigation costs than Europe and the difference is attributable to features of the legal environment. Unfortunately, this means that – on the assumption that these countries provide businesses the same benefits of legal protection – higher litigation costs put U.S. businesses at a disadvantage in terms of their global competitiveness.

Thank you again Mr. Chairman and distinguished Committee members for this opportunity to testify on this important topic. I would be happy to answer any questions that you may have.

Mr. FRANKS. We would now recognize our second witness, Mr. Flick. Please turn on your microphone, sir.

TESTIMONY OF ROCKY FLICK, MIAMI, OK

Mr. FLICK. Chairman Franks and Members of the Subcommittee, my name is Rocky Flick. I am the CEO of Blitz, USA. I appreciate the invitation to testify today.

Today's hearing explores the costs of the U.S. legal system and its effects on global competitiveness. I am here to testify that these costs are real. In my experience with my company, these costs are borne by employers, consumers, and employees in the form of lost jobs, wages, market share, and higher prices for goods and services.

Blitz, USA was a small company based in Miami, Oklahoma, the northeast corner of Oklahoma. When we filed for bankruptcy, we had about 120 good manufacturing jobs with better than average manufacturing wages and strong benefits. Healthcare was one of the benefits that we had at better than market levels for our employees.

We had been in business about 50 years. And we were able to lead in a business, even as a small business, selling to some very large companies. Our customers were Wal-Mart and Home Depot and Ace Hardware, and the places that you all shop for durable goods. We manufactured approximately 15 to 20 million red plastic and metal gas cans every year. And our challenges weren't with Chinese competition or foreign competition. We did a very good job at competing, both domestically and internationally. But we could not survive the onslaught of the trial system.

We as an industry and the gas container industry today continues targeted by the plaintiffs' lawyers. They have an organization where they organize around litigation, toward gas can lawsuits. And it is the biggest threat in the industry today.

The people who lost their jobs when we filed bankruptcy lost those benefits. I had several people that had serious issues, like cancer, that then we were just unable to provide their insurance, and they went through significant issues after Blitz closed its doors.

The way these lawsuits happen is the plaintiffs say that Blitz and other gas can companies should put a low-cost, simple device into a can to keep it from exploding. The large majority of the cases are when someone is pouring gas onto a fire. The second fact pattern is when some children get ahold of a gas can and get near to a hot water heater or a flame of some kind. There is no device that you can put on a gas can that will make it safe to pour gas on a fire. And this basic premise is what these lawsuits are about.

Over the years Blitz had insurance. The insurance company settled because our litigation is very expensive. And then that attracted more cases and they settled and attracted more cases and they settled, and finally insurance got too expensive for us to buy. We went out of business. There are other people in the business today filling our void. And I believe that they will have the same fate as we do, unless the legal system changes.

The CPSC studied this as far back as 1980 and determined that no device would help in this matter, that it shouldn't be regulated, that it was because of the way that people were misusing the can.

I am not aware of any case of ours or others, other manufacturers, where there wasn't misuse involved in the product.

And I see it is time for me to wrap up. But we declared bankruptcy. The lawsuits go on today. The trial bar is suing—continues to sue Blitz. I am still the CEO, trying to wrap up the bankruptcy proceedings. Our assets have all been sold. But the plaintiffs' bar continues to sue the retailers and they sue the individual executives and they sue the owners and past owners of the company.

This system in my view is not efficient and it is not just. And it needs change.

Mr. FRANKS. Thank you, Mr. Flick.

Mr. FLICK. I appreciate the opportunity to testify and look forward to your questions.

[The prepared statement of Mr. Flick follows:]

Rocky Flick

Testimony Delivered before the
House Committee on the Judiciary

Subcommittee on the Constitution and Civil Justice

Hearing on Excessive Litigation's Impact on America's
Global Competitiveness

March 5, 2013

Chairman Franks, Ranking Member Nadler, and Members of the Subcommittee, my name is Rocky Flick, formerly the CEO of Blitz, USA. I appreciate the invitation to testify today.

Today's hearing explores the costs of the U.S. legal system on our global competitiveness. I can personally attest that these costs are not hypothetical – they are real. They are just not an accountant's numbers on a page indicating decreased GDP or employment figures. The costs of an out-of-control legal system are borne by employers, consumers, and employees in the form of lost jobs, wages, market share, and higher prices for goods and services.

Until last July, Blitz, USA was the largest manufacturer of gas cans in America — a true market leader – and I was its proud CEO. We were in the gas can business 50 years and sold approximately 15 million of the 20 million red plastic gas cans sold annually. Blitz employed about 120 people on July 31, 2012 – salt of the earth people that you would be proud to have as a friend or neighbor. Blitz was the third largest employer in Miami, OK, and losing 120 jobs was a major blow to the economy of that heartland community.

Many lament the eroding manufacturing base in the U.S. and there are many causes. At least for the gas can industry, the threat to U.S. jobs doesn't come from cheap overseas labor; the biggest threat comes from plaintiffs' lawyers.

When Blitz closed its doors, the entire Miami, OK community suffered and was victimized by a legal system gone awry. These jobs were good jobs with decent pay and good health care. When the 120 employees lost their jobs, about 400 people, including the spouses and children of our employees, lost their health care.

One of our employees, Trish Deaton, is a perfect example. She worked for Blitz for 6 years. She met her husband, Nick, at Blitz. He is battling stage 4 colon cancer and the health care provided by Blitz was critical to their family. Chemotherapy for Nick costs $4,000 per treatment and the health care provided by Blitz defrayed those costs. Trish and Nick were struggling to get by, and having a job at Blitz and their health care benefits was critical. The Deaton's lost their benefits when Blitz closed its doors and they struggled unnecessarily. The Heaton's are far from being rich, but the trial lawyers who took Blitz down are.

Blitz shuttered its doors because the trial bar got greedy. It is that simple. Consumer fuel containers are a critical product owned by almost every household in America. Gas cans are used hundreds of millions of times a year. Red plastic gas cans are ubiquitous and are designed so that people can store, transport, and dispense gasoline safely. Even though it should go without saying that gasoline is dangerous and its fumes can ignite when gasoline is poured on a fire, a permanent warning is boldly displayed on the side of each can and hang tags are attached to the cans to hammer the point home that gasoline is dangerous near ignition sources.[1] Notwithstanding those warnings, hang tags, and other educational efforts, it is reported that approximately 30 times a year someone is injured because of the manner in which they dispense gasoline – typically lighting a fire or accelerating an existing fire with gasoline. This dangerous behavior is deadly and can lead to horrific disfiguring injuries. I have nothing but sympathy for people injured in this manner, but it is not the fault of the gas can.

Plaintiff's attorneys allege that a different design could prevent the accidents that are caused even when those accidents are the result of someone pouring gasoline on a fire. In fact, defense experts have testified that the design as proposed by the plaintiff bar could sometimes make consumer gas cans less safe or cause other adverse consequences. Furthermore, under no circumstances will it ever be safe to pour gasoline on a fire even with some design change, and we don't want to give anyone a false sense of security. We also know that people improperly disable the safety and environmental features included with gas cans and engage in other misuse. One need only search "fixing gas cans" on YouTube to find several videos on how to increase gasoline flow by disabling these safety features.

In 1980, after thorough study and review, the Consumer Product Safety Commission (CPSC) denied a petition requesting it to issue a consumer product safety standard for gasoline cans. The CPSC concluded that, "current information does not indicate that the design or performance of gas cans presents an unreasonable risk of injury" and further stated their belief that "the majority of

[1] The Portable Fuel Container Manufacturers Association sponsors the National Gasoline Safety Project, www.StopGasFires.org, (*see also* http://www.pfcma.com/safety_project.php) which is a national safety public awareness campaign promoting safe gasoline handling practices and specifically spreading the message that gasoline and fire never mix.

accidents occur because of the way gasoline and containers are used around ignition sources."[2]

About a decade ago, we started to see a couple of law suits here and there. Then, as our insurance provider started to increase settlement payments, we saw a flood of lawsuits. This became lucrative business for the trial bar. In fact, AAJ – the ironically named American Association of Justice – has held seminars and produced materials about how to sue gas can manufacturers. The portable fuel container industry was squarely in their sites. They even have a gas can "litigation group."

Blitz was the trial bar's target because we were the biggest manufacturer. In many accidents, there was no remnant of a can left after the explosion, but the trial bar alleged it was a Blitz can because of our dominant market share. We tried our best to survive, but couldn't withstand the trial bar's onslaught. We even were forced to raise our prices hoping to build enough cash reserves so that we could self-insure for some period of time. All our efforts were insufficient and the rest is history for a once proud American manufacturer. As we said in our June 11, 2012, press release announcing that Blitz would not be able to emerge from Chapter 11 bankruptcy, "Unfortunately, Blitz, its lenders, and insurers could not find a viable solution with personal injury attorneys to address the untenable litigation costs." Imagine having to explain that to your loyal employees who lost jobs and local vendors that were never paid when Blitz closed its doors.

The trial bar, however, is not finished. They have turned their sites on other companies, including retailers such as Wal-Mart, Home Depot and Lowes. So long as the lawyers can obtain settlements from product liability insurers or convince a jury to compensate a badly injured person even if they misused the gas can, the industry will be under tremendous pressure and stress. More people will lose their livelihoods; the price of gas cans will increase; and the only true beneficiaries will be a handful of plaintiff's firms.

If the trial bar makes it so uncomfortable that all fuel container manufacturers shutter their manufacturing plants, what would America be like without gas cans? Everyone has seen pictures of people filling water jugs, coolers,

[2] Petition Concerning Gasoline Cans; Denial of Petition, 45 Fed. Reg. 59376 (Sept. 9, 1980).

and other containers with gasoline after a natural disaster which poses incredible danger to the person transporting the gasoline and the people around him.

There is a silver lining in this story for the people of Miami, OK. Another manufacturer of gasoline containers bought the Blitz factory and assets, and will hopefully be opening soon, although I understand it will not be at previous employment levels. I still am very worried about the remaining portable fuel container manufacturing companies and what the trial bar has in store for them. I think we can all agree, as a July 23, 2012, Wall Street Journal editorial concluded, that "stories like this cry out for a bipartisan counter-offensive against these destructive raids that loot law-abiding companies merely because our insane tort laws make them vulnerable."[3]

I appreciate the opportunity to testify and look forward to your questions.

[3] *The Tort Bar Burns On*, The Wall Street Journal, A12, July 23, 2031.

Mr. FRANKS. I would now recognize our third witness, Professor Vidmar.

TESTIMONY OF NEIL VIDMAR, Ph.D., RUSSELL M. ROBINSON II PROFESSOR OF LAW, DUKE UNIVERSITY SCHOOL OF LAW, AND PROFESSOR OF PSYCHOLOGY, DUKE UNIVERSITY

Mr. VIDMAR. I want to be very clear, although I am have been a faculty member at Duke Law School for the last 26 years, I am not a lawyer by training, although I picked up a lot of law in the years there. And I did spend a year at Yale Law School when I became interested in the law. My approach to the kinds of questions that are before this Committee today and as part of this whole debate about the tort system, is actually to collect empirical data, sometimes collected by others, and also to critique the kinds of issues that are made before this Committee. One of my areas of specialization over the past 26 years has been medical malpractice and for a slightly shorter period of time I have been studying punitive damages and related areas. But we are still going back 20 years or so with regard to the basic kinds of questions.

Based on this quarter century of empirical work, there are many myths about the tort system, the American tort system, that are widely believed by members of our society due to simple misunderstandings or are myths created and perpetuated often by business groups and individuals that are self-serving and just flat out wrong.

One of the things I still talk about in my class is the McDonald's coffee spill case of the poor woman that "just spilled a little bit of coffee on herself and got a couple million dollars in an award." I have the pictures here today. I didn't put them into my materials, but if any Members of this Committee are interested in looking at the scars on that woman, they are pretty dreadful because McDonald's was selling its coffee at 190 degrees Fahrenheit when, in fact, the manufacturer had recommended 160 degrees. And the bottom line was that McDonald's continued to sell the coffee even though they had had over 700 complaints simply because it the coffee sold better, even though more people were burned. And if you see Stella Liebeck's scars, and I would be happy to pass those up, if you have a strong stomach.

The coffee spill case is one of the kind of myths that has been perpetuated. And it is overseas as well, I should say, because I have given talks in Australia and New Zealand. And I talk about the criminal justice system. And the first thing they bring up is, "Yeah, but what about the McDonald's coffee case?" It is just wrong information.

And the other thing is that, in fact, I published an article on medical malpractice in a leading medical journal. The doctors were shocked to learn that when they go to jury trial, that doctors prevail in three out of four cases. That is another one of these things, that we are always out to get you.

Since this Committee's concern is with the issue of litigation against businesses, and especially punitive damages, including exploding gas cans, allow me to offer a few comments that I and my other colleagues, Professor Tom Baker, now at the University of Pennsylvania Law School and Professor Herbert Kritzer at the

University of Minnesota Law School made; these are appended to my comments. And I urge the Committee Members to look at our paper on "Jackpot Justice" and the way that we systematically dissected it.

There are reasons why our litigation level is a little bit higher than European countries, for example. One, these other countries have stronger regulatory mechanisms that eliminate the need for tort claims. Perhaps exploding gas cans. Second, the social welfare systems in these other countries reduces the medical costs to injured parties. I lived in Canada for almost 20 years, although I was born in the United States. And one of the things that Canadians don't worry about are medical bills because they are taken care of. And tort bills are heavily driven by medical costs that are much higher in the U.S. than in other countries.

In the brief period I have left, allow me to make just several points before my time is up.

In 2005, there was a study by the National Center for State Courts. It found that 8 percent of initial claims asked for punitive damages. However only 31 cases were actually reported across the United States and the major cities in the United States. What happened to those initial claims? Well, what people often do not understand is how the tort system has mechanisms to eliminate frivolous claims. One is that the judge just looks at it and says, this is frivolous and I am not going to give it to the jury. That is it. Sometimes the judge says, well, we will let it go through. And before the jury is sent back to deliberate, the judge says, I won't give—I don't want you to consider the issue of punitive damages.

The other issue that I think is important is that we do have some large punitive damages cases. But what is striking is they are often business versus business. One is *TXO v. Alliance Research Corporation*, where the Supreme Court itself said this case involved was egregious behavior. In one of the articles, the second articles that I have appended on punitive damages, we have a case which, again, the largest punitive one that we uncovered was a case involving a business against another business.

So some of these things get blown out of proportion and are actually myths. And I keep going back, because I love beating this one to death, I love to beat the McDonald's coffee spill case. This is the fourth time I have referred to it. I really urge Members of this Committee to look up the McDonald's case on the Internet because this myth has just created incredible impression, the iconic example of our jury system gone awry. I have spent a lot of time studying juries. When I was doing medical malpractice I interviewed jurors, I followed them through. I was also involved in a unique research project in Arizona where we actually—the Arizona Supreme Court initiated this project—where we actually recorded in the jury room 50 civil juries deliberating as well as the test. The thing—and some of these articles are written up. I talk about it in one chapter of my book with Valerie Hans—one of things that came through is every time these claims are made about runaway juries, they are an insult to the American citizens that serve on juries. I feel very strongly about that. Because what we found was juries are so conscientious and actually like accountants go through the evidence and say, well, you know, the plaintiff claimed X bills. They go

through and they act like accountants: "Wait a minute, this doesn't add up."

And so I think those are my final comments. I have actually got quite a bit of time left. But I think the point that I would like to make is one in addition to what I have also said is I want to go back to this, that you underestimate the common good sense of the American people when you insult the jury system.

Thank you.

Mr. FRANKS. I thank the gentlemen.

[The prepared statement of Mr. Vidmar follows:]*

*See Appendix for the supplemental material submitted with this statement.

Prepared Statement of Neil Vidmar, Ph.D.

Russell M. Robinson II Professor of Law, Duke Law School and Professor of Psychology Duke University

Can We Sue Our Way to Prosperity? Litigation's Effect on America's Global Competitiveness

Before the Subcommittee on the Constitution and Civil Justice

United States House of Representatives

March 5, 2013

I. INTRODUCTION

Mr. Chairman and Members of the Committee:

I am pleased to offer a brief report bearing on two broad issues being considered by this Committee, namely the effects of the tort system on medical malpractice and the effects of punitive damages on businesses.

By way of Introduction, I hold the endowed Russell M. Robinson II Chair in Law at Duke Law School. I also hold a position of Professor in the Psychology Department at Duke University. My appointment in a law school is unusual, though not unique. I received my Ph.D. in Social Psychology from the University of Illinois in 1967, and in 1974, following a developing interest in law, I spent a year as a Russell Sage Fellow at Yale Law School. From that period forward, the overwhelming corpus of my academic and applied research has been devoted to empirical studies bearing on various aspects of the legal system, including the tort system. As a consequence of this research, I was invited to join the Duke Law faculty in 1987. I have written three books on the U.S. jury system and somewhere approaching 200 articles in law reviews and in peer reviewed social science or medical journals. I have provided expert testimony or advice on jury systems and related matters in the U.S., Canada, Australia, New Zealand, Hong Kong and the United Kingdom.

Most pertinent to my testimony here today regarding the U.S. tort system I will briefly address two of the areas in which I have conducted empirical research. For almost a quarter century I have published empirical studies bearing on medical malpractice litigation. I have previously testified about medical malpractice before U.S. Senate and House committees as well as state legislatures. I have drafted amicus briefs, endorsed by other researchers, bearing on malpractice litigation in a number of state courts. For a slightly shorter period, I have conducted research on the issue of punitive damages. I summarize some of my conclusions in these two areas in this statement.

I will come quickly to the point of my remarks. Wild claims about the American tort system and its negative effects on our society have consistently not stood up to scrutiny when examined carefully from an empirical perspective. By empirical perspective, I mean systematic examination of data and conclusions that can be drawn from those data.

Due to short notice I received about this hearing, my prepared statement is necessarily brief. However, I have appended two writings to this statement that expand upon my summary comments.

II. Medical Malpractice Litigation

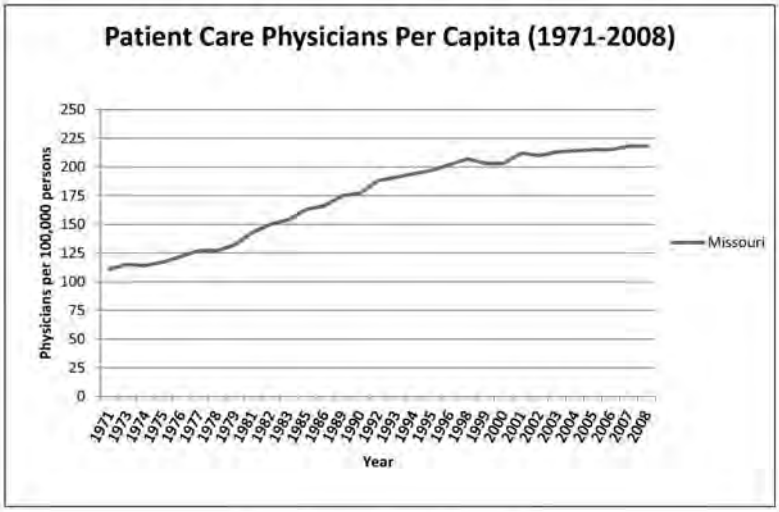
A. Effects of Jury Awards on Per Capita Number of Physicians

The issue of lawsuits from alleged medical malpractice is one of the most common complaints about the tort system. Both the American Medical Association and state medical organizations have raised consistently similar claims. Runaway juries, it is alleged, increase the cost of medical liability

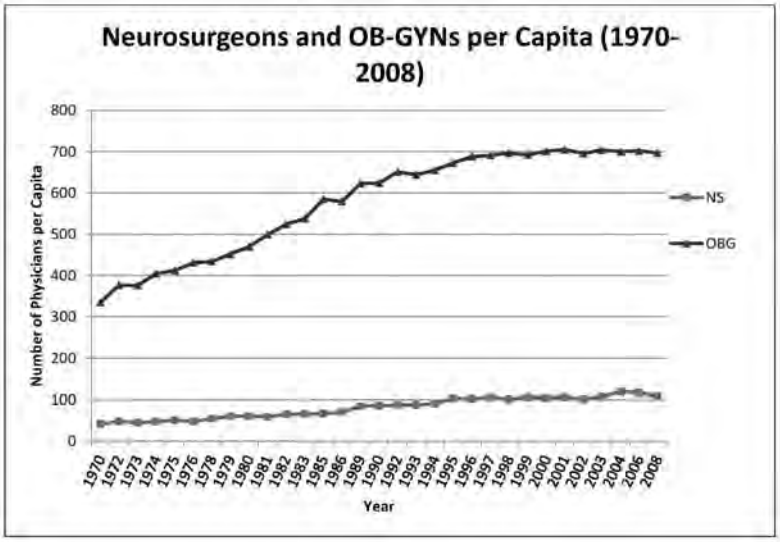
insurance; cause doctors to flee high litigation states to more friendly states; cause doctors to undertake unnecessary defensive measures, such as ordering unnecessary tests. These claims were outlined in a document published by the American Medical Association: *Medical Liability Reform – NOW!* (2005) at www.**ama**-assn.org/amednews/**2005**/02/07/edco0207.htm. A standard proposed remedy is to place a cap on the "pain and suffering" component of jury awards.

Beginning in 1990, I undertook an in-depth investigation of such claims in the State of North Carolina. That research resulted in a 1995 book that placed a different perspective on the medical negligence process: Vidmar, N., *Medical Malpractice and the American Jury: Confronting the Myths About Jury Incompetence, Deep Pockets, and Outrageous Damage Awards*, University of Michigan Press (1995). Subsequently, I have undertaken detailed investigations of these claims in the states of Illinois, Pennsylvania, Florida, Louisiana and Missouri. First, consider Missouri since it involves my most recent study, but the results are similar to my earlier studies.

To investigate the doctor exodus claim, I went to statistics from the AMA itself. That organization does a yearly sampling of physicians of all types in each state. The data are reported on a county by county basis, by types of medical practice and by counties within each state. Here is what I found about the alleged doctor exodus in Missouri: The number of patient care physicians per capita had steadily increased since 1971: These data are portrayed in Figure 1:



However, some claims had been made that the big problem was with specialized and critical areas such as neurosurgeons and Ob-Gyns. Fortunately, the AMA data list these specialties separately. Thus, Consider Figure 2:



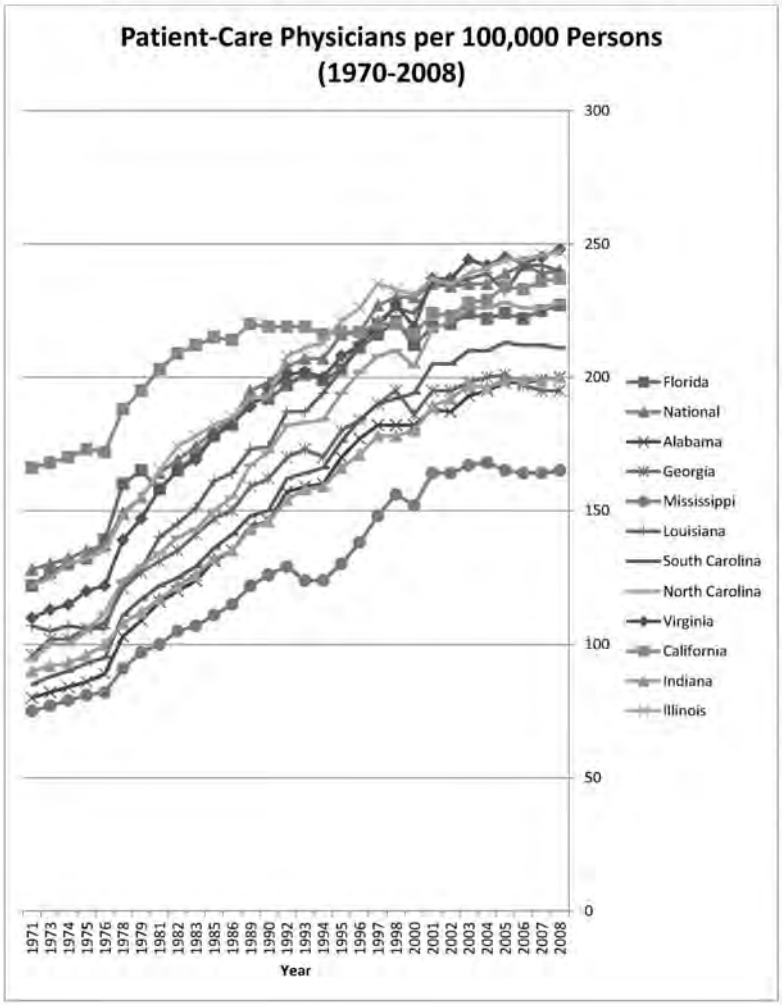
A further claim that is often made is that the "litigation crisis" causes doctors to flee from rural areas. To be sure, there typically are fewer doctors per capita in rural areas, but this problem goes back roughly a hundred years. The root cause appears to be that, on the whole, doctors prefer to live and practice in urban areas. But like the general claim of a physician exodus, the AMA data also lends no support. Although the per capita number of physicians is lower in rural areas, the upward slope of the graph is roughly similar to Figure 1.

B. Explanations for Upsurges in Medical Liability Premiums

But there is more to the story. The state of Missouri has an outstanding Department of Insurance and it operates with a level of credibility that is similar to the federal Congressional Budget Office. It has an outstanding record with respect to tracking medical malpractice claims; moreover it turns out periodic reports. A special report by that department in 2003 addressed the issue of increases in medical liability premiums with the following conclusions:

1. Claims closed and filed have trended downward for both physicians and other types of health care providers.
2. In the past decade, awards for malpractice damages actually lagged behind general inflation.
3. All increases in award sizes are accounted for by medical inflation, wage inflation (for lost earnings) and the increase in severity of the injury to the patients.
4. On average in 2003, physicians paid less for malpractice coverage than in 1990, even though 40 percent more doctors were licensed. All medical providers also paid less overall for coverage than in 1990.
5. Economic awards for increased medical costs and lost earnings accounted for a greater share of total damages than non-economic damages. (Underline added for emphasis.)
6. Missouri had few of the multimillion-dollar awards cited in the [nationwide] media and, when they did occur, most damages represented the medical costs to treat the injury and the income the victim could not earn.

In the event that a critic might argue that perhaps Missouri is unique, turn to Figure 3. Again using AMA statistics, Figure 3 reports physician trends for a selected number of states between 1970 and 2008. There are differences between states, but these differences can be ascribed to differences in population and other factors. The important lesson is that the per capita number of physicians has steadily increased over four decades. When the data are further disaggregated, as I have portrayed for Missouri, there are no surprises. The number of specialists and the number of rural doctors also show upward trends.


Patient-Care Physicians per 100,000 Persons
(1970-2008)
300
250
200
150
100
50
0
Florida
National
Alabama
Georgia
Mississippi
Louisiana
South Carolina
North Carolina
Virginia
California
Indiana
Illinois
1971
1973
1974
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C. Salutary Effects of Medical Malpractice Litigation

I would be remiss if I did not call this Committee's timely attention to an outstanding piece of empirical research that will shortly be published in the New York University Law Review. The author is Professor Joanna Schwartz at UCLA School of Law and the article is entitled, *A Dose of Reality for Medical Malpractice Reform*. While much of the discussion about the tort system has focused on the claim that malpractice litigation has negative effects on the practice of medicine, Professor Schwartz has conducted research strongly suggesting that it has positive effects. Professor Schwartz conducted a national survey of health care professionals supplemented with thirty-five "in-depth" interviews in a sample of U.S Hospitals across the country. Her respondents were professionals responsible for managing risk and improving patient safety. From this research, Professor Schwartz concludes that malpractice litigation is not compromising patient safety. In fact, it has fostered transparency with both patients and hospital staff. Her interviews lead to the conclusion that lawsuits have become a valuable source of data about weaknesses in hospital policies and the practices of the hospital's staff and administration. The research is carefully conducted and places a different light on the tort system, namely, some positive effects on patient safety.

III. Product Liability

A. Care in the Interpretation of Data

About five years ago, I and two of my colleagues, Professor Tom Baker, University of Pennsylvania Law School, and Professor Herbert Kritzer, University of Minnesota Law School, published a critique of a 2007 report by the Pacific Research Institute entitled *Jackpot Justice: The True Cost of America's Tort System* that was widely available on the Internet. Our article was entitled, *Jackpot Justice and the American Tort System: Thinking Beyond Junk Science* (2008). In that article, we drew attention to the flaws and assumptions of the *Jackpot Justice* report. I append our report to this statement, because it goes into detail with respect to the problems with that report. The problems include its heavy reliance on data from reports of Tillinghast Towers Perrin, an industry-focused organization whose data are not available for independent public evaluation with respect to their validity and reliability. Our report is important in that this Committee will today hear about data from that company's successor, Towers Watson. I have taken the liberty of appending our report to this statement.

Of course, I have not heard the testimony about the Towers Watson report as I write this statement. However, I offer a summary of what my colleagues and I said about the earlier data:

1. It is a fundamental error to include tort transfer payments to victims as part of the costs of the tort system.
2. To be considered reliable, the data need to be subject to peer review.
3. The previous data came from financial reports that insurance companies prepare to enable insurance regulators to assess the solvency of insurance companies, not to make the civil justice system transparent.

4. The solvency data present a snapshot of insurance costs that can be very misleading due to a unique insurance industry business cycle. Depending on where the companies are in that cycle different conclusions will be drawn.

It is noteworthy that Judge Richard Posner, a highly respected scholar, drew similar objections regarding the use of those data to draw conclusions about the costs of the tort system.

My colleagues Baker and Kritzer and I also drew attention to the problem of comparing American tort costs to those of other countries for the following reasons:

1. Other countries have stronger regulatory mechanisms that eliminate the need for certain types of tort claims.
2. Social welfare systems in other countries may reduce the need to rely on the tort system for medical costs and other support following an injury.
3. Tort claims are heavily driven by medical costs and the cost of health care is much higher in the U.S. than in other countries.

I will not elaborate further on our critique of *Jackpot Justice* and its data issues since it is appended to these comments. But I do want to draw attention to the fact that the Baker, Kritzer and Vidmar critique also discusses the American tort system as a transfer system with examples from medical malpractice litigation.

B. The Always Controversial Topic of Punitive Damages.

In another article appended to this statement, Vidmar, N. and Holman, M., *The frequency, predictability and proportionality of jury awards of punitive damages in 2005: a new audit*, Vol. XLIII *Suffolk Law Review*, 101-138, 2010, Professor Holman and I discuss data from the 2005 Bureau of Justice Statistics 2005 Survey of State Courts, plus supplemental data from several other sources.

Our conclusions in that article are as follows:

Although punitive damages were asked for in about 8.8 percent of pleadings in the country's largest urban courts in 2005, only 131 cases resulted in punitive awards. The plaintiffs either dropped the claims or judges would not allow the punitive claims to be put before the jury or dropped them in post–verdict remittiturs. Of the punitive awards, only 14 cases involved a ratio that exceeded the single digit ratio recommended by the U.S. Supreme Court. Moreover, the data that we analyzed are consistent with earlier research by Cornell Law Professor Theodore Eisenberg and his co- authors, who found that most of the variability in the ratios between compensatory and punitive awards was in cases at the low end of compensatory awards.

The Vidmar and Holman findings are generally consistent with an earlier study that my co-author Mary Rose and I found with a data set from Florida, Vidmar and Rose, *Punitive Damages; In Terrorem and in Reality*. 38 *Harvard Journal on Legislation*, 489-511 (2001). In that research, we found that the ratio of punitive to compensatory damages was 0.67 to 1.

Finally, it is important to draw attention to the fact that some of the mega punitive damages awards involve business to business lawsuits rather than individuals suing businesses. An article by Michael L. *Rustad, The Closing of* Punitive Damages' *Iron Cage*, 38 *Loy. L.A. L. Rev.*, 1297 (2005), looks carefully at these issues.

I hope my perspective is useful to this Committee. I am most willing to answer any questions.

Additional Research by Neil Vidmar bearing on the Tort System

Holman, M., Vidmar, **N.** and Lee, P., *Most Claims Settle: Implications for Alternative Dispute Resolution from A Profile of Medical Malpractice Claims in Florida*, 74 *Law & Contemporary Problems*, 103 (2011).

Vidmar, N. and Holman, M., *The frequency, predictability and proportionality of jury awards of punitive damages in 2005: a new audit*, Vol. XLIII *Suffolk Law Review*, 101-138 (2010).

Vidmar, N. and Wolfe, M.W.**,** *Punitive Damages*, 5 *Annual Review of Law and Social Science*, 179-199 (2009).

Vidmar, N., *Juries and Medical Malpractice: Facts versus Claims*, Clinical Orthopaedics and Related Research, Springer Open Access DOI 10.1007/s11999-008-0608-6 (published November 2008). Available at http://dx.doi.org/10.1007/s11999-008-0608-6.

Mr. FRANKS. And I now recognize our fourth and final witness, Professor Butler. Sir, I hope you will also turn your microphone on.

TESTIMONY OF HENRY N. BUTLER, GMU FOUNDATION PROFESSOR OF LAW, AND EXECUTIVE DIRECTOR, LAW & ECONOMICS CENTER, GEORGE MASON UNIVERSITY SCHOOL OF LAW

Mr. BUTLER. Happy to be here today. Thank you.

Chairman Franks, Ranking Member Nadler, and Members of the Subcommittee, thank you for the opportunity to be here today.

The impact of our civil justice system on international competitiveness is a vitally important one. The premise of this hearing that we, in fact, have excessive litigation is one that I am willing to accept, although I cannot quantify the extent to which litigation is, in fact, extensive. One area of the law that has seen extraordinary amounts of litigation in recent years, and an area of particular interest to me, and which will severe as the focal point of my testimony, is State consumer protection law. I hope to make two points in my brief testimony. First, optimal. That is an economic rule. Optimal legal rules recognize the trade-off between the cost of accidents and the costs of accident prevention. Second, excessive litigation can tip this balance, leading firms to make socially wasteful expenditures, which ultimately harms both their global competitiveness and consumers.

Tort law is perhaps the most analyzed area of law and economics. This framework of analysis can trace its lineage to one developed by Judge Learned Hand in the seminal *U.S. v. Carroll Towing* opinion over 60 years ago. Judge Hand opined that the determination of tort liability should be based on whether the alleged tortfeasor had failed to take additional precautions that would have cost less than their expected benefits in terms of reduced likelihood and severity injuries.

A similar approach is found in the work of Judge, then law professor, Guido Calabresi. Calabresi famously wrote in his seminal book, "The Cost of Accidents," that the goal of tort law should be to minimize the combination of the costs of avoiding accidents and the costs of accidents. That is in evaluating a legal regime we should think about the tradeoffs of costs and benefits. We can have too much safety, we can have too much consumer protection, we can have too much disclosure, and so forth. Because the marginal costs of accident reduction increases as the probability of accidents decreases, the law tolerates some injuries. That is, the optimal number of issues is not zero. And I know that sounds cold and harsh, but that is the way we think about it in law and economics, and I think the way the courts actually act. The benefits of holding American businesses liable for injuries and damages for consumers, customers, users of products and services are well known and have been summarized some by Ranking Member Nadler's comments. So it serves as a guide for the behavior that we expect of our businesses.

A civil litigation system characterized by excessive litigation can lead to lower levels of production, employment, innovation, and business openings. Unfortunately, some areas of American law have strayed from the balancing approaches articulated by Judges Hand and Calabresi. Their common sense notions have become uncommon in some areas of American law. So State consumer protection acts, which I realize are not in your jurisdiction, are an unsettling example of an area where product litigation has strayed far from a common sense balancing approach. In my view, the amount of such litigation, which imposes a tremendous toll on all American businesses that directly interact with consumers, is clearly excessive. States pass these laws, often referred to as little FTC acts, be-

cause they were modeled after Section 5 of the FTC Act. They passed these laws for appeared to be sound economic reasons. In our modern mass-produced economy it is often uneconomical for individual consumers to bring lawsuits against manufacturers when they are dissatisfied with a product. To solve this problem, little FTC acts allow for private actions, awarding of attorneys' fees to a winning consumer, statutory damages oftentimes as high as $1,000 per occurrence, and relaxation of traditional common law requirements of reasonable reliance and actual injury. At about the same time that the States were adopting little FTC acts, the class action lawsuit was coming into favor as another solution to the uneconomical lawsuit problem. So somewhere along the way, the two solutions merged into the consumer class actions. And they now benefit from the procedural—the class actions now benefit from the procedural and substantive advantages that were found in the little FTC acts. This combination of solutions has brought about a perfect storm of litigation resulting in a dramatic increase of litigation during the first decade of the century, as documented by a study that I oversaw when I was at Northwestern University. Consumers ultimately pay the costs that excessive litigation imposes on business through higher prices. Of course, because the law of demands that higher prices will result in fewer goods being sold, some consumers will decide to go without products altogether, and firms will then need fewer workers. To the extent that businesses cannot recover all of these from consumers, moreover, they result in reduced profits which translate into lower returns for shareholders and other investors.

I wanted to quickly summarize how this impacts—this type of litigation can impact on the global competitiveness of firms. Corporations have responded to these lawsuits; of course, they have to respond to these lawsuits. And every lawsuit that is filed against a business diverts resources from otherwise productive pursuits. The greater the expected cost of litigation, the more a company will invest in avoiding litigation. If there are problems with a product, the firm will invest resources to improve to avoid litigation. And even when there is nothing wrong with the product and no consumers have relied or been injured, however, the mere threat of class actions and potential liability under broadly interpreted State consumer protection acts can also lead companies to pour more resources into safety. The potential for enormous financial liability as well as the potential for unfavorable publicity can force even the most stable and rational businesses to settle cases that they believe they could win at trial. But because this increased investment is tied to the cost of handling unfounded legal claims rather than consumer injury, it is socially wasteful. In this matter, excessive litigation disrupts the balance between the marginal benefits and costs to precaution that tort law attempts to—that tort law and other areas of law attempt to strike as a balance.

So the upshot of my brief remarks is that excessive litigation under something as benign sounding as State consumer protection acts can have serious adverse consequences for America's competitiveness.

Thank you for allowing me the opportunity to express my views.

[The prepared statement of Mr. Butler follows:]

Testimony of Professor Henry N. Butler

GMU Foundation Professor of Law and
Executive Director, Law & Economics Center
George Mason University School of Law

March 5, 2013

Hearing on "Excessive Litigation's Impact on America's Global Competitiveness"

House Committee on the Judiciary
Subcommittee on Constitution and Civil Justice

I. INTRODUCTION

Chairman Franks, Ranking Member Nadler, and Members of the Subcommittee, thank you for the invitation to testify today. My name is Henry Butler. I'm employed at George Mason University School of Law where I am a GMU Foundation Professor of Law and the Executive Director of the Law & Economics Center. The views that I express here today are my personal opinions. Neither George Mason University School of Law nor the Law & Economics Center take positions on these types of matters.

I have a Ph.D. in Economics from Virginia Tech and a law degree from the University of Miami. I've held academic positions at Texas A& M University, University of Chicago, University of Kansas, Chapman University, and Northwestern University. I have devoted a great deal of my career to trying to improve our civil justice system through the education of literally thousands of state and federal judges with a focus on the important, productive role that our legal system plays in our dynamic market-based economy.

The impact of our civil justice system on international competitiveness is a vitally important issue, and I congratulate the subcommittee for holding the hearing. The premise of the hearing – that we, in fact, have "excessive litigation" – is one that I am willing to accept based

on observations during the course of my 30 years as a legal scholar, although I cannot quantify the extent to which litigation is excessive. One area of the law that has seen extraordinary amounts of litigation in recent years, and an area of particular interest to me – and which will serve as a focal point for this testimony – is state consumer protection law.

I hope to make two main points in my brief testimony. First, optimal legal rules recognize the tradeoff between the costs of accidents and the costs of accident prevention. Second, excessive litigation can tip this balance, leading firms to make socially wasteful expenditures, which ultimately harms both their global competitiveness and consumers. One thing that we must keep in mind, however, as we evaluate the international impact of excessive litigation and consider possible solutions, is the tremendous societal benefits that flow from a well functioning civil justice system. We must take care to not throw out the baby with the bathwater.

II. ECONOMIC ANALYSIS OF LEGAL RULES

My research area is the economic analysis of law. A persistent theme of the economic analysis of law is that our common law heritage, founded on private property rights, freedom of contract, private ordering, and the rule of law, has served us well. The economic analysis of law provides a systematic framework for analyzing the impact of alternative legal rules, procedural as well as substantive.[1]

Tort law is perhaps the most analyzed area of law and economics. This framework of analysis can trace its lineage to one developed by Judge Learned Hand in the seminal *U.S. v.*

[1] See generally Butler, Henry N. and Drahozal, Christopher R., Economic Analysis for Lawyers (2nd Ed., 2006).

Carroll Towing[2] opinion over sixty years ago. Judge Hand opined that the determination of tort liability should be based on whether the alleged tortfeasor had failed to take additional precautions that would have cost less than their expected benefit, in terms of reduced likelihood and severity of injuries. A similar approach is found in the work of Judge (then Yale law professor) Guido Calabresi. Calabresi famously wrote in his seminal book, THE COSTS OF ACCIDENTS, that the goal of tort law should be to minimize the combination of the costs of avoiding accidents and the costs of accidents. That is, in evaluating a legal regime, we should think about the tradeoff of costs and benefits: we can have too much safety; we can have too much consumer protection; we can have too much disclosure; and so forth. Because the marginal cost of accident reduction increases as the probability of accidents decreases, the law tolerates some injuries. The optimal number of injuries is not zero.

The important point to take from the economic analysis of tort law is that incentives matter; diverse rules create different incentives and, thus, result in a diverse set of outcomes. Accordingly, alternative legal rules should be evaluated in terms of how they guide behavior. A straightforward normative implication of this analysis is that we should create legal rules that provide businesses incentives to invest in injury avoidance so long as the marginal cost of achieving additional safety is less than the expected marginal benefit of increased safety (where the marginal benefits are the expected value of prevented injuries). It is socially wasteful to force businesses to overinvest society's scarce resources beyond this point.

The benefits of holding American businesses liable for injuries or damages to consumers, customers, users of products and services are well known: compensation for injured parties; incentives for improvements in product quality and safety; and higher prices for risky products, which again reduces consumer harm by reducing purchases of these products. On the other side

[2] 159 F2d. 169 (2d Cir. 1947).

of the benefit-cost tradeoff, the costs of our civil justice system have increased dramatically over the past 30 years or so. Litigation transactions costs have increased dramatically – due in part to increased costs of legal representation, litigation delays, class actions, and, more recently, the dramatic increase in the costs associated with electronic discovery. Additionally, if the legal rule does not reflect an optimal balance of costs and benefits, it will deter the socially beneficial activity. Higher liability costs for risk-reducing products, for example, can actually *increase* accidental deaths. Finally, a civil justice system characterized by excessive litigation can lead to lower levels of production, employment, innovation, and business openings.[3] Unfortunately, some areas of American law have strayed far from the balancing approaches articulated by Judges Hand and Calabresi. Their common sense notions have become uncommon in some areas of American law.

III. STATE CONSUMER PROTECTION LAWS

State consumer protection acts are an unsettling example of an area where private litigation has strayed far from a common sense balancing approach. In my view, the amount of such litigation – which imposes a tremendous toll on all American businesses that directly interact with consumers – is clearly excessive. States passed these laws – often referred to as "Little FTC Acts" because they are modeled after Section 5 of the U.S. Federal Trade Commission Act – for what appeared to be sound economic reasons. In our modern mass produced economy, it is often uneconomical for individual consumers to bring lawsuits against manufacturers when they are dissatisfied with a product. To solve this problem, Little FTC Acts allow for private actions, awarding of attorneys fees to a winning consumer, statutory damages

[3] See generally Shepherd, Joanna M., Products Liability and Economic Activity: An Empirical Analysis of Tort Reform's Impact on Businesses, Employment, and Production, Vanderbilt Law Review, Vol. 66:1:257 (2013).

(often as high as $1,000 per occurrence), and relaxation of traditional common law requirements of reasonable reliance and actual injury.[4] At about the same time as states were adopting Little FTC Acts, the class action lawsuit was coming into favor as another solution to the uneconomical lawsuit problem. Somewhere along the way, the two solutions merged so that consumer class actions now benefit from the procedural and substantive advantages found in the Little FTC Acts.[5] This combination of solutions has brought about a perfect storm of litigation resulting in a dramatic increase in litigation during the first decade of this century.[6]

It is ironic that private litigation under state consumer protection acts is expanding when consumers are more empowered that ever. Searching for the availability of products is incredibly easy and inexpensive, as is learning about price, quality, and value. Consumers are better able to find the exact product they want at the lowest possible price than was imagined even a decade ago. Businesses are forced to compete in this information-rich environment. A business that violates consumer trust, moreover, does so at the peril of near-instantaneous retribution via social media and other online fora. The threat of losing their reputational capital – not the threat of legal liability – forces businesses to behave. In this way, the informational revolution that is the Internet has helped harness competitive market forces to provide

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[4] See Schwartz, Victor E. & Silverman, Cary, Common-Sense Construction of Consumer Protection Acts, 54 KAN.L.REV. 1, 7 (2005).

[5] See Butler, Henry N. and Johnston, Jason Scott, Reforming State Consumer Protection Liability: An Economic Approach (August 6, 2009). Columbia Business Law Review, Vol. 2010; Northwestern Law & Econ Research Paper No. 08-02; U of Penn, Inst for Law & Econ Research Paper No. 08-29; U of Penn Law School, Public Law Research Paper No. 08-47. Available at SSRN: http://ssrn.com/abstract=1125305 or http://dx.doi.org/10.2139/ssrn.1125305; and Butler, Henry N. and Wright, Joshua D., Are State Consumer Protection Acts Really Little FTC Acts? (May 5, 2010). Florida Law Review, Vol. 63, No. 1, pp. 163-192, January 2011 ; Northwestern Law & Econ Research Paper No. 10-11; George Mason Law & Economics Research Paper No. 10-45. Available at SSRN: http://ssrn.com/abstract=1600843.

[6] Wright, Joshua D., State Consumer Protection Acts: An Empirical Investigation of Private Litigation (November 12, 2010). Searle Civil Justice Institute Preliminary Report, 2009 . Available at SSRN: http://ssrn.com/abstract=1708175.

unprecedented protection for consumers. Against this market backdrop, one would expect there to be less need for consumer protection lawsuits. Yet, private actions under consumer protection lawsuits keep increasing.

Consumers ultimately pay the costs that excessive litigation imposes on businesses through higher prices. Of course, because the law of demand dictates that higher prices will result in fewer goods being sold, some consumers will be forced to go without products altogether, and firms will need fewer workers. To the extent that businesses cannot recover all of these costs from consumers, moreover, they will result in reduced profits, which translate into lower returns for shareholders and other investors.

IV. IMPACT ON GLOBAL COMPETITIVENESS

Now, consider how excessive private litigation under state consumer protection acts impacts America's global competitiveness. Corporations have to respond to these lawsuits.[7] They cannot ignore them. Every lawsuit filed against a business diverts resources from otherwise productive pursuits. The greater the expected costs of litigation, the more a company will invest in avoiding litigation. If there are problems with a product, a firm will invest resources in to improve it to avoid litigation. Even if there is nothing wrong with the product (and no consumers have relied or been injured), however, the mere threat of class actions and potential liability under broadly interpreted state consumer protection acts can also lead companies to pour more resources into safety. The potential for enormous financial liability as well as the potential for unfavorable publicity can force even the most stable and reputable business to settle cases that they believe they could win at trial. But, because this increased investment is tied to the costs of handling unfounded legal claims, rather than consumer injury, it

[7] Elliott, E. Donald, Twombly in Context: Why Federal Rule of Civil Procedure 4(b) is Unconstitutional (December 14, 2010). 64 FLA. L. REV. 895 (2012). Available at SSRN: http://ssrn.com/abstract=1711229

is socially wasteful. In this manner, excessive litigation disrupts the balance between the marginal benefits and costs of precaution that tort law attempts to strike.

What's more, consumer class actions are very disruptive of ordinary business activities, diverting managers' time and ingenuity from the productive pursuits of trying to grow a business in dynamic global markets. This diversion of resources increases costs, putting U.S. companies at a competitive disadvantage relative to their foreign rivals that have not yet been subjected to such suits. Clearly, excessive consumer protection litigation is a drag on our economy.

V. CONCLUSION

The upshot of my brief remarks is that excessive litigation under something as benign sounding as a state consumer protection act can have serious adverse consequences for America's competitiveness. Thank you for allowing me the opportunity to express my views.

Mr. FRANKS. Gentlemen, I thank you for your testimony. And we will now proceed under the 5-minute rule with questions. I will begin by recognizing myself for 5 minutes.

I will address my first question to you, Professor Butler. I think it is commonly assumed that when U.S. companies are sued and excessive litigation costs are imposed that it is a nameless, faceless

corporation that pays these costs. In your experience, who ultimately bears the costs of excessive litigation?

Mr. BUTLER. Well, to the extent we have excessive litigation, I think it is fair to characterize it as a tax. And as Milton Friedman famously would say, only people pay taxes. If somebody has to bear that cost and that cost is either borne by consumers in the form of higher prices, employees in terms of lost jobs, shareholders in terms of lower rates of return. So there is no—there is no free lunch in this system; the costs are borne by someone.

Mr. FRANKS. Yes, sir.

Mr. Flick, I might follow up with you sort of in the same vein. Who paid the ultimate price for the lawsuits against Blitz, USA? I won't try to lead you in the question. Who paid the ultimate costs there?

Mr. FLICK. I think all three of those, the consumer—the prices of gas cans went up over the years from about $5 for a 5-gallon gas can to more recently $20. People are paying more for the product, and the costs of litigation are in that. The costs of some environmental regulation are in that too.

But the consumer certainly paid more, our people who lost their jobs paid with their jobs and their loss of benefits, and the shareholders ultimately had a company that was worth nothing.

Mr. FRANKS. Thank you, sir.

Mr. Hinton, let me ask you a question here.

I was fascinated with the Professor Vidmar's comment that they recorded, I think, some of the juries deliberating in cases. I didn't know whether the juries knew that they were being recorded or not. If they did, I suppose that would change the dynamics of the deliberation pretty profoundly; if they didn't, it opens up a whole new set of questions.

But Professor Vidmar's testimony, he states that the claims about negative effects of the American tort system have not stood up to scrutiny. I would like to just give you the opportunity to reiterate what your studies have shown about the effects of the American tort system and to respond to any points regarding Professor Vidmar's testimony.

Mr. HINTON. Yes. Thank you. I think one of the points I would like to respond to Professor Vidmar that he raised was that if you look at Europe, they have much more extensive healthcare benefits and welfare benefits and so on. And so how can you be sure that higher tort costs in the United States are not just a result of that.

And in the study that we have done, we actually relied on some research by Kermar and Schmidt, who tried to control the amount of government program spending in their comparative analysis and found that if you were to change the benefit system in Europe to the same level of benefits that they have—we have in the U.S., it would only change the tort costs there by about 26 percent, which is a tiny fraction of the difference that we measure.

So I think that in terms of the effects of the tort system, those cost differences, they are so large it is difficult to ignore them. The question of whether or not they affect competitiveness does depend a little bit on this issue of transfer rate; how much benefit is there coming from the tort system. The reason in our study that we think we address that is because we think that those types of bene-

fits provided by the legal systems in these countries are of similar magnitude. And they are certainly not sufficiently different to explain why the U.S. tort system costs over two and a half times the European one.

Mr. FRANKS. Well, thank you, sir.

Mr. Flick, I might return to you, sir. I don't know if Blitz, USA would have qualified as a small business. I think you said at one point you had 120 employees, and that is certainly not a large corporation. But would it have been easier for Blitz to survive the lawsuits against it if it were a large corporation or a division of a large corporation?

Mr. FLICK. Yes, I believe so. I guess it would depend on how large and how much the large corporation wanted to put into fight——

Mr. FRANKS. So you think there may be a disproportionate impact on small businesses?

Mr. FLICK. Well, a small business just can't get the cases to trial with the high costs. If it costs 2 or $3 million to win a case and your insurer—the insurance company is going to settle that case. And a large business can take a longer view due to their resources and fight the cases and shine more light on the truth.

Mr. FRANKS. Well, thank you very much. And I am going to turn to Mr. Nadler and yield him for 5 minutes for questions.

Mr. NADLER. I thank the Chairman.

Professor Vidmar, I would like you to elaborate. I mean, we had a little debate here about the U.S. having higher litigation costs than Europe. Can you expand in your testimony about why these differences might exist and why Mr. Hinton is wrong in what he was saying?

Mr. VIDMAR. My view is that when some of these estimates—I have not seen those statistics. What I do know is that the issue that was brought up with the Jackpot Justice article, which were very similar to these, I mean, he has different data than we have now, but when my colleagues, Tom Baker and Herbert Kritzer and I went through the report, we just found so many flaws in the assumptions, that we decided it was not worth the paper it was written on.

Mr. NADLER. So they were like all these studies that we were told here that when we amended the Bankruptcy Code, every credit card holder will get $400 savings in lower interest rates. They have that amount of validity.

Mr. VIDMAR. Yeah. It is——

Mr. NADLER. Um——

Mr. VIDMAR. Oh, I am sorry.

Mr. NADLER. Go ahead.

Mr. VIDMAR. No. I was just going to say, it is difficult sometimes in making these exact comparisons across the different countries.

Mr. NADLER. Okay. Could you comment briefly on the assertion that some jurisdictions are legal hellholes driving out doctors, that OB/GYN's are leaving jurisdictions——

Mr. VIDMAR. Well, you know——

Mr. NADLER [continuing]. Because of the tort system.

Mr. VIDMAR. Yes. That is something that I addressed a number of years ago about legal tort claims places. I have actually written

about them—one of the places we know about is the Bronx jury. Everybody moves their cases to the Bronx because the Bronx juries are favorable to plaintiffs. In fact, I wrote an article with a colleague where we actually went in and looked at the data and compared the Bronx to Manhattan and to the other boroughs. We found no difference. That is the kind of work that I do.

Mr. NADLER. So Manhattan and the Bronx are both legal hellholes?

Mr. VIDMAR. I am sorry?

Mr. NADLER. So Manhattan and the Bronx are both legal hellholes?

Mr. VIDMAR. Yes. Well, I mean, it is one of those things. But that has been the pleasure for me in doing these things just as an intellectually interesting task is everybody believes about the Bronx jury.

Mr. NADLER. So in other words, you found no evidence that the fact——

Mr. VIDMAR. We found no evidence whatsoever to support that position, with one tiny exception.

Mr. NADLER. To support the position that doctors are leaving.

Mr. VIDMAR. With one tiny exception, which is not doing it justice. Yeah.

Mr. NADLER. Okay. Mr. Hinton, in your testimony you cited a 2011 report by Towers Watson, you referred to it, that U.S. Tort costs exceed $250 billion per year. In the report, they state, "we examined only one side of the U.S. Tort system, the costs. No attempt has been made to measure or quantify the benefits of the tort system or conclude that the cost of the U.S. tort system outweighed the benefits or vice versa."

Have you calculated the benefits of the tort system? And if so, what is the net cost of the system after subtracting the benefits? Since we don't know the net costs, then everything else that you are talking about is irrelevant.

Mr. HINTON. That is one of the reasons we developed this forthcoming study looking at across countries. So basically the idea of that study design is to say, let us choose some other countries where we think the regulatory environment and the compensatory benefits that are——

Mr. NADLER. And that will show you the net benefits of the tort system?

Mr. HINTON [continuing]. Are about the same, right, so we hold those constant, and that enables us then to infer from differences in the costs—if those differences in costs and the benefits are about the same, then we must be——

Mr. NADLER. So that is a forthcoming study?

Mr. HINTON. That is the forthcoming study.

Mr. NADLER. So as of now, this touted $250 billion cost is a number that means nothing, because it is just one side of the equation. We don't know the other side of the equation. Until you come out with a forthcoming study, it is an irrelevant statistic. Correct?

Mr. HINTON. I mean, I think it is an exactly what it says it was. It is an estimate by Towers Watson, not by me——

Mr. NADLER. Okay.

Mr. HINTON [continuing]. Of how big they think the tort system is in terms of its costs.

Mr. NADLER. In terms of its costs, but it says nothing about its net benefits or net costs.

Mr. HINTON. They didn't address that, I don't think.

Mr. NADLER. Okay. Exactly. Thank you.

Professor Vidmar, could you comment on Mr. Hinton's statement about the forthcoming study that by comparing—can you in fact compare these systems across different countries?

Mr. VIDMAR. Well, there are so many differences between different countries that you always get into the difficulty of confounded variables, I am using a technical term that we use in this field, but, I mean, it is just not the same. And, in fact, I think, if I understood the comment, is that some of these issues are just not controlled for in the study.

Mr. NADLER. Okay. Thank you. Let me get back to Mr. Hinton before my time runs out. In your study with the $250 billion, the Towers Watson study, does the $250 billion include transfers from one party to another?

Mr. HINTON. It includes all the costs that would——

Mr. NADLER. So in other words——

Mr. HINTON. It would include some transfers.

Mr. NADLER. So you did not subtract the transfers from the costs?

Mr. HINTON. Not in that study. That is my understanding, that——

Mr. NADLER. So do you think transfers are net costs?

Mr. HINTON. No. I think that the transfers are part of the benefit of the system. Right? They provide for the compensation, I think.

Mr. NADLER. Okay. So in other words, even the cost figure is not a real cost figure, because it includes——

Mr. HINTON. Well——

Mr. NADLER [continuing]. Includes transfers. Transfers are not a cost.

Mr. HINTON. Well, a cost——

Mr. NADLER. As Judge Posner pointed out.

Mr. HINTON. If I am paying you compensation, then the compensation is still a cost to me.

Mr. NADLER. To you, but not to the system.

Mr. HINTON. Well——

Mr. NADLER. Because I have the money. Maybe I deserve to have the money and you shouldn't, because you punched me in the arm or whatever.

Mr. HINTON. I think you are right that you have to be careful how you refer to the system when you are referring to costs.

Mr. NADLER. Okay. My last—I think my time has expired. Thank you. I yield back.

Mr. FRANKS. I thank the gentleman. And I would now recognize the gentleman from Pennsylvania, Mr. Rothfus, for 5 minutes.

Mr. ROTHFUS. Thank you, Mr. Chairman. Mr. Hinton, in your testimony, you talk about features of a country's legal environment and how it might impact on a country's overall litigation costs. Do you have an opinion on characteristics of our legal environment that you think have the biggest negative impact?

Mr. HINTON. Well, in our study, we specifically looked at two features of the legal environment: whether or not you had a civil or common law tradition, and the number of lawyers per capita in that country. There are obviously other features that are important characteristics of the legal system. We didn't study those directly, but that may be a topic for further work.

But one of the differences that is notable between the U.S. and Europe is the existence of class actions as a remedy and mass litigation procedures. And in the analysis we did of D&O insurance, it is certainly true that securities class actions represent a significant part of the costs of D&O insurance in the U.S. And so may make a contribution or explain in part why the U.S. makes up such a large fraction of the total global D&O costs.

Mr. ROTHFUS. What about other countries and their treatment of punitive damages? For example, are European countries, do they have a punitive damages option available to litigants?

Mr. HINTON. I am sorry. I didn't——

Mr. ROTHFUS. Punitive damages. May litigants seek punitive damages in European courts?

Mr. HINTON. I am sorry. I can't answer that question. I am not really an expert on that issue.

Mr. ROTHFUS. What about, I mean, have you studied, you know, mechanisms that other countries may use to assess the viability of a claim before they would go to a court? Are there any stages to litigation in European countries before you get to a court that might weed out claims that don't have merit?

Mr. HINTON. Again, I would have to do further study on those legal characteristics.

Mr. ROTHFUS. Professor Vidmar, just a couple of questions. You made a statement in your written testimony about, this is on page 5, the important lesson—this is with respect to physicians. The important lesson is that the per capita number of physicians has steadily increased over 4 decades.

Is that still a current assessment or is this study somewhat old, because I looked at some of the charts that accompanied your testimony, both on page 3, the patient care physicians per capita, and again on page 4, we had some specialties per capita, neurosurgeons and OB/GYN's? In looking at these charts, it looks as though, frankly, the number has flatlined over the last decade.

Mr. VIDMAR. They are going up. You can only take—is that on? Yeah. You can only take them up so far. But we actually have some data that have gone up through 2010. You reach a certain point that you just don't—you don't need more physicians or whatever it is, I mean, if you insisted that it go up.

What has been very important in our research is to show they have—contrary to the claims. Illinois was one example. Doctors are leaving Illinois. Okay. That was the claim. We looked, and they weren't leaving Illinois. A related claims was that doctors in the rural areas were leaving. We looked and broke the data down by rural counties. They weren't leaving. I have done the same thing for Missouri, I have done the same thing for Florida, and consistently we find that these claims are just not legitimate. Or they are not supported by data is probably a better way to state it.

Mr. ROTHFUS. A little bit about punitive damages. Again, my understanding of punitive damages is that they are meant to punish a wrongdoer. When you punish a wrongdoer, when society punishes a wrongdoer in the criminal context, we have a beyond-a-reasonable-doubt standard of proof. It seems to me that if you are going to punish a wrongdoer, would you not consider that kind of standard of proof in a civil context?

Mr. VIDMAR. Well, in a civil context it is—in the ordinary case, it is more reasonable than not, but when you get to punitive damages, the standard is higher.

Mr. ROTHFUS. A clear and convincing——

Mr. VIDMAR. A preponderance of evidence becomes much more accepted. It is not proof beyond a reasonable doubt, because people are not put in jail or not sentenced to die as a result of the verdict, but in fact in the punitive damages there is a higher threshold of doubt that the jury has to overcome.

Mr. ROTHFUS. But you are punishing people, are you not?

Mr. VIDMAR. Yes, yes, for misbehavior. And the work that I have done, when you read these cases on a case-by-case basis, what you find is some of the defendants in these cases—I can't give examples right offhand, I can actually send some in, but reading the case studies, their behavior is absolutely egregious.

Mr. ROTHFUS. When you punish wrongdoers, shouldn't the benefit go to society? When you extract a punishment from a wrongdoer, shouldn't it be applied more generally to the society?

Mr. VIDMAR. I didn't understand the question.

Mr. ROTHFUS. Well, when you allow for punitive damages in a civil litigation context——

Mr. VIDMAR. Yes.

Mr. ROTHFUS [continuing]. You are a private litigant litigating that——

Mr. VIDMAR. Yeah.

Mr. ROTHFUS [continuing]. And when you are punishing a wrongdoer, it is not for the harm, it is for the bad act.

Mr. VIDMAR. It is for the bad act, yes.

Mr. ROTHFUS. And doesn't society have an interest in taking the award for that bad act and making——

Mr. VIDMAR. Well——

Mr. ROTHFUS [continuing]. Sure that victims are adequately compensated?

Mr. VIDMAR. In some instances, I would actually think that that might be the case, but that is the way our law has developed. And there is no more I can say about that, except that when you see these cases, it is a punishment. The behavior, you know, sometimes it has been sexual abuse, sometimes it is been just somebody who has been so totally reckless in what they have done, that any Member of this Committee, if I showed you some of those cases, you would say, yeah, that is a bad person. And this is one way, it is not a criminal sanction, but it is one way of punishing. It is a fine.

But one of the things I want to reemphasize, I went over it very quickly, the jury just doesn't get these right away. Most of these claims that are made, some lawyers, and again, I am not going to defend the lawyers, almost automatically when they file a lawsuit

they ask for punitive damages, but they know it is not going anywhere. And, in fact, the judge looks at it and says——

Mr. ROTHFUS. Well, if they know it is not going anywhere, should there be Rule 11 sanctions?

Mr. VIDMAR. Well, they do it sometimes. It is just a matter of part of the negotiation tactics. The other side knows that they are not going to get——

Mr. ROTHFUS. But if there is no merit for it——

Mr. VIDMAR. I am sorry?

Mr. ROTHFUS. If there is no merit for it and——

Mr. VIDMAR. Well, but——

Mr. ROTHFUS [continuing]. Somebody is putting it in a pleading, you know, shouldn't there be some kind of——

Mr. VIDMAR. Well——

Mr. ROTHFUS [continuing]. Sanction for that?

Mr. VIDMAR.—I would almost agree with you, some of the time when they do this, it is just the lawyers getting out of control. I am not always going to defend lawyers. Remember, I am not a lawyer, so I don't have to defend them all the time.

I think that sometimes some plaintiff lawyers do it a matter of pleadings, and they just figure, well, this will scare the other side, but what I can tell you is the other side says, this—they get into pretrial discussions and the other side says, this ain't going to go anywhere. If the plaintiff lawyer gets really recalcitrant, it gets to the judge, and the judge says, we are going to throw this out. And our data show that of the claims that are made, most of the time the legal system filters these cases out before they ever get to a jury. And I should add——

Mr. ROTHFUS. Thank you, Mr. Chairman.

Mr. VIDMAR [continuing]. Another thing, that I do a little bit of consulting. Most of the time when I have done, because my law school position allows me do that, I am usually a defense expert rather than a plaintiff expert on these kinds of matters. So I see both sides of the cases.

Mr. ROTHFUS. Thank you, Mr. Chairman. Yield back.

Mr. FRANKS. I thank the gentleman. And I would now recognize the Ranking Member of the full Committee, Mr. Conyers, for 5 minutes.

Mr. CONYERS. Thank you, Chairman Franks. This has been pretty interesting, but Mr. Flick, your situation is prominently known. Were you sanctioned by the court, finding that Blitz hid information in the form of a handwritten memo by you that would have hurt, if not potentially eliminated Blitz's defense that the flame arresters weren't useful in preventing these explosions?

Mr. FLICK. Yes. Thank you for letting me talk about that.

Mr. FRANKS. Sir, can you pull your microphone? Pull it toward you.

Mr. FLICK. Yes. Thank you. Blitz—I don't know how much detail I can get into that, because——

Mr. CONYERS. Is the answer yes?

Mr. FLICK [continuing]. Because the case is under appeal, but I don't think we were sanctioned for hiding anything. We produced some documents late, and we were sanctioned for that. It is under appeal, and——

Mr. CONYERS. What about destruction of documents and not turning certain other documents over?

Mr. FLICK. I don't think it has ever been shown that we destroyed any documents.

Mr. CONYERS. So is your answer yes or no?

Mr. FLICK. Would you——

Mr. CONYERS. To my question.

Mr. FLICK. The question—repeat the question, please.

Mr. CONYERS. Well, I was just trying find out if it is true that you had a handwritten memo, which I have a copy of, and that your defense would have been eliminated in preventing devastating explosions if that information had come forward.

Mr. FLICK. I don't think the defense would have been eliminated. There was a document that was found that was produced late, and we were sanctioned for that, and that is under appeal.

Mr. CONYERS. Okay. Well, what about the part where the court finds that the settlement would have been not less than $250,000 higher if the plaintiff would have had the documents discussed in this memorandum opinion, and particularly those which were not disclosed to the plaintiff would have drastically increased the settlement value? The court seemed to have had some problems, and—but since you are still in court with it, I won't pursue this any further. I didn't know that this was still under appeal.

Professor Vidmar, you have been the subject of much comment even though you are one of the witnesses. You have heard references to the so-called tort tax. Have you ever examined that for any accuracy or do you have a view about it?

Mr. VIDMAR. I try to stick to my areas of expertise. That is not one. In economics—I mean, I understand economics as a general rule, but I tend to avoid areas that go beyond my expertise, and that, I feel, is one that I shouldn't jump into.

Mr. CONYERS. We have heard a lot about class action lawsuits, but it has been my experience that class action lawsuits are very complex, they are not easy to come by and very few of them get through. As a matter of fact, former President Clinton gave it a try at one time and wasn't very successful at it.

Mr. VIDMAR. Our legal system has its flaws, but it also has its good points. And many of the times you have an adversary system where plaintiffs go after—you know, the lawyers go after people, but our system does a pretty darn good job of weeding out most of these frivolous kinds of lawsuits, but of course that is not what we hear about. We hear about the ones that go through. But judges and others, they start applying the law and say these are just not appropriate lawsuits, so they don't get there.

Mr. CONYERS. Thank you, Mr. Chairman.

Mr. FRANKS. And I thank the gentleman.

And I would now recognize the gentleman from Florida, Mr. DeSantis, for 5 minutes.

Mr. DESANTIS. Thank you, Mr. Chairman. Thanks to the witnesses for your time and testimony. Mr. Hinton, you mentioned that you compared lawyers per capita. I didn't actually hear what the result was. I am assuming America has way more lawyers per capita than European countries.

Mr. HINTON. Yes. That is right, but it is not just that the U.S. has more, is that we were able to measure how many, the number of lawyers in each country, and so see how much variation in the liability insurance prices followed the same pattern that existed across all the countries.

Mr. DESANTIS. No. I understand that. And in terms of the—did you look at Great Britain, because you said there was civil versus common law countries? We are obviously common law. Great Britain is common law. Did you look at them or are they just continental European countries?

Mr. HINTON. No. The U.K. was included in our study.

Mr. DESANTIS. Okay. In the U.K., is it true, I don't know if you looked at this, that they have basically a British rule where if you sue somebody and you lose, then you got to pay the winning party's attorney's fees?

Mr. HINTON. Yes. That is my understanding, is that that is how the loser pays system operates.

Mr. DESANTIS. Is that something that the continental European countries also utilize?

Mr. HINTON. It works differently in different countries.

Mr. DESANTIS. Okay. Mr. Flint, I guess in your experience—I mean, you guys eventually got brought under because of excessive litigation, but had you been dealing with litigation before you went under? I mean, was this just a common occurrence that you would have to deal with lawsuits?

Mr. FLICK. Well, the lawsuits under this theory started about 10 years ago for our company, and they started slow and got excessively more in the last few years.

Mr. DESANTIS. So were you winning those early lawsuits? Or how was that——

Mr. FLICK. I was only able to get two cases to trial. We won one and lost one, the rest of them settled or are pending, or they are stayed in bankruptcy court currently.

Mr. DESANTIS. And so from your experience, were these cases driven by victims or by lawyers?

Mr. FLICK. In my experience, they were driven by the money that plaintiff's lawyers make. There are victims, and they are horrific injuries in each of these cases, but I think the driver was the money that the plaintiff's lawyers were making.

Mr. DESANTIS. And you guys—from your testimony, it sounded like they couldn't even tell sometimes whether it was actually your cans, but is it that they are going after you because they knew that you could pay a judgment?

Mr. FLICK. That would be speculation, but, you know, in lots of cases it was only testimony that said it was our can, because there wasn't any physical evidence. And we did buy adequate amounts of insurance, and I think that is a driving force for the plaintiff's attorneys as well. They are a business, and they go where they can get money.

Mr. DESANTIS. And did you settle any cases?

Mr. FLICK. Our insurance companies did, usually under protest of the company. We wanted to be able to tell our story more than we did.

Mr. DESANTIS. So knowing that you—so you may have a situation where you know it is going to cost more to pay the attorneys to actually litigate the case, but you wanted to do that rather than just kind of paying somebody a smaller fee just to kind of go away and drop the case?

Mr. FLICK. Yes, sir, that is correct.

Mr. DESANTIS. Okay. Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. FRANKS. And I thank the gentleman.

And I will now recognize the gentlemen from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Professor Vidmar, are there cases where companies changed their policies only because punitive damages changed the calculation that it would be cheaper to just go ahead and pay a lot of claims rather than fix a problem?

Mr. VIDMAR. I can't speak to that directly. I think there is some evidence for this. I do know the insurance companies, I think consistent with what you have said, often say, "Look, settle this thing. We'll take care of it," rather than go forward, even though sometimes the defendant in these cases is protesting. So it is kind of a——

Mr. SCOTT. Well, I mean, when the calculation in the boardroom is, rather than fix the problem, why don't we just incur the recurring lawsuits, because paying the lawsuits would be cheaper than fixing the problem, wasn't that what happened in one of the automobile cases where people were getting burned to death?

Mr. VIDMAR. I believe that is correct, that in the past, that this was a cost of doing business, we'll lose a few, but we'll win more often, because they have to make a calculation, a balance. To some degree——

Mr. SCOTT. And only because punitive damages changed that calculation did they bother to stop killing people.

Mr. VIDMAR. As opposed to compensatory damages, that is one of the functions of punitive damages, is to simply override this, "Well, it is cheap to pay somebody off." The punitive damages said, you are going to pay a penalty for doing this.

Mr. SCOTT. Are you familiar with the numbers that said there are about a hundred thousand deaths due to preventable medical errors?

Mr. VIDMAR. Yes.

Mr. SCOTT. And 15,000 medical malpractice cases?

Mr. VIDMAR. I think that is probably right.

Mr. SCOTT. And so if there was a fair system, there would be not 15,000 cases, but a hundred thousand cases. Is that right?

Mr. VIDMAR. It is not clear in those instances from what I have seen about this. I am hesitant to make a direct kind of projection from that.

Mr. SCOTT. But, I mean, when people say there are too many lawsuits, those numbers themselves suggest that that cannot be true.

Mr. VIDMAR. Well, that is probably true.

Mr. SCOTT. Now, Mr. Hinton, you said that the average costs per incidence is high. I think Professor Vidmar pointed out that a lot of—just about every country outside of the United States,

healthcare is not a cost. Is that one of the reasons our damages are higher?

Mr. HINTON. Yes. That is an important thing to control for when you are comparing countries, both how much is paid for as a government benefit, as a social—part of social programs, but also there is differences in the private sector health insurance market. And we controlled for those things in our study.

Mr. SCOTT. Well, do you also control for the fact that in the United States a lot of these lawsuits are so expensive to bring, that the smaller lawsuits aren't brought? And that would increase the average, wouldn't it?

Mr. HINTON. I am not sure how that would affect our study.

Mr. SCOTT. What is the—we are talking about competitiveness. What part of the product price is litigation costs?

Mr. HINTON. What fraction of the product's price? That is an interesting question. It obviously depends very much on the product. And I know we heard today from Mr. Flick about their experience in the prices——

Mr. SCOTT. Well, if you have a company that is getting sued a lot, it may be because they are not very careful in the way they do business, but, I mean, the product price, you have got one for litigation, and if it is not that big, and then the percentage of that that is negligence cases, because a lot of this is businesses suing businesses, isn't it?

Mr. HINTON. Well, I do know of another example where some economists studied differences in drug prices between Canada and the United States—actually, I think it was vaccine prices—and it was around the time of—I think it was in the '80's.

Mr. SCOTT. Where we provided immunity to offset that——

Mr. HINTON. That is right. There was—that was the legislative solution. But at the time it was studied, they found that it was a big cost—a price differential, and that was attributed to cost of——

Mr. SCOTT. I am running out of time. I would like Professor Vidmar to just tell us, typically what does a lawyer make for bringing a frivolous lawsuit?

Mr. VIDMAR. For a frivolous lawsuit, nothing.

Mr. SCOTT. Thank you.

Mr. VIDMAR. The other thing that I discovered in the research is sometimes people are hurt very badly, whether it is medical malpractice or whether it is some other injury, but the evidence is so weak or it is so difficult, you are going to have to require so many experts to do this that they—and I do know of cases where the lawyers just say, I can't take the case, and so the person never gets compensation even though by some other standard, we would say they deserve it.

Mr. SCOTT. So you are saying in a good case, they can't bring it because it is too expensive; in a frivolous case, if they bring it they don't get paid?

Mr. VIDMAR. That is roughly it, yes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. FRANKS. I thank the gentleman.

And I will now recognize the gentleman from Florida, Mr. Deutch, for 5 minutes.

Mr. DEUTCH. Thank you, Mr. Chairman. Mr. Flick, in response to a question earlier about who paid the ultimate cost, you talked about the number of your employees who lost their jobs and the cost of the gas can going from $5 to $20 per gas can. And then in your written testimony you said that Blitz shuttered its door because the trial bar got greedy.

And I appreciate the majority's decision to hold a hearing about the excessive litigation's impact on America's global competitiveness. I don't know. I am still not sure what constitutes excessive litigation.

And in the case of Blitz, I wonder if the trial bar, if it is greedy trial lawyers who brought the case of the 4-year-old who was burned to death in his garage after he knocked over a Blitz can and it exploded, or the 10-year-old from California who was burned 85 percent of his body when the gas can exploded, or the man who was walking down the street carrying a Blitz gas can when the static electricity from his body ignited the gas can and he was burned over 80 percent of his body.

And I wonder if it was greedy trial lawyers who are responsible for bringing the case of the man whose lawnmower ran out of gas, and when he went to refuel, and while pouring, his can exploded and threw him through the barn door and then he burst into a ball of flame.

I wonder if it was greedy trial lawyers who were responsible for bringing the case of the 4-year-old in upstate New York who was burned over 80 percent of his body, or the 11-year-old who was roasting marshmallows around the campfire when the fire died and he went to pour some gas on, and the can burst into flames.

And then finally, I wonder if it is greedy trial lawyers who are responsible for bringing the case of a young boy from Florida, where I am from, Jacob Joyner, who was 10 when he suffered second and third degree burns over half of his body, and after 6 weeks in intensive burn treatment facilities, he passed away.

I understand there is this ongoing effort to demonize lawyers. In every one of these instances, the only way that these tragic circumstances were going to be addressed—the nature of our tort system is such that the only way that any of these individuals or their families could pursue justice is through the courts.

And so it is my understanding, and this is just what I would like to chat a bit about, that as early as 1973, Consumer Reports had said that if fumes outside a gas ignite, a flashback is possible that could ignite the contents of the can itself. And they said then that such accidents can be prevented by a flame arrester, which they had suggested should be legally required in all gas cans.

And so given—it is also my understanding, by the way, and I would just like your thoughts on this, frankly, that the cost of those flame arresters is about $0.04, significantly less than the jump from $5 to $20 per gas can.

And, again, I just want to know whether it is the—you said the trial bar got greedy, and I want to know if it is the trial bar's fault that the decision was made by the company to manufacture something where there was plenty of evidence of what could be done to prevent these things from happening, and if 20 years ago when the company was first sued, or before that, when Blitz was first told

that there was a way to prevent the explosions, if a flame arrester had been included in these devices, that the horribly mutilated and in some cases dead folks that I referred to wouldn't have been hurt.

And, frankly, if that decision had been made, and ultimately there is a legitimate chance, isn't there, that the employees who we were told earlier are the ones who really paid the ultimate cost here rather than these victims, whether they might not still have their jobs?

Mr. FLICK. Well, that is a long question, and I would like to break it down as you presented it. Oh. Is this on? Okay. I think, to your first point, you know, do we just blame—do I just blame the plaintiffs' bar? No, I don't. I think they are a player in a system that is broken, and I believe if you——

Mr. DEUTCH. But I am not asking about the system. I am asking about each of these individuals and their lawyers.

Mr. FLICK. Well, I think you have got a fair amount of misinformation in the statements that you have made. You have listed purposefully, I think, a few cases where it is assumed that there wasn't misuse, and I don't—and that doesn't——

Mr. DEUTCH. I am only—I only want—I am going to run out of time. The only question I have is was there ever a moment where you considered putting flame arresters into the cans?

Mr. FLICK. Yes, yes, continually for years. And we studied it and we studied it deeply, and we felt that it would cause more harm than good, and we didn't feel that it would make the cans safer. And I think it is a false assumption to say that this $0.04 device, which isn't a $0.04 device, would——

Mr. DEUTCH. How much does it cost?

Mr. FLICK. Well, I don't—it depends on how you do it, but then you get other unintended consequences. And it is easy for a plaintiff's lawyer to say, you could have done this and saved this person, but it takes more——

Mr. DEUTCH. What is the unintended consequence by putting something in that could have prevented the explosions that wound up causing——

Mr. FLICK. You could encourage people to accelerate fires with the product, thinking it is safer than it is.

Mr. DEUTCH. All right. I yield back, Mr. Chairman.

Mr. FRANKS. And I would now yield to Mr. Cohen for 5 minutes.

Mr. COHEN. Thank you, Mr. Chair. This is a hearing that reminds me of the hearings I have been having in the Subcommittee on Regulations and Commercial Law. And it has been dealing with regulations, and everything has centered on what are the costs of regulations, and this is what are the costs of our litigation system. And in neither one of these Committees has the majority put forth the side of what are the costs to human beings who are affected by bad air and bad water, by torts. And that seems to be totally disregarded. And we see these numbers. The tort system costs us $265 billion or whatever. Well, that means there has been $265 billion of harm somewhere. Very little of it is punitive damages. Most of it is harm. And when somebody is injured by a drunk driver, that is part of that figure.

Aren't the victims—Mr. Hinton, aren't the victims of drunk drivers who might lose a limb or a life entitled to damages?

Mr. HINTON. They are in some cases, right. And I think the issue on competitiveness——

Mr. COHEN. In some cases—let us say the cases were liable—in every case that goes to—there is a judgment, there is liability found——

Mr. HINTON. Right.

Mr. COHEN [continuing]. There has been a breach of duty.

Mr. HINTON. I agree with that. I think to answer your question about why don't we talk about the cost to the—you know, the cost to society, you know, the harm to individuals, in the case of our study, at least, we were trying to address the question of international competitiveness or comparisons across countries, and so we deliberately compared countries where we felt that the rates of accidents were similar and the levels of protection and compensation paid were similar, and so that we could essentially avoid having to compute that number directly, but take account of the benefits of the legal system.

No one is saying that having a legal system, legal protections is a bad thing per se. You know, it delivers justice and compensation. What we are trying to do is work out whether it can be done, you know, more cheaply, or less—you know, more efficiently, so we compared these countries where we feel that there are similar levels.

Mr. COHEN. What countries were they that you looked at?

Mr. HINTON. They were the core European, Eurozone countries, the U.K., Canada and the United States.

Mr. COHEN. Okay. Well, if you take countries like India that are competitive countries, and I was in India recently and I heard from heads of companies that said, oh, our tax system is unfair. We need to have a tax system that lets us compete with Simmons and these other companies that we have to compete against. And what I heard from Mr. Goodlatte is we need have a tort system and a civil justice system that is like these other countries.

Well, America is not like the other countries. America is in fact the best country in the world. That is one thing you realize from traveling. We are the best place in the world to live and we got the best stuff here, and our civil justice systems is the envy of the world. And in India and Pakistan, it takes 20, 30 years to get a case to judgment. That is one of the deficiencies of their government. That is why we have in our Seventh Amendment the right to trial shall remain inviolate. That has been 200 and something years of jurisprudence, and people look at us with envy. And for us to take the lowest common denominator of taxes and/or civil justice so that we can compete is not what America is about, and it never should be, because we take that, we scrap the civil justice system. We say, all right, we will just have the same system as India or we will have the same system as somebody else. And, you know, I just don't see that in any system. I think our country is doing pretty good and I just don't see the damages.

And I am sure that the professor talked about some of this, but I picked up today's New York Times. A liability challenge. Generic drug makers defense faces a Supreme Court test. Karen Bartlett was left seriously injured and legally blind having taking a generic drug. I mean, are not the victims like Miss Bartlett, the victims

who took Celebrex, the victims who got hip replacements from Johnson & Johnson after the company had known that 40 percent of the devices were expected to fail, aren't they entitled to getting justice? And how would that justice be different if it was handled in a different jurisdiction? How would it have happened in India?

Mr. HINTON. That is a really good question and it is the sort of frame of reference to sort of think about the study that we did, right. We are not saying that there aren't Celebrex victims in other countries in Europe. Essentially the premise of the sort of law experiment is that, yes, there are people who took the drug are going to be equally at risk in the U.S. As they were in these European countries, and they are going to have their disabilities compensated and have their healthcare costs compensated in different ways in different countries, but to a similar extent. And it is because we are able to make that assumption that it is then fair to compare the cost side of the equation and say, at the end of the day, the U.S. is a much more expensive place to do that and to deliver that justice.

Mr. COHEN. My time has expired, but I thank the Chairman for the opportunity to ask questions and to speak in terms that the Founding Fathers would have appreciated.

Mr. FRANKS. Thank you, Mr. Cohen.

And this concludes today's hearing. Thanks to all of our witnesses for attending.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record. And, again, I thank the witnesses. I thank the Members and, of course, I even thank the audience. This hearing is adjourned.

[Whereupon, at 4:35 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary

With America's facing high unemployment and stagnant economic growth, it is the role of every congressional committee to do its part to get America moving again. For the Judiciary Committee this means, in part, doing what we can to remove the crushing burden that excessive litigation costs impose on our global competitiveness, economic growth, and our ability to create and retain jobs.

Judge Learned Hand observed that "litigation is to be dreaded beyond almost anything short of sickness or death." Unfortunately, the United States has become the world's most litigious country.

This litigiousness has created what amounts to a "tort tax," which imposes an added cost on every product Americans purchase and every service we consume.

We need a civil justice system that deters wrongdoers and fully compensates victims. But a prosperous free enterprise economy also depends on a tort system that is efficient and free of meritless litigation and excessive damage awards. As economists have pointed out, "an efficient tort system produces greater trust among market participants through the fair and systematic resolution of disputes, thereby encouraging more production and exchange, creating a higher standard of living for individuals within a society."

In other words, we can ensure that all injured parties have their day in court while at the same time enhancing our global economic competitiveness and creating and maintaining jobs for American workers.

Regrettably, our civil justice system is not functioning toward this end. It's not fairly compensating victims, who have to wait too long to get a case to trial and receive an average of only 46 cents of every dollar spent in litigation even when they win. And it's hurting the economy.

America's runaway litigation system harms the economy in at least four ways. First, the specter of undeserved, ruinous litigation makes it more difficult for small businesses to grow and become competitive on a global scale.

Second, even those American businesses that are large enough to compete globally are saddled with litigation liabilities that their foreign rivals do not face.

Third, America's lawsuit climate discourages foreign direct investment in the U.S. economy.

And finally, American companies' domestic liability for their actions abroad places them at a competitive disadvantage relative to foreign competitors seeking to do business in the same foreign markets.

The real losers in all of this are ordinary Americans. American consumers are hurt in the form of higher prices, U.S. workers in the form of lower wages, and American retirees in the form of lower returns on retirement accounts and pension funds.

Those hurt by excessive litigation costs include people like the former employees of Blitz USA, the company Rocky Flick, the second witness on our panel today, used to run. At its peak, Blitz USA, produced three out of every four portable gas cans nationwide and employed 350 people in the small town of Miami, Oklahoma.

But over the last decade, a wave of costly litigation driven by the misuse of its products by others—a misuse over which the company had no effective control—took its toll. And lawsuits finally drove the company out of business.

Blitz USA is gone, but the lesson of the devastating impact lawsuits can have on real lives and real communities lives on.

I'm sure that Rocky will share much more with us today about the real life impact excessive litigation costs had on Blitz and its employees.

I look forward to our witnesses' testimony; I believe that it will be invaluable as we move forward this Congress with reforms to improve our civil justice system.

Material submitted by the Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Chairman, Subcommittee on the Constitution and Civil Justice

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WSJ.com

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The Tort Bar Burns On

A case study in modern robbery: Targeting the red plastic gas can.

Like 19th century marauders, the trial bar attacks any business it thinks will cough up money in its raids. The latest victims are the people who make those red plastic gasoline cans.

Until recently, Blitz USA—the nation's No. 1 consumer gasoline-can producer, based in Miami, Oklahoma—was doing fine. It's a commoditized, low-margin business, but it's steady. Sales normally pick up when hurricane season begins and people start storing fuel for back-up generators and the like.

Blitz USA has controlled some 75% of the U.S. market for plastic gas cans, employing 117 people in that business, and had revenues of $60 million in 2011. The Consumer Product Safety Commission has never deemed Blitz's products unsafe.

Then the trial attorneys hit on an idea with trial-lawyer logic: They could sue Blitz when someone poured gas on a fire (for instance, to rekindle the flame) and the can exploded, alleging that the explosion is the result of defects in the can's design as opposed to simple misuse of the product. Plaintiffs were burned, and in some cases people died.

Blitz's insurance company would estimate the cost of years of legal battles and more often than not settle the case, sometimes for millions of dollars. But the lawsuits started flooding in last year after a few big payouts. Blitz paid around $30 million to defend itself, a substantial sum for a small company. Of course, Blitz's product liability insurance costs spiked.

In June, Blitz filed for bankruptcy. All 117 employees will lose their jobs and the company—one of the town's biggest employers—will shutter its doors. Small business owners have been peppering the local chamber of commerce with questions about the secondary impact on their livelihoods.

The tort-lawsuit riders leading the assault on Blitz included attorneys Hank Anderson of Wichita Falls, Texas; Diane Breneman of Kansas City, Missouri; and Terry Richardson of Barnwell, South Carolina. All told, they've been involved in more than 30 lawsuits against Blitz in recent years.

The rest of the plastic-can industry can't be far behind, so long as there's any cash flow available. The American Association for Justice's (formerly the Association of Trial Lawyers of America) annual conference in Chicago this month will feature, with a straight face, a meeting of the "gas cans litigation group."

The Atlantic hurricane season started June 1, and Blitz estimates that demand for plastic gas cans

rises 30% about then. If consumers can't find the familiar red plastic can, fuel will have to be carried around in heavy metal containers or ad-hoc in dangerous alternatives, such as coolers.

Trial lawyers remain a primary funding source for the Democratic Party, but stories like this cry out for a bipartisan counter-offensive against these destructive raids that loot law-abiding companies merely because our insane tort laws make them vulnerable.

Print Close

Fueling Lawsuit Abuse

By John Stossel

Published July 23, 2012 | FoxNews.com

Lawyers say they help the "little guy." Sometimes they do. But they also create their own victims. The newest casualty is Blitz USA -- the nation's largest producer of consumer gas cans.

According to the Wall Street Journal, "The Consumer Product Safety Commission has never deemed Blitz's products unsafe."

But lawyers saw an opportunity. They realize that people misuse gas cans by pouring gasoline on hot embers (to restart fires). People get burned, and some die.

It's not Blitz USA's fault that customers make stupid decisions. But lawyers know that litigation costs are often higher than the cost of a settlement. In many cases, Blitz USA agreed to settle, sometimes for millions of dollars. It would probably have cost more to fight a case and win.

Other trial lawyers realize that they can get rich by legally extorting money from the company, so they joined in.

In a letter to customers Blitz USA notes that "these claims and the costs of defending these claims have increased dramatically."

Last month, the lawyers drove Blitz USA into bankruptcy.

Now more Americans will store gasoline in less convenient and much less safe containers.

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URL

http://www.foxbusiness.com/on-air/stossel/blog/2012/07/23/fueling-lawsuit-abuse

Supplemental Material submitted by Neil Vidmar, Ph.D., Russell M. Robinson II Professor of Law, Duke University School of Law, and Professor of Psychology, Duke University

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Jackpot Justice and the American Tort System: Thinking Beyond Junk Science

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July, 2008

Jackpot Justice and the American Tort System: Thinking Beyond Junk Science

Tom Baker, Herbert Kritzer and Neil Vidmar

In 2007 the Pacific Research Institute[1] released a report, *Jackpot Justice: The True Cost of America's Tort System*, that is widely available on the internet.[2] The conclusion of the report is that America's tort system costs $865.37 billion annually, amounting to an "annual price tag, or 'tort tax' for a family of four in terms of costs and foregone benefits" of $9,827. As our report will demonstrate, **the conclusions of *Jackpot Justice* are without scientific merit and present a very misleading picture of the American tort system and its costs.**[3]

Research on the tort system's efficiency, its fairness and other issues are legitimate topics of empirical inquiry and are to be encouraged. Indeed, the three authors of this report have collectively devoted many years to empirical investigation of the tort system. (Summary biographies of the authors appear at the end of this report.) However, when research findings, such as those in *Jackpot Justice*, are disseminated to the public and are intended to have effects on legislative and other public policy institutions, they deserve careful scrutiny, including close examination of the validity of the theoretical underpinnings, the methodologies used, the quality of the data reported, and the conclusions that are drawn from the analyses. Scrutiny of *Jackpot Justice* in this way reveals many flaws that strongly contradict the conclusions that the Pacific Research Institute authors have made.

Our report has four sections. In Section I we draw attention to *Jackpot Justice*'s misleading claims about its scientific approach to the data and the claimed scholarly consensus that underlies their research. In section II we present a detailed critique of their analyses and conclusions. In Section III we address a missing part of the equation that *Jackpot Justice* uses to speculate about the "tort tax": the cost of torts to victims. The analyses we present in this section *are simply illustrative* of the kind of data that would be needed to assess the costs and benefits of the tort system. We do not claim that our rough estimates are accurate, but they help to point to the reasoning flaws in *Jackpot Justice*. In section IV we offer examples that are intended to counter general public misperceptions of three topics that are central targets of those who argue the tort system is unfair: medical malpractice litigation, products liability, and punitive damages. These examples are intended to put a concrete face on some of the technical issues discussed in the preceding sections of our report.

A central message of our report is that ***the tort system needs to be viewed in terms of its benefits as well as its costs.*** Moreover, our report draws attention to the social and political choices involved in policies directed toward the goals of promoting responsibility, preventing injuries and compensating victims of negligence. We do not contend that the American tort system is flawless. But it is important to be aware that the corporate critics of the tort system frequently use the same tort system in their disputes with other businesses.

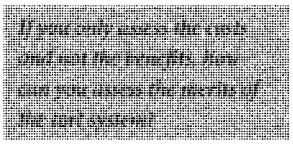
I. Misleading Claims and Assertions

A. Half a "Theory"

Jackpot Justice begins by asserting its goal:

> *...to arrive at a fuller accounting of the true cost of the U.S. tort liability system. The study provides a conservative first approximation of the total costs, both direct and indirect, and the total excess costs of the tort system*[4]

A key insight is the reference to "excess costs" contained in the above statement. The researchers began with an assumption that there would be excess costs, rather than taking a scientifically neutral position which would test *if* there were excess costs. To be sure, the report subsequently concedes that "[a] thriving free-enterprise economy depends on an efficient tort system that provides proper incentives to businesses to produce safe products in a safe environment and ensures that truly injured people are fully compensated for their injuries."[5] Yet, in almost the same breath the report concedes that the authors "*do not explore the benefits [of the tort system], of which there are many.*" (emphasis added).[6] Instead they focus on the tort system as a "massive transfer system" that takes from businesses and gives to individuals, without considering if those individuals are deserving of compensation or if business fails to compensate large numbers of individuals whom they injure.



Thus, from the very outset the research was fatally flawed: it started with a clear agenda and made assumptions and decisions that would advance that agenda. Stating the problem baldly, **if you only assess the costs and not the benefits, how can you assess the merits of the tort system? Clearly, the only logical conclusion is that the authors did not want to present a balanced picture.**

B. Advocacy Disguised as Science

The authors of the report make the **claim that their analysis represents a scholarly, consensus view.** They describe *Jackpot Justice* as a "fuller account of the true cost of the U.S. tort liability system" that is based on "scholarly studies by top economists and legal scholars," that reflects a "consensus view on those who have studied these factors," and that is based on "statistically significant results in the most prestigious academic publications."[7]

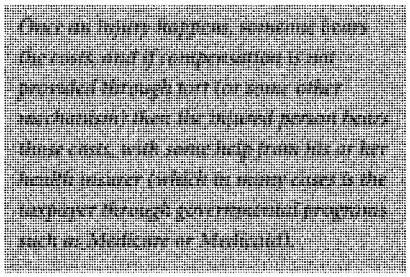
In reality *Jackpot Justice* presents neither the true cost of the U.S. tort liability system nor a consensus view. **Not one of the numbers included in the table of tort costs in the report comes from a "prestigious academic publication" or was subject to peer review by independent experts. Most of the report's numbers rest on insurance industry-supported studies, particularly reports from Tillinghast Towers Perrin, an industry-focused organization whose data are not available for independent public evaluation of their validity and reliability.** With one minor exception, the rest of the studies are extreme extrapolations from dated scholarly studies that, taken on their own merits, plainly do not support the *Jackpot Justice* conclusions.

Consider just one example. In Chapter 1 the report states: "Civil courts also give awards to individuals who have not suffered actual injuries and are thus not deserving of compensation."[8] The single source for this sweeping comment is to an unpublished Pacific Research Institute paper that deals with California's worker's compensation system.[9] *Worker's compensation schemes are not part of the tort system.* No other source is cited.

II: Technical Analysis of PRI's Jackpot Justice Report

In this part of our response, we engage in a technical analysis of PRI's *Jackpot Justice* report that will demonstrate that the method that PRI used to compute their "tort cost" number lacks scientific merit. Judge Richard Posner – a founding father of the economic analysis of law and a Reagan appointee to the United States Court of Appeals – put it best on the internet blog that he writes with the Nobel Prize winning economist Gary Becker. **Referring to *Jackpot Justice*'s bottom line, Judge Posner wrote, "The figure, however – the authors' estimate of the net social loss created by our system – is, as I have tried to show, fictitious."**[10]

In this rebuttal to *Jackpot Justice* we start from Judge Posner's analysis, and go beyond it, to shed light on some major problems in the report that Judge Posner did not address. At the start, it is very important to realize that, as Judge Posner pointed out, many of the items that the PRI report labels as "costs" are not true economic costs at all. Indeed, one of their very large items represents an estimate of the total amount of money that the tort system transfers from people who caused harm to the people that they harmed. Such transfers are one of the main goals of the tort system and are not a "social cost." Once an injury happens, someone bears the costs, and if compensation is not provided through tort (or some other mechanism) then the injured person bears those costs, with some help from his or her health insurer (which in many cases is the taxpayer through governmental programs such as Medicare or Medicaid).



Jackpot Justice presents its tort cost estimate in the form of a table that appears at two places in the report. The table divides the tort costs into two categories that we will analyze separately. As we observed earlier, none of the numbers in that table come from peer-reviewed studies published in academic journals. Most of the numbers are derived from insurance industry reports that have not been subject to any independent review. With one minor exception, the rest are highly dubious extrapolations from dated academic studies that were not designed for this purpose.

A. Static Accounting Costs

About forty percent of the total of the PRI report's tort cost table – $327 billion – is in a category that PRI calls "static accounting costs." Despite the asserted academic and scholarly nature of the report's tort cost estimate, all of the numbers in the static accounting costs part of the table actually begin with a "tort cost" study produced by the insurance consulting company, Tillinghast Towers Perrin. As Judge Posner noted "It is impossible to determine from Tillinghast Towers Perrin's report what the sources for

most of its data are, and so the figures I have quoted must be taken with a grain of salt; indeed, so far as I can tell, they may be completely unreliable."[11]

There are at least the following problems with using the Towers Perrin numbers in this way.

First, the Towers Perrin report includes the tort transfer payments to victims as part of the "costs" of the tort system. As we have just explained, that is a fundamental error that greatly exaggerates the costs.

Second, the Towers Perrin report has not been subject to the independent peer review that is one of the hallmarks of social scientific research published in academic journals.

> ...the Towers Perrin estimate was "almost certainly exaggerated, given the financial connection between the firm and the insurance industry."

Third, the public data that Towers Perrin uses come from financial reports that insurance companies prepare to enable insurance regulators to assess the solvency of insurance companies, not to make the civil justice system transparent. Because of the solvency objective, regulators deliberately designed the reporting system to require the insurance industry to err on the high side in estimating their future payments. That way insurance regulators can be more confident that insurance companies will have the money that they need to pay claims in the future.

Fourth, the solvency data present a snapshot of insurance costs that can be very misleading due to a unique insurance-industry specific business cycle called the underwriting cycle.[12] Indeed, in preparing the *Jackpot Justice* report, the authors picked the year that represented the highest point in the cycle. We explain the significance of their choice of years in a note, but the bottom line is that using the comparable figure from the most recent Towers Perrin report would cut the *Jackpot Justice* "static cost" number by more than ten percent.[13]

Fifth, nearly one-third of the Towers Perrin tort costs are allocated to medical malpractice and self-insured costs, categories for which there are no reliable, publicly available data that provide a complete accounting. Towers Perrin estimated these costs using proprietary methods and data.[14]

For these reasons, Judge Posner was surely correct in concluding that the Towers Perrin estimate was "almost certainly exaggerated, given the financial connection between the firm and the insurance industry."[15]

The *Jackpot Justice* authors then massaged the Towers Perrin number in a variety of questionable ways that appear designed to produce an even larger estimate of "static costs" than the estimate of tort costs in the Towers Perrin report. The details of the massaging are somewhat technical, but the central problem is triple counting.

The *Jackpot Justice* authors first identify the transfer payment component of the Towers Perrin number – i.e. the amount of money that, according to Towers Perrin, gets paid to victims. That number is $128 billion. Drawing on tax literature, they then simply assume that nearly 30% of that amount is a "deadweight loss" to society and therefore add $36

> Without tort liability, firms would have much incentive to invest in safety measures to benefit potential victims of the firms' activities....

billion to the static cost table.

It is important to emphasize that the authors really do simply assume this number. There is no empirical support whatsoever for making this deadweight loss calculation in the tort context, and nowhere do the authors explain why this kind of transfer functions as a tax. Under their rationale, many routine business costs could arguably function in a similar fashion. Judge Posner explained the problem very well:

> *[The authors of Jackpot Justice] base this [calculation] on a study which found that increasing the corporate tax rate by $1 generates 28 cents in deadweight costs. The basis of that finding was that a tax, like a monopoly markup, causes the taxpayer, like a consumer, to substitute for the taxed item or activity something that may cost society more to provide but looks cheaper because it's untaxed, or taxed at a lower rate. The authors of Jackpot Justice do not explain why a tort transfer would have the same effect. Of course, the threat of tort liability might well alter the behavior of potential injurers—indeed, it is intended to do so—but it might alter the behavior in a direction of greater efficiency, by making the potential injurers internalize accident costs. That is the objective of tort law, though imperfectly achieved. Without tort liability, firms would have weak incentives to invest in safety measures to benefit potential victims of the firms' activities, unless the victims were either their employees or their customers.*

The *Jackpot Justice* authors' next step is, once again, to make an assumption. This time they assume that plaintiffs will pay to obtain, and defendants will pay to avoid, the transfer payment in an amount that equals the transfer payment plus the deadweight loss. This assumption – which is also without any empirical support in the tort context – results in an additional $164 billion in static costs.

Finally, *Jackpot Justice*'s authors add the value of the transfers themselves to their tort cost table (while admitting in the text that transfer payments are not social costs) producing a total "static accounting cost" number of $328 billion: the assumed $36 billion, plus the assumed $164 billion, plus the transfer payments of $128 billion. This is nearly three times as much as the questionable transfer payment number with which they started and even exceeds Towers Perrin's exaggerated calculation of the costs of the tort system.

B. Dynamic Costs

The other sixty percent of the costs in *Jackpot Justice*'s tort costs table – about $537 billion – is in a category that the authors call "dynamic costs." With one tiny exception, the numbers in this category represent highly inflated extrapolations from very dated academic studies that were not designed to generate estimates of this sort.

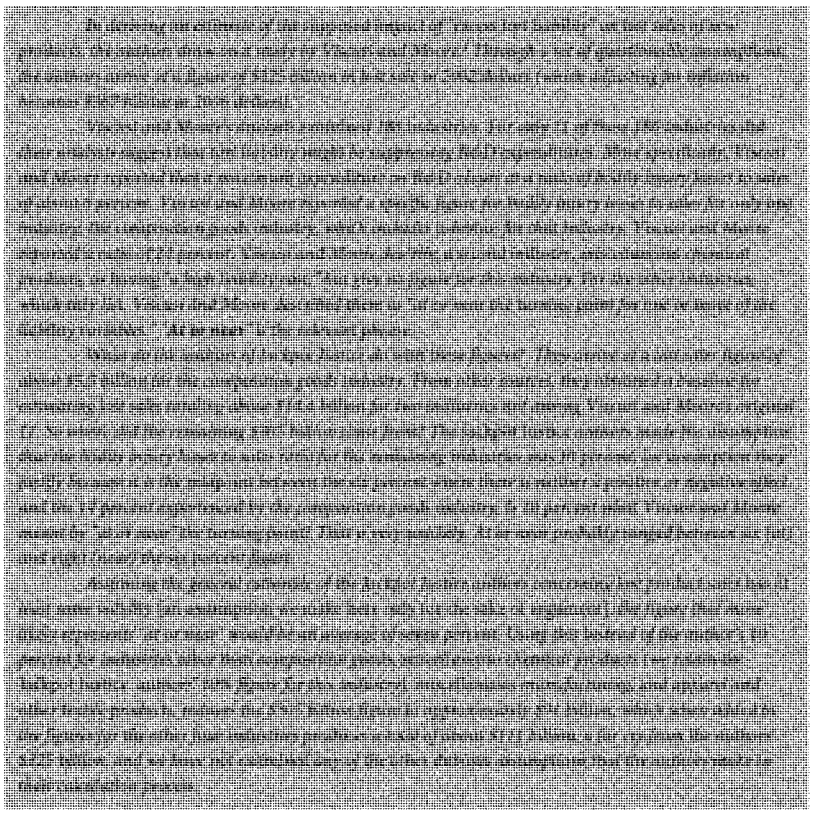
Most of the "dynamic costs" fall in two categories: defensive medicine (which they label "health care expenditures") and social costs from lost sales of new products that the *Jackpot Justice* authors claim were not produced because of concern about liability. For neither of these does the report does consider the positive effects of tort liability. Tort liability is supposed to change behavior, to make medical procedures and products safer. So the fact that doctors and manufacturers do things differently because of tort liability hardly proves that the tort system is wasteful.

The defensive medicine number ($124 billion) in *Jackpot Justice* comes from a Price Waterhouse Coopers report that was funded by the health insurance industry as part of a Congressional lobbying campaign.[16] The Price Waterhouse Coopers report drew on a reputable, if dated, academic study that measured defensive medicine; but that study looked at expenditures for only one set of diseases and, thus, does not provide a sound basis for generalizing about defensive medicine. Later research by the same academic research team called their earlier conclusions into question.[17] Of course, neither *Jackpot Justice* nor the health insurance industry report cited that later research. Instead, the health industry report simply generalized from the first study to assert, without any empirical or analytical support, that ten percent of the entire cost of health care in the U.S. is attributable to defensive medicine and medical liability payments.[18]

The *Jackpot Justice* number for the social costs from lost sales of new products ($367.06 billion) comes from massaging the results of an even older academic study that was not designed to produce this kind of number. On its face, a claim that there are $367 billion per year in lost sales due to fears of products liability borders on the absurd. The total manufacturing output of the United States is about $1.6 trillion per year,[19] and the idea that estimated tort costs (from what turns out to be only 12 industries[20]) could lead to lost sales equal to about 23 percent of manufacturing output seems more than a little far-fetched. The details of their data massaging are technical, but the over-arching theme is making questionable assumptions that produce a very high number in situations in which other assumptions would be more reasonable.

The authors of the study upon which this figure is supposedly based, Viscusi and Moore, examined a total of 186 industries to evaluate whether tort losses increased or inhibited innovation in different industries. Fully 175 of those industries had a bodily injury loss to sales ratio that predicted either no effect or a positive effect on research and development (R&D), suggesting that tort losses actually increased innovation and new product sales.

We explain in a textbox how making just one very reasonable change in a central assumption made by the *Jackpot Justice* authors cuts the total amount of lost sales that they estimate by about two-thirds. This does not mean that we accept their argument that the tort system produces a significant amount of lost sales. Instead we offer this example to further demonstrate that the *Jackpot Justice* tort costs table is a house of cards. Moreover, and as noted above, Viscusi and Moore reported that for some significant number of industries, tort losses spurred product development and added to the industries' sales of new products. Yet, in line with their decision to ignore the benefits of the tort system, the authors of *Jackpot Justice* made no effort to quantify the increased sales that could be attributed to R&D spurred by tort losses. Given that 94 percent of industries fell below the range where tort losses might depress R&D, the more reasonable conclusion is that the overall net effect of tort losses on R&D is positive, if one is willing to assume that there are the kinds of effects the *Jackpot Justice* authors want us to believe there are. Finally, the authors never take into account that many of the supposed lost products would replace existing products on the market; the question is not what lost sales of the new products are but, rather, the net difference in sales between the new products and those they replace.



An equally telling critique comes from Judge Posner, who pointed out that the *Jackpot Justice* authors made a fundamental mistake by using the *lost sales revenue* from a product as the basis for calculating the alleged *social cost* of not producing the product. In the first place, since the product was not produced because of a concern about liability, there is a good chance that the product would have been unsafe and, therefore, the social impact of not producing the product would be positive, not negative. Second, even if the product was not unsafe, lost sales revenue is not the measure of the social welfare that results from not producing the product. The social welfare that comes from producing a product is the difference between what it costs to produce the product and the amount that people are willing to pay for it, as Judge Posner explained.

The *Jackpot Justice* authors' response to Judge Posner's critique can only be described as bizarre. They first acknowledged that Judge Posner was right about the meaning of social cost. They then explained that lost sales revenue could nevertheless be a reasonable measure of the social cost, as long as people are generally willing to pay twice the price of a product. This is a true statement, but there is absolutely no reason to believe that people in fact would be willing (and able) to pay *twice the sales price* for all of the

products that they consume! Yet, as those authors' response to Judge Posner makes clear, the measure of "dynamic costs" in the report's tort costs table depends on just that assumption.[21]

C. Excess Tort Costs

To their credit, the authors of Jackpot Justice do not claim that all of what they label tort costs are unwarranted. Rather in the end they want to make claims about what constitutes *excess* tort costs in the U.S.

How then did they arrive at an estimate of "excess tort costs"? They turned again to Tillinghast-Towers Perrin data and a 2002 report showing tort costs as a percentage of GDP in eleven industrialized countries. The *Jackpot Justice* authors averaged the figures for the ten countries other than the United States, and obtain a figure of 0.9 percent of GDP. They then proceeded to assert that the difference between this average percentage and the American percentage of 2.2 percent of GDP constitutes "excess tort costs."[22] In other words, 59 percent of U.S. tort costs, according to these authors, are "excess."

First, there is little or no information to assess the validity of the Tillinghast Towers Perrin numbers for the ten other industrialized nations. The 2002 report from which the numbers are taken provides no source information or any information on how the numbers were arrived at. Assuming they were generated in some way by Tillinghast-Towers Perrin they probably have all the problems previously described.

Second, did the *Jackpot Justice* authors ever consider whether tort costs in other countries might differ from the U.S. because of factors that might explain why such costs are higher in the U.S.? Not surprisingly, the answer to this question is "no." We can identify at least three reasons why tort costs in other industrialized countries might be lower than in the U.S.:

1. Other countries have stronger regulatory mechanisms that eliminate the need for some types of tort claims, either by reducing injuries or by redirecting concerns about products out of the tort system.
2. Social welfare systems in other countries may reduce the need to rely upon tort claims for support and compensation after injury.
3. Tort claims are driven heavily by medical costs, and the cost of health care is much higher in the U.S. than it is in other countries.

It is difficult to quantify the first two of these, but we can roughly quantify the third, differences in health care costs using data from the Organization for Economic Cooperation and Development on health care expenditures per capita measured in U.S. purchasing power for 2005.[23] The U.S. per capita expenditure is $6,401; the average for the other ten countries used by the *Jackpot Justice* authors for comparison of tort costs was $2,816.[24] Using these figures, per capita health costs in the U.S. are 2.27 times the per capita health costs in the ten comparison countries, about the same factor by which the U.S. tort costs exceed the average of tort costs in the ten countries as computed by Towers Perrin (2.44). In other words, assuming that the Tillinghast Towers Perrin figures for the ten other countries are correct – itself a big assumption – the difference between the average for those 10 countries and the United States could be explained solely by the much higher cost of health care in the U.S., without any consideration of the differences in the operation of the tort system of the U.S. compared to the other countries.

D. Summary of Technical Analysis

For all the reasons that Judge Posner identified, plus the additional information we provided about the Tillinghast Towers Perrin reports and the Jackpot Justice author's dynamic cost numbers, the tort cost number in their report is pure fiction. The numbers rest on insurance industry reports, questionable assumptions, and highly dubious extrapolations from a small number of academic empirical studies. Moreover, the *Jackpot Justice* authors' labeling of some portion of tort costs as "excessive" rests on assumptions that cannot be supported by even a very simple analysis of their calculations.

III. The Missing Costs of Torts to Victims

The authors of *Jackpot Justice* eschew any effort to measure the cost of torts to victims in the United States. However, without considering those costs, one is ignoring the central question of whether the existing system actually is failing to do enough when it comes to compensating persons who are the victim of someone else's actions.[25] While we are not in a position to generate a comprehensive measure of these costs, we did consider what might go into such a measure. The result is what might best be described as a first approximation, or a very crude, estimate of the costs inflicted on tort victims. We describe below in detail what we did to arrive at an estimate. As we will repeat at the end of this section, **we do not view our estimate as something anyone should use; it is offered for illustrative purposes only.**

A good starting point, if one wants to estimate the cost of tort injuries to the victims, is a 1991 study by the RAND Corporation on compensation for nonfatal accidental injuries (excluding injuries due to medical treatment).[26] In their report from that study, the RAND researchers provide figures for what they label "direct costs" (medical costs) and earnings loss for each of three different types of accident settings: work, motor vehicle, and other. They note that their figures do not take into account losses associated with nonmarket activities (e.g., household tasks and the like) nor is there any consideration of noneconomic damages (pain and suffering). Of course many of the accidents do not involve torts. However, the RAND researchers asked whether the accident victims had considered filing a tort claim,[27] and we use the percentage considering a claim to adjust the gross figures in the RAND report. The original RAND figures are shown in Table 1 with a last line showing our estimate of the amount of loss, excluding nonmarket activities and pain and suffering, attributable to tort loss injuries.

TABLE 1: ORIGINAL RAND ESTIMATES (In Billions)

	work	auto	other
Medical costs	$31.5	$24.9	$41.5
Lost income/wages	$51.7	$12.1	$14.2
% considered claiming	25%	54%	10%
Costs attributable to Tort	$20.8	$20.0	$5.6

We next applied inflation adjusters to bring these figures up to 2006 dollars (the year used in *Jackpot Justice*). The medical cost index for 1988 was 138.6 and for 2006 336.2, giving a multiplier of 2.43. For income loss, we used Bureau of Labor Statistics wage data; the resulting multiplier is 1.79.[28] Finally, we

adjusted for population growth (1988 population = 244.5 million; 2006 population = 299.4 million). Using these procedures, we arrive at a figure of $121.6 billion for the medical expense and lost wage components of the tort loss associated with nonfatal injuries other than medical malpractice, not counting the value of nonmarket activities.

What about nonmarket costs, or what might be labeled "lost household production?" A recent study of loss associated with medical injuries estimated the overall cost of lost household production as roughly equal to the loss of market wages.[29] We know of no reason that there should be a major difference in lost household production dependent on the source of the injury. Consequently, we had added an amount equal to the updated figure for lost wages based on the RAND data ($37.4 billion) to represent nonmarket losses (other than pain and suffering). This results in a total loss for nonfatal tortious injuries other than medical injuries of $158.9 billion.

Next, we need to add in the costs associated with medical injuries attributable to negligence. A conservative estimate is that there are a million incidents of medical negligence each year and that 100,000 of these result in death. Let us consider for now only the nonfatalities. Studdert *et al.* estimated that in Colorado and Utah the health care costs, lost wages, and lost household production associated with an estimated 4,007 "preventable adverse events" totaled $308.3 million in 1996 dollars.[30] Their analysis included fatalities (8.8% of preventable adverse events) but excluded birth injuries.[31] Unfortunately, Studdert *et al.* did not separate out the fatalities, and all we can do is guess at the proportion of the total costs came from that subset of cases. If we assume that half of the total loss was attributable to fatalities, we arrive at an average figure for non-fatalities of $54,220, after adjusting to 2006 dollars. Applying this to the approximately 900,000 nonfatal incidents nationwide, the total of costs associated these injuries (which we take to exclude birth injuries) is $48.8 billion.

Next we need to estimate the number of, and costs associated with, preventable birth injuries. The best study focused on birth injuries is that described by Sloan et al.[32] Based on a review of closed claims, they focused on 613 birth injuries over a five year period. They estimated the average total economic loss as $1.4 million per case, which when adjusted to 2006 dollars is $2.3 million. How many birth injuries occurred nationally? If one makes the very conservative assumption that all preventable birth injuries lead to claims, and that the rate of preventable birth injuries in Florida can be generalized nationally, there would have been about 1,850 injuries in 2006 (given the number of births that year). The total cost under this assumption would be $4.3 billion. If one makes the more realistic assumption that only a small fraction of such injuries lead to claims, say 25%, then the total cost would be $13.2 billion.[33]

Finally, we need to add an estimate of the tort losses associated with fatalities. This is difficult, and requires us to assign some economic value to the average fatality. However, we will be transparent, which will allow alternate estimates. The first question is the number of fatalities. We obtained from Center for Disease Control the number of deaths due to accidents (motor vehicle: 44,000, work: 2,500, and other: 50,000), and applied the same "claiming rate" percentages (see Table 1) to estimate the number of deaths due to torts. To this figure we added the estimated 100,000 fatalities resulting from medical negligence. This yielded a total of just under 130,000 deaths each year attributable to torts.

One way to assign a dollar value to a death would be to determine the sum of the medical costs incurred from the injury before death, lost wages, and lost household production. This is essentially what Studdert *et al* did in their medical injury study in Colorado and in Utah, although, as noted previously, they did not separate out fatality cases. If our assumption that half of the costs of non-birth injury medical

negligence comes from the fatality cases, the average fatality case in the Colorado-Utah study had a loss of about $560,000. The method commonly used by economists is to impute a value to life by looking at the wage premium workers obtain as a function of the risk associated with various types of jobs. One economist who has written on this is W. Kip Viscusi (whom the authors of *Jackpot Justice* have looked to for figures for their analysis). Viscusi reports that the U.S. studies that have applied this method obtain estimates clustered in the range of $4 million to $10 million, with an average of about $7 million.[34] Clearly, we have a wide range here, from about $500,000 to $4 million (using the lower end of the range reported by Viscusi), which yields estimates of the tort loss associated with fatalities ranging from $65 billion to $520 billion. For purposes of arriving at a total, we will use the figure of $1 million per life, which provides a conservative estimate. If one prefers the high figure of $4 million for loss of life, simply add $390 billion to our total.

Combining our four figures, $158.9 billion for the medical expense, lost wages, and lost household production for nonfatal accidents other than medical malpractice, $48.8 billion for the medical expense and lost wage components of nonfatal medical negligence injuries other than birth injuries, $13.2 billion for birth injuries, and $130 billion for torts that resulted in fatalities, we arrive at a figure of $350.9 billion (or, $750 billion if one prefers the higher valuation for fatalities). Obviously we have made a number of debatable assumptions in reaching this figure. However, we have also not included anything noneconomic damages associated with nonfatal injuries.[35]

We want to state again that we do not view this estimate as a reliable estimate of the cost of injuries and fatalities due to torts. We provide it simply to suggest that analysts seriously concerned about the costs associated with torts could have made some effort to consider the cost of torts from the victims' perspective.

IV. The Tort System as a Financial Transfer System: Medical Malpractice, Products Liability, and Punitive Damages.

Jackpot Justice refers to the tort system as a financial transfer system. In general terms we do not disagree, but it is a system that has demonstrable benefits for persons injured through negligence and for American taxpayers as well. It boils down to a public policy decision about who should bear the costs of negligence. *Jackpot Justice* takes aim at medical malpractice litigation as an example of the tort system gone awry so let us begin by considering some of the costs associated with medical negligence. We also address their two other main targets – products liability and punitive damages.

A. The Example of Medical Malpractice

Medical Negligence is Not Infrequent

The 1990 Harvard study of medical negligence examined hospital records of 31,000 patients and concluded that one out of every 100 patients admitted to hospital had an actionable legal claim based on medical negligence.[36] Significantly, seven of those ten persons suffered a permanent disability. Fourteen percent of the time the adverse event resulted in death and ten percent of the time the incident resulted in hospitalization for more than six months. Generally, the more serious the injury the more likely it was

caused by negligence.[37] Subsequent research involving Utah and Colorado found rates of negligent adverse events that were similar to the New York findings.[38]

In 2000, The Institute of Medicine produced a report that relied on these studies and other data.[39] The report concluded that each year 98,000 persons die due to medical negligence and that many other patients sustain serious injuries. There are reasons to believe that this report may have underestimated the incidence of medical negligence because the studies it used were based solely on hospital records.[40] In 2004, Healthgrades, Inc., a company that rates hospitals on health care for insurance companies and health plans, concluded that the Institute of Medicine's figure of 98,000 deaths was too low and that a better estimate was 195,000 annual deaths.[41] In short, there is no serious question that medical negligence not only occurs, but that it occurs at a substantial rate.

Injuries Due to Medical Negligence Have High Costs

As we described earlier, Professors Sloan and van Wert conducted systematic assessments of economic losses (medical costs, income losses, and other expenses) in Florida cases involving claims of medical negligence occurring as a result of birth-related incidents.[42] Even though those researchers offered the caution that their assessment procedures probably underestimated losses, they found that severely injured children's economic losses were, on average, between $1.4 and $1.6 million in 1989 dollars. If adjusted for inflation using the consumer price index these figures in 2006 dollars translate roughly to $2.3 million per injury. In the same study the losses of persons who survived an emergency room incident were estimated at $1.3 million, or $2.3 million in 2006 dollars. For persons who died in an emergency room incident the loss to their survivors was estimated at $0.5 million, or roughly $0.8 million in today's dollars.[43]

Most Negligently Injured Patients Do Not Sue

The Harvard study of medical negligence found that one of every 100 patients admitted to hospital had an actionable legal claim based on medical negligence. Yet only about one in eight filed a claim.[44] Subsequent research replicated that finding. Research by Lori Andrews found that of 1,047 patients who experienced a medical error, only thirteen patients made a claim.[45] Sloan and Hsieh studied 220 childbirths in Florida that involved death or permanent injury to the infant and had the medical records reviewed by independent medical experts.[46] Only 23 of the 220 parents sought legal advice and these tended to be cases in which the child suffered very serious injuries and in which the reviewing doctors concluded that negligence was probably involved. Yet, not a single lawsuit was filed in any of the 220 cases.

There are many reasons that injured patients do not file lawsuits. Among the reasons are that they never learn that the bad outcome was due to negligence; they assume that the doctor was trying hard; and they cannot find a lawyer willing to take their case because it is too difficult or too expensive to litigate.[47]

Who Pays for the Medical Malpractice Loss? A Hypothetical Example

Assume John Worker, age 35, is making $40,000 per year in his construction job. He has a wife and two young children.[48] His total assets include $10,000 in savings and $15,000 equity in his home. Like millions of Americans he cannot afford health insurance. During medical treatment for a benign tumor, Mr. Worker incurred a serious injury due to medical negligence that required six months of hospitalization. Despite his eventual recovery, the injury prevents him from working for the rest of his life. He has partial

paralysis on right side of his body and chronic pain that is severe enough to frequently require strong painkillers. The uncontested economic losses (even without adjustments for inflation) are as follows:

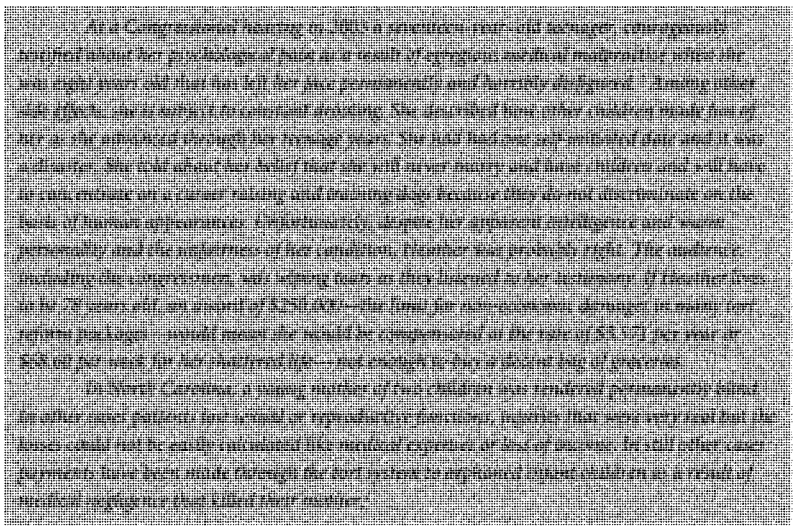
a.	Past medical bills (intensive care and rehabilitation):	$300,000
b.	Future medical bills resulting from injury at $15,000/year for his life expectancy of 39 years to age 74:	$585,000
c.	Past income loss during year of recovery:	$ 40,000
d.	Future income loss to age 65 at $40,000/year:	$1,200,000
e.	**Total economic losses:**	**$2,125,000**[49]

Because he has no health or other insurance, his state's Medicaid system will probably pick up the medical bills. Unless his wife gets a better job or relatives help out, the family may also have to rely on welfare.

And here is the transfer issue. Medicaid, Medicare and welfare programs are funded by American taxpayers. The cost of Mr. Worker's injury will be born by taxpayers, not by the party that was negligent. This is a transfer tax is totally ignored in the theorizing of the *Jackpot Justice* authors. Alternatively, however, Mr. Worker may file a lawsuit. If he is successful against the negligent healthcare provider, taxpayers will not be forced to bear the costs. Moreover, even if Medicaid pays for his medical bills while the lawsuit is in progress, Medicaid is required to file a lien against any settlement or award that results from the lawsuit in order to reimburse the taxpayers. In short, taxpayers benefit from the transfer effects of the tort system.

Pain and Suffering

Tort critics constantly denigrate pain and suffering payments with snide suggestions that such awards are unmerited. We have already drawn attention to the allegation in *Jackpot Justice*: "of every dollar paid by defendants with the claim that twenty-four cents of every tort dollar goes for "non-economic



payments, including punitive damages." Put the punitive damages aside for now, because punitive damages are seldom given in medical malpractice cases,[50] and consider two responses to this assertion. The first is that American law has long recognized pain and suffering as a legitimate component of damages. The second is that most plaintiffs ultimately receive proportionately little or nothing for pain and suffering.

Medical malpractice settlements, whether they occur before trial or after a jury verdict, actually yield little beyond partial compensation for loss of income and medical expenses. In their study of birth and emergency room injury awards, Professor Sloan and his colleagues compared the plaintiffs' economic losses to the amount actually received.[51] On average, in cases that were settled prior to trial, plaintiffs received only 52 percent of their losses. Plaintiffs in cases that went to trial did better than plaintiffs in settled cases, ultimately receiving 22 percent more than their estimated economic losses.[52] Patients with the most severe injuries were least likely to receive adequate compensation.[53] After conducting their detailed analyses Sloan and co-authors concluded that:

> *few claimants received payments far above the mean for their stage of resolution categories. The fact that even plaintiffs who were successful at verdict received payments only moderately higher than economic loss contradicts the notion that courts make very excessive awards in medical malpractice cases.*[54]

Summary on Medical Malpractice

Medical malpractice litigation serves as a vehicle for thinking about the costs of injuries and who should pay. To be sure, the tort system is not perfect. Many injured persons do not make claims and of necessity taxpayers bear the burden. Even when claims are filed, both sides bear substantial transaction costs. The problem is that *Jackpot Justice* does not even consider the enormous costs of medical negligence, let alone suggest an alternative system of compensation. Indeed, it is worth reiterating that, yes, the tort system is a wealth transfer system, but a competent theory should take into consideration costs and benefits; and clearly there are both benefits that accrue from the present system and enormous costs in terms of human lives and taxpayer dollars that need to be considered if it were drastically altered with no viable alternative system to replace it.

B. The Products Liability Example

Products liability is another central theme in *Jackpot Justice*. The claim is that fear of litigation stifles innovation, and lowers America's competitive edge against manufacturers from foreign countries. The U.S. Chamber of Commerce and the American Tort Reform Association frequently report stories about "judicial hellholes" and stories about a tort system run amuck. One story on the internet and elsewhere tells of a man who purportedly injured himself while using his lawnmower as a hedge clipper, and then won $500,000 in a lawsuit against the lawnmower company. *U.S. News and World Report* told of a trial involving a woman who threw a soft drink at her boyfriend in a restaurant, slipped on the wet floor and then won $100,000 in a lawsuit against the restaurant. *Forbes*, *The New York Times*, and the *Los Angeles Times* have all carried the story about a woman who claimed to have lost her psychic powers after a C.A.T. scan and was awarded millions of dollars. The problem is that these stories are either total fabrications or great distortions of the facts of the lawsuit.[55]

The Actual Frequency of Product Liability Awards

The best data on product liability trials comes from the Civil Justice Surveys of the U.S. Bureau of Justice Statistics. In 2001, a survey representative of the 75 largest counties in the United States uncovered the fact that there were a grand total of 144 product liability trials, 31 of which were about asbestos.[55]

About 92 percent of product liability trials were jury trials. Plaintiffs prevailed over defendants in 45 percent of the jury trials and 50 percent of trials that were decided by judge alone. In asbestos trials, the median award was $1,650,000, but it must be remembered that in asbestos cases there are often multiple plaintiffs who split the award. In other cases, which also sometimes involve more than one plaintiff, the median award was $311,000. Often the injuries suffered by plaintiffs in product liability trials are life crippling or death. Furthermore, what is striking given the complaints about punitive damages in these cases is the fact that in 2001 punitive damages were awarded in only three product liability cases in the Bureau of Justice Statistic's sample of state courts, and two of those were in trials involving asbestos.

The Bureau of Justice Statistics also gathered data on trials in federal courts nationwide for the period 2002-2003.[57] There were 203 product liability trials in these federal courts, including two trials involving airplanes, five involving marine products, 27 involving motor vehicles and one involving asbestos. Plaintiffs won only one third of the trials. The median estimated award in all cases was $350,000. Furthermore, in some of these cases there were multiple plaintiffs involved in the lawsuit, a factor bearing on how much each individual plaintiff received from the total award.

A large percentage of the costs in *Jackpot Justice*'s table of tort costs are attributable to products liability. Claims are often made that the numbers of product liability claims are increasing. The court statistics contradict these claims.[58] The data about numbers and outcomes in the courts cover the period from 1990 through 2003. First consider asbestos trials. In 1990 there were 87 trials and plaintiffs were awarded damages in 38 of them. The year 1991 was the high point of asbestos trials. There were 271 trials and plaintiffs were awarded damages in 228 instances. The following year there were only 29 trials and the numbers dropped to single digits after that. In 2002 and 2003 there were no asbestos trials in federal courts in the United States.

But what about non-asbestos product liability trials? In the federal courts in 1990 there were 279 trials but that number has steadily dropped so that in 2000 there were 100 trials, 2001 saw 79 trials, 2002 saw 107 trials and in 2003 there were only 87 trials. Across the period from 1990 through 2003 plaintiffs won approximately only one case in three.

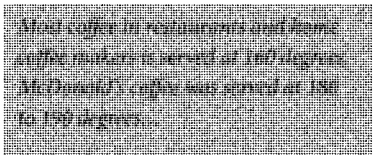
In short, reliable data show that product liability trials are much less frequent than claimed by advocates of tort reform and implied in *Jackpot Justice*. Also, the size of awards is much more modest than would be expected by the rhetoric against the tort system. The data also suggest that punitive damage awards in particular are infrequent. But let us examine them in more detail.

C. The Punitive Damages Example

Punitive damages awarded by juries in particular are a central theme in claims about product liability. Many stories about punitive damages have become urban legends passed around in printed form and on the internet.[59] The most famous case in recent years is the McDonald's coffee spill case in which a jury awarded the plaintiff, Stella Liebeck, several million dollars after she spilled hot coffee on herself at a

McDonald's drive through. The Liebeck case is a true case, but many people are unaware of the actual facts of the case that put the jury award in a different light. Professors William Halton and Michael McCann have reported the complete story.[60]

In 1992 79-year-old Stella Liebeck ordered a cup of coffee at a McDonald's drive-through in Albuquerque, New Mexico. The coffee spilled into her lap, causing third degree burns to her thighs, buttocks, genitals and groin areas that left permanent scars. Mrs. Liebeck, a conservative Republican, sent a letter of grievance to McDonald's corporate office acknowledging that she had spilled the coffee, but claimed there was no warning about the danger of the product. She asked McDonald's to re-evaluate its coffee temperature and to check the coffee machine to determine if it was faulty, and pay her approximately $20,000 in medical expenses. In reply McDonald's offered Mrs. Liebeck $800.00.



Only then did Mrs. Liebeck consult a lawyer. The lawyer asked McDonald's for $90,000 for her medical bills plus pain and suffering. McDonald's refused and made no counter-offer. The case went before a mediator who recommended a settlement of $225,000. Again McDonald's refused to negotiate a settlement.

The case went to trial. Two medical experts testified about the effects of burns, including the fact that 190 degree coffee can cause third degree burns that penetrate through the skin into the underlying fat, muscle and bone. Her lawyer charged that McDonald's failed to comply with industry standards. Most coffee in restaurants and home coffee makers is served at 160 degrees. McDonald's coffee was served at 180 to 190 degrees. Other evidence produced at the trial showed that most customers were unaware of the hazards of such hot coffee. McDonald's had received over 700 complaints about its coffee and had paid out over $750,000 in previous claims. Nevertheless McDonalds had never once consulted a burn specialist. Finally, a witness for McDonald's admitted that he had seen photos of previous coffee burns from claimants and that McDonald's had made a conscious decision to not warn its customers. He dismissed the dangers as being statistically irrelevant and testified that McDonald's had no current plan to change its coffee standards.

The jury found for Mrs. Liebeck and awarded her $200,000 for compensatory damages. However, it also found Mrs. Liebeck 20 percent responsible, which reduced the compensatory damages to $160,000. In arguing for punitive damages, Mrs. Liebeck's lawyer noted that McDonald's sold over a billion cups of coffee each year and generated daily revenues of $1.35 million. He argued that two days worth of coffee revenues was a sufficient and reasonable punitive award. The jury agreed and awarded $2.7 million.

Following the verdict the trial judge reviewed the evidence and reduced the punitive award to $480,000. McDonald's appealed but eventually the case settled for an undisclosed sum. McDonald's coffee is now sold at temperatures similar to other restaurants. Despite the abuse heaped on Mrs. Liebeck's case, McDonald's customers are safer as a result today.

Punitive Damage Awards in Perspective

Over the past thirty years respected research organizations, the federal government, and independent academic researchers have conducted a large number of studies examining jury awards in punitive damages cases. In a recent case before the U.S. Supreme Court, twenty-four scholars who had worked in this field summarized the findings. The research has found that

- Juries award punitive damages infrequently;
- Punitive damages awards have not increased in frequency;
- When adjustments are made for inflation the magnitude of such awards has not increased over the past several decades;
- Most awards are modest in size, in comparison to compensatory awards;
- The overwhelming majority of awards show a rational proportionality between actual and potential harm caused by defendants;
- The same proportionality relationship between compensatory and punitive damages exists in cases involving large punitive awards;
- Juries pay particular attention to the reprehensibility of defendants' conduct;
- Jury decision-making processes in punitive damages cases are similar to the decision-making processes used by judges in bench trials of such cases;
- The amounts of punitive awards rendered by juries and judges are similar when adjustments are made for case types;
- No evidence shows juries are biased against large businesses;
- Judges effectively exercise supervision over punitive damages in post-verdicts motions or on appeal; and
- In other instances post-verdict settlements reduce or abandon punitive awards without judicial intervention.[61]

Using data collected by the U.S. Bureau of Justice and the National Center for State Courts Professor Eisenberg and his collaborators concluded as follows:

> *[T]his article shows a strong and statistically significant correlation between compensatory and punitive damages. . . . In addition we find no evidence that punitive damages awards are more likely when individuals sue businesses than when individuals sue individuals. With respect to award frequency, juries rarely award punitive damages and appear to be especially reluctant to do so in the areas of law that have captured the most attention, products liability and medical malpractice. Punitive damages are most frequently awarded in business/contract cases and intentional tort cases.*[62]

The Purposes of and Legislative Support for Punitive Damages

Punitive damages can be traced back many centuries in English law and were adopted very early into American law. At least 40 states specifically allow punitive damages.[63] The purpose of punitive damages is to protect society from violations of public safety or public values. They are a sanction for behavior that is judged, wanton, reckless, or in disregard for the safety and well being of others. Some states refer to them as "exemplary damages" or "vindictive damages." In most states punitive damages may not be given in medical malpractice cases unless the doctor has knowingly engaged in reprehensible behavior, such as

sexual assault on a patient or deliberate alteration of medical records. Moreover, while the plaintiff need only prove his or her case on "the preponderance of evidence," to receive compensatory damages, punitive damages typically require a much higher standard of proof, namely "clear and convincing evidence."[64]

Although in recent years various state legislatures have voted to put restrictions on the conditions under which punitive damages may be awarded, they still are regarded as having an important role to play in response to egregious behavior. The U.S. Supreme Court, while expressing concerns about the amounts awarded and what juries may consider in rendering them, has acknowledged that punitive damages further legitimate societal goals of retribution and deterrence.[65]

Business-Against-Business Disputes and Punitive Damages

In an important book on the American tort system, Professors Thomas Koenig and Michael Rustad pointed out that the real action involving punitive damage lawsuits involves businesses suing other businesses.[66] They occur frequently in trademark infringement cases and contract disputes; and on the surface many of them might be viewed as frivolous. Koenig and Rustad gave some examples:

> *American Express settled a punitive damages case against Chase Manhattan Corporation over Chase's print and mail advertisements, which praised its award earned from J.D. Power and Associates for its credit cards;*
>
> *Federal Express filed a lawsuit seeking treble damages over the U.S. Post Office's "What's Your Priority?" Advertising Campaign;*
>
> *The maker of Scott paper towels sued Proctor and Gamble over its claim that Bounty paper towels were the "quicker –picker- upper."*

The frequency of business-to-business lawsuits involving punitive damages clearly undercuts the attacks by businesses against punitive damages. Punitive damages can only be given if the defendant's behavior involves fraud or some other egregious behavior, and such claims can only be litigated under the tort system. These business disputes often involve claims for very large damages. Not only are large sums involved in the claims, they also entail batteries of lawyers on both sides and therefore huge litigation costs. It is the height of hypocrisy to claim that punitive damages are ruining the country when an injured person sues for punitive damages while ignoring the fact that large corporations regularly sue one another and regularly ask for punitive damages.

Post-verdict Outcomes

The McDonald's case described above points to another often overlooked fact about punitive damages: the jury verdict is not the final word. The trial judge reduced the punitive award from $2.7 million to $480,000. The U.S. Supreme Court has told state courts that judges must review punitive award verdicts for fairness. Either trial judges or appellate courts review all the evidence to determine fairness and the awards are often reduced.

W. Kip Viscusi, who is cited as an important authority in *Jackpot Justice*, concluded in his book, *Reforming Products Liability,* that plaintiffs in product liability cases received only 29 percent of the original award. This is because "[c]ourts often reduce punitive damages on appeal, and defendants may negotiate a reduction …in return for prompt payment of the damages amount."[67] Two other researchers, Karpoff & Lott, studied over 2000 cases involving punitive damages and found that the average post-verdict payment was never more than 17 percent of the award.[68]

Summary

This discussion of products liability and punitive damages, like the medical malpractice issue, raises serious questions about the general, undocumented claims that appeal to widely available myths about the tort system. Again it is important to stress that there are substantial transactions costs in the tort system, but they occur on both sides. What should be clear is that even businesses seem to believe that there are benefits that accrue from punitive damages litigation, since there are so many business-against-business disputes represented among the jury awards.

Background to This Report

The present project was begun after one of the authors read *Jackpot Justice* and called it to the attention of the other two authors. We then contacted the American Association for Justice to ask if they were interested in sponsoring a report that critiqued *Jackpot Justice*. They were. The three authors received remuneration for their efforts.

Because our critique of *Jackpot Justice* draws attention to heavy reliance on data that is proprietary and not peer reviewed, we went an extra step and arranged to have an earlier draft of our report critiqued by several reviewers under a procedure whereby they would remain anonymous to us (although those reviewers did know our identities). We are grateful for their constructive comments on that earlier draft.

Finally, while our biographical summaries report our academic affiliations, this report and its conclusions are our own and do not necessarily reflect the positions of our respective institutions.

Summary Biographies of the Authors

Tom Baker is Professor of Law at the University of Pennsylvania Law School. His recent book, *The Medical Malpractice Myth* (U. Chicago P. 2005), pulls together the empirical research on medical malpractice and liability, examines the misperceptions behind the tort reform movement, and proposes an evidence-based approach to medical liability reform. He is the author of *Insurance Law and Policy: Cases, Materials and Problems* (Aspen 2003; 2nd ed. 2008) and many articles and book chapters relating to insurance, risk, and responsibility. He is the contributing editor of *Embracing Risk: The Changing Culture of Insurance and Responsibility* (U. Chicago P. 2002), which helped to establish the emerging sociology of risk and insurance. He has conducted empirical research on tort litigation, securities class actions, and insurance claiming following natural disaster. He has taught insurance and related courses at Columbia Law School, Yale Law School, the University of Miami School of Law, Vanderbilt University, and the Faculty of Law at the Hebrew University of Jerusalem, and the University of Connecticut. A member of the Scientific Committee of the Geneva Association for Risk and Insurance Studies, he regularly lectures on insurance in academic and professional settings. He is the founder and facilitator of the New England Insurance and Society Study Group, an interdisciplinary group of scholars engaged in insurance-related research. Before entering law teaching, Professor Baker clerked for Hon. Juan R. Torruella (1st Cir.), practiced with the firm of Covington & Burling, and served as Associate Counsel in the Office of Independent Counsel (Walsh) investigating Iran-Contra. He received his B.A. and J.D. from Harvard University, *magna cum laude*.

Herbert Kritzer is Professor of Law, William Mitchell College of Law, Saint Paul, Minnesota, Adjunct Professor of Political Science, University of Minnesota, and Professor of Political Science and Law *emeritus*, University of Wisconsin-Madison. He has conducted extensive empirical research on the American civil justice system, as well as research on other common law systems. His most recent book is *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* (Stanford University Press, 2004). In addition, he is the author of *The Justice Broker* (Oxford University Press, 1990), *Let's Make*

a Deal (University of Wisconsin Press, 1991), and *Legal Advocates: Lawyers and Nonlawyers at Work* (University of Michigan Press, 1998), and is coauthor of *Courts, Law and Politics in Comparative Perspective* (Yale University Press, 1996); he is the editor of the multi-volume *Legal Systems of the World* (ABC-CLIO, 2002), and coeditor of *In Litigation: Do the Haves Still Come Out Ahead* (Stanford University Press, 2003). He has published extensively in professional journals, including leading journals in Political Science, interdisciplinary legal studies, and major law reviews. Over the last 20 years he has conducted research on the American civil justice system dealing with contingency fee legal practice, the impact of Rule 11 sanctions, alternative forms of advocacy and representation, and the adult guardianship process in Wisconsin. Research with a cross-national element has included writing on the English Rule, propensity to sue, the frequency of criminal and civil trials in England, and politics in the English judicial system. Other areas of recent work have included Supreme Court decision-making, public attitudes toward the courts, and changing patterns in state supreme court dockets. Professor Kritzer has served as a consultant and analyst for the Wisconsin Supreme Court's Office of Court Operations for a State Justice Institute funded "consumer perspective" survey of users of the Wisconsin Circuit Courts, as a consultant to the State Bar of Wisconsin on its study of Wisconsin jury verdicts, its survey of *pro bono* activities, and its current legal needs study, as a consultant to the Alaska Judicial Council for its study of fee shifting practices in Alaska, and as a consultant for the World Bank for docket profiling studies in Latin America. Professor Kritzer was a member of the Wisconsin Equal Justice Task Force, which examined issues of gender equity in the Wisconsin court system. His current research includes changing patterns in judicial elections (a first article appeared in *DePaul Law Review*), insurance defense legal practice (recently published in *Vanderbilt Law Review*), and the impact of the *Daubert* decision (recently published in the *Journal of Empirical Legal Studies*), and a study of local television news coverage of the courts and the legal profession. Professor Kritzer recently completed a term as editor of *Law & Society Review*, the leading journal in interdisciplinary legal studies. In July 2007, Professor Kritzer joined the faculty of the William Mitchell College of Law after having taught for 30 years at the University of Wisconsin-Madison.

Neil Vidmar is Russell M. Robinson II Professor of Law at Duke Law School and holds a secondary appointment in the Psychology Department at Duke. He received his Ph.D. in social psychology from the University of Illinois in 1967 and joined the Psychology Department at the University of Western Ontario in Canada in that year. In 1973 -1974 he was a Russell Sage Resident at Yale Law School and in 1974-1975 was a resident fellow at Battelle Seattle Research Institute. Vidmar remained at Western Ontario until his appointment at Duke Law School in 1987. His most recent book is *American Juries: The Verdict* (Prometheus Books 2007), co-authored with Valerie Hans. Vidmar is also co-author with Valerie Hans of *Judging the Jury* (1986), author of *Medical Malpractice and the American Jury* (1995) and editor/author of *World Jury Systems* (2000). Vidmar has written over 100 articles and chapters that include the following subjects: the tort system; the jury system; medical malpractice litigation, small claims courts; the Ontario Business Practices Act; punitive damages; independent para-legals; rights consciousness; dispute resolution; procedural justice; privacy; eyewitness reliability; death penalty attitudes; and battered woman syndrome . He was co-investigator of a study of civil juries in an Arizona Superior Court (supported by the National Science Foundation and the State Justice Institute) that videotaped the actual deliberations of 50 civil juries. Vidmar was lead drafter of amicus briefs to the U.S. Supreme Court in *Kumho Tire v. Carmichael* (1999) (expert evidence), *State Farm v Campbell* (2003)(punitive damages) *Ledbetter v. Connecticut* (2006) (eyewitness identification) and *Philip Morris v. Williams* (2007) (punitive damages). He has lectured on judging scientific evidence for judicial education programs in the United States, Canada, England, Australia and New Zealand.

ENDNOTES

[1] The Pacific Research Institute for Public Policy, or PRI, is a non-profit think tank founded in 1979. Its stated purpose is "to champion freedom, opportunity and personal responsibility for all individuals by advancing free market policy solutions" Its activities include publications, events, media commentary, legislative testimony and community outreach. See www.pacificresearch.org

[2] *Jackpot Justice* at www.legalreforminthenews.com/2007PDFS/PRI_2007**JackpotJustice**Final.pdf (last visited February 17, 2008).

[3] Many scientific and medical journals today properly require authors to reveal the sources of their funding. It is not clear which persons or organizations underwrote *Jackpot Justice* but, as critics, the present authors do want to reveal that, although they are independent academics associated with important institutions of learning and each has published a substantial amount of research bearing on the American tort system, this critique of Jackpot Justice was partially underwritten by funding from the American Association for Justice.

[4] See *Jackpot Justice*, *supra* note 1 at 1.

[5] *Id,* at 2.

[6] As we will explain, the starting point for *Jackpot Justice* is a similarly flawed analysis by Tillinghast-Towers Perrin, a firm closely tied to the insurance industry and other groups hostile to civil justice. See Towers Perrin Tillinghast, U.S. Tort Costs and Cross-Border Perspectives: 2005 Update at 11 (reporting that their report "does not attempt to quantify the benefits of the tort system," while acknowledging that the benefits of the tort system "...include a systematic resolution of disputes, thereby reducing conflict, possibly including violence" and that "the tort system may act as a deterrent to unsafe practices and products" with the result that "compensation for pain and suffering is seen as beneficial to society as a whole.") Available at: www.towersperrin.com/tp/getwebcachedoc?webc=TILI/USA/2006/200603/2005_**Tort**.pdf (last visited February 17, 2008).

[7] See *Jackpot Justice*, *supra* note 1 at 1-2.

[8] *Id.*, at 5

[9] *Id*, at note 3, page 44.

[10] See Richard Posner, "Is the Tort System Costing the United States $865 Billion a Year?" available at http://www.becker-posner-blog.com/archives/2007/04/is_the_tort_sys.html (last visited February 17, 2008).

[11] See *id.*

[12] See Tom Baker, "Medical Malpractice and the Insurance Underwriting Cycle," 54 DePaul L. Rev. 393 (2005).

[13] The Towers Perrin tort cost updates include tort costs estimates for each year since 1950, and Towers Perrin has been releasing these updates on a periodic basis since 1985. As explained in the body of our response, these numbers wax and wane with an insurance business cycle called the underwriting cycle. The authors of Jackpot Justice based their calculations on the very highest inflation adjusted number in all of the Towers Perrin reports. They took the 2004 number -- $260 billion – and used the consumer price index to adjust it to a 2006 dollar amount of $279 billion. See *Jackpot Justice*, *supra* note 1 at 15. Then, using Towers Perrin's estimate that plaintiffs receive only 46% of this amount, they calculated the total tort transfer payments to be $128 billion, which is the number that they use to calculate all of the static costs in their table. The most recent Towers Perrin tort cost update shows that, as we predicted, the "costs" of the tort system are declining. Why? Because the insurance underwriting cycle is now in the price-cutting phase that always follows the crisis phase. As a result, the most recent Towers Perrin report states that the "costs" of the tort system in 2006 were only $247 billion. See Towers Perrin, 2007 Update on U.S. Tort Cost Trends.

Available at:
http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2007/200712/tort_2007_1242007.pdf (last visited February 17, 2008). This is $32 billion – more than ten percent – less than the $279 billion number that the *Jackpot Justice* authors used

[14] Tillinghast Towers Perrin, *supra* note 6 at 17-20.

[15] See Posner, *supra* note 10.

[16] Price Waterhouse Coopers, The Factors Driving Health Care Costs (2006). Available at: http://www.pwc.com/extweb/pwcpublications.nsf/docid/BB82984D3A7DF2A185257267003C98BC (last visited February 17, 2008).

[17] See Daniel Kessler and Mark McClellan, "Malpractice Law and Health Care Reform: Optimal Liability Policy in an Era of Managed Care," 84 J. Public Health Economics 175 (2002).

[18] The research on defensive medicine is discussed at length in Chapter 6 of Tom Baker, The Medical Malpractice Myth (U. Chicago P. 2005).

[19] Manufacturing figures are for 2005, and are from http://www.nam.org/s_nam/bin.asp?CID=202325&DID=233605&DOC=FILE.PDF (last visited February 17, 2008).

[20] While Viscusi and Moore report that 11 industries fell below their threshold, the *Jackpot Justice* authors include 12 industries in their analysis, for reasons that are not clear from the report. See W. Kip Viscusi and Michael J. Moore, "Products Liability, Research and Development, and Innovation," 101 J. Political Economy 161 (1993). See *Jackpot Justice*, *supra* note 1 at note 36.

[21] See the *Jackpot Justice* authors' response to Judge Posner, *supra* note 1, available at http://liberty.pacificresearch.org/blog/id.70/blog_detail.asp (last visited February 17, 2008).

[22] It is worth noting that the most recent Towers Perrin update reports that U.S. tort costs have declined by more than ten percent since 2002 to 1.87% of GDP. See Towers Perrin, *supra* note 13. We do not regard this new number as any more reliable than the old one, but it does illustrate how the Towers Perrin numbers wax and wane with the underwriting cycle.

[23] The data were obtained from http://www.oecd.org/dataoecd/46/36/38979632.xls (last visited February 17, 2008).

[24] The OECD data which we used did not show a 2005 figure for Japan; it did show a figure of $2, 358 for 2004, which we inflated to $2,450 for our calculations.

[25] Richard L. Abel, "The Real Tort Crisis -- Too Few Claims," 48 Ohio State L. J. 443 (1987).

[26] Deborah Hensler *et al.*, Compensation for Accidental Injury in the United States at 103, 123 (1991).

[27] The percent considering claiming refers only to those considering claiming under tort; it does not include claims under workers' compensation. See *id.* at 109.

[28] Specifically, we took the average hourly hearings in 1982 dollars for "total private" from the Bureau of Labor Statistics for 1988 ($7.82) and 2006 ($8.24), converted those figures to 1988 dollars ($9.59) and 2006 dollars ($17.21) using the BLS "inflation calculator"), and took the ratio (17.21/9.58) to get our multiplier of 1.79.

[29] David M. Studdert, Troyen A. Brennan, and Eric J. Thomas, "Beyond Dead Reckoning: Measures of Medical Injury Burden, Malpractice Litigation, and Alternative Compensation Models from Utah and Colorado," 33 Indiana L. Rev. 1643, 1684 (2000). Actually, Studdert *et al.*, find that the lost household production associated with "*preventable* adverse events" was 135% of lost wages; moreover, they used a very conservative figure of $20 per day, as the value of lost household production. Consequently, our estimate is probably a bit low.

[30] *Id.*, at 1659 and 1670.

[31] Eric Thomas *et al.*, "Costs of Medical Injuries in Utah and Colorado," 36 Inquiry 255, 256 (1999).

[32] Sloan, Frank A., Penny B. Githens, Ellen Wright Clayton, Gerald B. Hickson, Douglas A. Gentile, and David F. Partlett , Suing for Medical Malpractice. (U. Chicago P. 1993).

[33] Generally something fewer than 10% of preventable medical injuries result in claims. While one might expect the percentage to be close to 100% for major birth injuries, Sloan and Hsieh examined a sample of 220 adverse birth outcomes, some of which were attributable to negligence, and found that not one of them led to a claim being filed. See Frank A. Sloan and Chee Ruey Hsieh (1995) "Injury, Liability, and the Decision to File a Medical Malpractice Claim." 29 Law & Society Rev. 413, 418.

[34] W. Kip Viscusi, "The Value of Life," New Palgrave Dictionary of Economics and the Law, 2nd Edition Available at SSRN: http://ssrn.com/abstract=827205; see also Michael J. Moore and W. Kip Viscusi (1990) Compensation Mechanisms for Job Risks: Wages, Workers' Compensation, and Product Liability (Princeton U. P.), pp. 13-15, 69-81.

[35] If we assume that the pain and suffering components of the non-fatal accidents is equal to the medical expense and lost wages, we would arrive at a total figure of around half a trillion dollars ($500 billion).

[36] See Harvard Medical Practice Study, Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation and Patient Compensation in New York (1990). See also Paul C. Weiler et al., A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation (1993). This and other research on the incidence of medical malpractice is collected in Chapter 2 of Baker, The Medical Malpractice Myth, *supra* note 18.

[37] Harvard Medical Practice Study, *supra* note 37 at 44, tbl. 3.2.

[38] See Eric J. Thomas et al., Incidence and Types of Adverse Events and Negligent Care in Utah and Colorado, 38 Medical Care 261, 261 (2000).

[39] See Institute of Medicine, To Err Is Human: Building a Safer Health Care System (Linda Kohn et al. eds. 2000), http://books.nap.edu/catalog/9728.html?onpi_newsdoc112999; Lucian L. Leape, "Institute of Medicine Medical Error Figures Are Not Exaggerated," 284 J. of the Am. Medical Assn. 95 (2000)

[40] For example, Lori Andrews conducted a study in a large Chicago area hospital, and studied actual incidence of negligent events in hospital wards. Andrews discovered that many injuries were not recorded on the records as required, especially when the main person responsible for the error was a senior physician. See Lori Andrews "Studying Medical Error in SITU: Implications for Malpractice Law and Policy," 54 DePaul L. Rev. 357 (2005). Other research is consistent with the Andrews's findings. For example, in one study Dr. Thomas Julian had a panel of obstetricians review obstetric malpractice claims. He concluded, "common obstetrical risks were often not recognized or not recorded in medical records." See Thomas M. Julian et al., "Investigation of Obstetric Malpractice Closed Claims: Profile of Event," 2 Am. J. Perinatology 320 (1985).

[41] www.healthgrades.com/media/english/pdf/HG_Patient_Safety_Study_Final.pdf (last visited February 17, 2008). The Healthgrades report estimated that there were 1.14 million "patient safety incidents" among thirty-seven million hospitalizations. Healthcare further concluded that "[o]f the total 323,993 deaths among Medicare patients in those years who developed one or more patient-safety incidents, 263,864, or 81 percent, of these deaths were directly attributable to the incidents" and that "[o]ne in every four Medicare patients who were hospitalized from 2000 to 2002 and experienced a patient-safety incident died."

[42] Frank A. Sloan & Stephen S. van Wert, "Cost of Injuries," in Frank A. Sloan et al., Suing for Medical Malpractice 123, 139-40 (U. Chicago P. 1993).

[43] It is important to note that there was considerable variability in these estimated averages: some patients had much higher economic losses and, conversely, others had lesser economic losses. Sloan and van Wert cautioned that a major share of past losses was covered by collateral sources, such as private health insurance, or taxpayer-supported sources such as Medicare. However, even if future medical expenses, including nursing care, are covered by these other sources, loss of income and other expenses, such as care

given by family members resulting in diminished income from those family members, will not be covered. Sloan and van Wert's estimates, moreover, did not consider non-economic losses, such as pain and suffering, disfigurement, or loss of enjoyment of life's amenities. *Id.*

[44] See Russell A. Localio et al, "Relation Between Malpractice Claims and Adverse Events Due to Negligence: Results of the Harvard Medical Malpractice Study," 325 New England J. of Med. 245 (1991). Earlier research in California by Patricia Danzon concluded that 1 in 10 injured patients filed a claim. See Patricia Danzon, Medical Malpractice: Theory, Evidence and Public Policy (Harvard U. P. 1985).

[45] See Andrews, *supra* note 40.

[46] Frank Sloan and C. Hsieh, "Variability in Medical Malpractice Payments: Is the Compensation Fair?" 24 Law & Society Rev. 601 (1990).

[47] Frank Sloan and Chee Ruey Hsieh, "Injury, Liability, and the Decision to File a Medical Malpractice Claim," 29 Law & Society Review 413 (1995); Herbert Kritzer, Risks Reputations and Rewards: Contingent Fee Legal Practice in the United States at 289 (Stanford U. P. 2004); Neil Vidmar, "Medical Malpractice Lawsuits: An Essay on Patient Interests, The Contingent Fee System, Juries and Social Policy," 38 Loyola of Los Angeles L. Rev. 1217, 1228 (2005).

[48] This example is elaborated in greater detail in Vidmar, supra note 18.

[49] In order to simplify the presentation, we have neither adjusted the damages upward to reflect inflation nor reduced the total to present value.

[50] The Bureau of Justice Statistics study found that in 2001 punitive damages were awarded in four percent of cases. See Thomas H. Cohen, Bureau of Justice Statistics, No. NCJ 206240, Civil Justice Survey of State Courts, 2001: Tort Trials and Verdicts in Large Counties, 2001 9 (2004). Moreover, these exceptional cases involve gross malfeasance, such as sexual assaults on patients. See Thomas H. Koenig & Michael L. Rustad, In Defense of Tort Law at 127-128 and 140-145 (2001).

[51] Frank Sloan *et al.*, Suing for Medical Malpractice at Chapter 9 (1993).

[52] *Id.*

[53] See Sloan and Hsieh, *supra* note 46.

[54] Sloan *et al. supra* note 55 at 195.

[55] See Jonathan Turley, "Legal Myths: Hardly the Whole Truth," USA Today, January 30, 2005 at http://www.usatoday.com/news/opinion/2005-01-30-tort-reform_x.htm (last visited February 17, 2008); Stephanie Mencimer, "The Fake Crisis over Lawsuits: Who's Paying to Keep the Myths Alive" at http://www.aliciapatterson.org/APF2102/Mencimer/Mencimer.html (last visited February 17, 2008).

[56] U.S. Department of Justice, Bureau of Justice Statistics, Civil Justice Surveys of State Courts, 2001 (November 2004 NCJ 206240. The survey actually uncovered 14 additional cases for which the cause of action was unknown. Very possibly these were cases like food poisoning in restaurants because these are usually classified by courts as product liability cases—restaurant food is a product.

[57] U.S. Department of Justice, Bureau of Justice Statistics, Federal Tort Trials and Verdicts, 2002-2003 , August 2005, NCJ 208713.

[58] *Id* at 10.

[59] See, e.g. Myron Levin, "Tall tales of outrageous jury awards have helped bolster business-led campaigns to overhaul the civil justice system," Los Angeles Times, August 14, 2005, C1 (available in Lexis-Nexis major newspapers file).

[60] William Haltom and Michael McCann, Distorting the Law: Politics, Media and the Litigation Crisis at 183-226 (U. Chicago P. 2004).

[61] See Brief for Neil Vidmar et al. As Amicus Curiae Supporting Respondents, *Phillip Morris v. Williams*, 127 S. Ct. 1057 (2007) (No. 05-1256).

[62] Theodore Eisenberg *et al.*, "The Predictability of Punitive Damages," 26 J. of Legal Studies 623 (1997)

[63] Michael Rustad, "The Closing of Punitive Damages' Iron Cage," 38 Loyola Los Angeles Law Review 1297 (2005).

[64] *Id.* at 1324.

[65] See Phillip Morris v. Williams, 127 S. Ct. 1057, (2007); State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003); BMW of N. Am. v. Gore, 517 U.S. 559, 568 (1996).

[66] Koenig and Rustad, *supra* note 50 at 78-80.

[67] W. Kip Viscusi, Reforming Products Liability at 94 (Harvard U. P. 1991). A subsequent article by Hersch and Viscusi in 2004 repeated this conclusion: "Defendants do not pay the punitive damages amounts.... Many awards have been overturned or reduced on appeal, and others have settled privately or are still under appeal." Joni Hersch and W. Kip Viscusi, "Punitive Damages: How Judges and Juries Perform," 33 J Legal Studies 1, 9 n. 5 (2004).

[68] Jonathan Karpoff and John Lott, "On the Determinants and Importance of Punitive Damage Awards," 42 J.L. & Econ 527- 30 (1999). Rustad conducted a study that led to the following conclusions about the aftermath of punitive damages awards in the cases that he studied: 40% were settled between the parties; 32 % were reduced or reversed by courts; 25% were confirmed on appeal; and in 14% some of the award was paid. See Michael Rustad, "In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data," 78 Iowa L. Rev. 1 (1992).

THE FREQUENCY, PREDICTABILITY, AND PROPORTIONALITY OF JURY AWARDS OF PUNITIVE DAMAGES IN STATE COURTS IN 2005: A NEW AUDIT

Neil Vidmar & Mirya Holman[1]

The state of punitive damages in the United States has been a controversial topic for more than three decades, resulting in litigation reaching the U.S. Supreme Court and state supreme courts. Various business advocacy groups have sought to drastically curb or eliminate punitive damages while plaintiffs' lawyers and consumer groups vigorously defend the use of punitive damages. State legislatures have responded with many substantive and procedural reforms over the years. Yet, in *Exxon Shipping Co. v. Baker*,[2] the United States Supreme Court, while approvingly citing empirical evidence indicating that there are "not mass-produced runaway awards"[3] and that "by most accounts the median ratio of punitive to compensatory awards has remained less than 1:1,"[4] once again expressed concerns about punitive awards exceeding a single-digit ratio to compensatory damages and the predictability of punitive awards. A full understanding of the issues involved in the punitive damages controversy requires consideration of the causes of action, the magnitude of both compensatory and punitive claims, the ratios of these two outcomes, and a qualitative understanding of the nature of punitive awards. This article presents a profile of punitive damages awarded by juries in 2005 using the U.S. Bureau of Justice Statistics' Civil Justice Survey of State Courts. We supplement the BJS survey with an additional sample of punitive damages claims from nine states in 2005. This additional database provides more details about the disputes and procedural matters associated with the trials. The data show that there are case-type patterns in the awarding of punitive damages that contradict claims about punitive awards, especially involving product liability cases, and that the ratio of punitive to compensatory damages is a complex matter not

1. Vidmar is the Russell M. Robinson II Professor of Law and Professor of Psychology at Duke University. Holman is an Assistant Professor of Political Science at Florida Atlantic University. The authors are indebted to Michael Quick for his excellent research assistance, to George Christie for comments on an earlier draft of this paper, and to Ted Eisenberg and the participants on a panel at the Conference on Empirical Legal Scholarship at the University of Southern California in 2009. Finally, and especially, the authors are indebted to Michael Rustad for his insightful comments and encouragement.

2. 128 S. Ct. 2605 (2008).

3. *Id.* at 2624 (surveying punitive damage literature).

4. *Id.* at 2624 (describing relative evenness of damage awards).

easily resolved without consideration of the underlying factual bases of the claims.

I. INTRODUCTION

Litigation involving punitive damages has been before the U.S. Supreme Court and various state supreme courts numerous times since the 1980s.[5] Central issues in the litigation have involved the relationship between punitive to compensatory damages, the purposes of punitive damages, and limitations on when, how, and why juries and judges might award punitive damages. Various advocacy groups, including the American Tort Reform Association and the U.S. Chamber of Commerce, have sought strict limits on the amounts that can be awarded for punitive damages, especially in product liability, premises liability, and similar lawsuits that involve businesses as defendants. These groups argue that the threat of punitive damages stifle innovation and harm American businesses.[6] In contrast, consumer groups and plaintiffs' lawyers assert that punitive damages are necessary, because they are a method of deterring extraordinary negligence and compensating victims for social wrongs.[7]

The Supreme Court, in opinions from *Pacific Mutual Life Insurance Co. v.*

5. *See, e.g.*, Michael L. Rustad, The Closing of Punitive Damages' Iron Cage, 38 LOY. L. REV. 1297 (2005); Neil Vidmar & Matthew Wolfe, Punitive Damages, 5 ANN. REV. OF L. & SOC. SCI. 179 (2009); *Developments: The Paths of Civil Litigation*, 113 HARV. L. REV. 1752 (2000).

6. *See, e.g.*, Brief of the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioner, Philip Morris USA v. Williams, 549 U.S. 346 (2007) (No. 05-1256); Brief of Oregon Forest Industries Council & Oregon Grocers Ass'n et al. as Amici Curiae Supporting Petition for Writ of Certiorari, Philip Morris USA v. Williams, 549 U.S. 346 (2007) (No. 05-1256); Brief of the Product Liability Advisory Council, Inc., as Amicus Curiae Supporting Petitioners, Philip Morris USA v. Williams, 549 U.S. 346 (2007) (No. 05-1256); Brief of the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioners, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) (No. 07-219); Brief of Washington Legal Foundation as Amicus Curiae Supporting Petitioners, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) (No. 07-219); Brief of the Product Liability Advisory Council, Inc., as Amicus Curiae Supporting Petitioners, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) (No. 07-219); Brief of the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioner, Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); Brief of the Product Liability Advisory Council, Inc., & the Business Roundtable et al. as Amici Curiae Supporting Petitioner, BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) (No. 94-896); AM. TORT REFORM FOUND. JUDICIAL HELLHOLES 2009/2010 (2009); VICTOR E. SCHWARTZ & CARY SILVERMAN, U.S. CHAMBER INST. FOR LEGAL REFORM, 101 WAYS TO IMPROVE STATE LEGAL SYSTEMS: A USER'S GUIDE TO PROMOTING FAIR AND EFFECTIVE CIVIL JUSTICE (2009).

7. *See, e.g.*, Brief of Federal Procedural Scholars as Amicus Curiae Supporting Respondent, Philip Morris USA v. Williams, 549 U.S. 346 (2007) (No. 05-1256); Brief of Oregon Trial Lawyers Ass'n as Amicus Curiae Supporting Respondent, Philip Morris USA v. Williams, 549 U.S. 346 (2007) (No. 05-1256); Brief of Sociologists, Psychologists, and Law and Economics Scholars as Amici Curiae Supporting Respondents, Exxon Shipping Co. v. Baker 128 S. Ct. 2605 (2008) (No. 07-219); Brief of the Ass'n of Trial Lawyers of America as Amicus Curiae Supporting Respondents, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (No. 01-1289); Brief of Certain Leading Social Scientists and Legal Scholars as Amici Curiae Supporting Respondents, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (No. 01-1289); CTR. FOR JUSTICE & DEMOCRACY, ENVIRONMENTAL TORT LAWSUITS: HOLDING POLLUTERS ACCOUNTABLE (2008); CTR. FOR JUSTICE & DEMOCRACY, PUNITIVE DAMAGES: RARE, REASONABLE, AND EFFECTIVE (2007).

Haslip,[8] *BMW of North America, Inc. v. Gore*,[9] *State Farm Mutual Automobile Insurance Co. v. Campbell*,[10] *Philip Morris USA v. Williams*,[11] to *Exxon Shipping Co. v. Baker*,[12] has expressed concern about the magnitude of some punitive damage awards, especially the ratio of punitive to compensatory damages and their relation to case characteristics. In *BMW*, the Court stated that "low awards of compensatory damages may properly support a higher ratio [of punitive to compensatory damages] if, for example, a particularly egregious act has resulted in only a small amount of economic damages."[13] The *BMW* Court outlined a three-factor test for evaluating whether a punitive damage was excessive: (1) the reprehensibility of the defendant's conduct; (2) the disparity between the compensatory award and the punitive damage award; and (3) the existence and amount of any alternative state sanctions for similar misconduct.[14] In *BMW* and again in *State Farm*, the Court further expressed a guideline indicating that harms involving financial injury should be seen as less deserving of high punitive damages ratios than harms involving personal injuries. In *Haslip*, the Court found that a punitive to compensatory damage ratio of 4:1 was "close to the line" on unconstitutionality.[15] In *State Farm*, the Court suggested that ordinarily punitive damages should not exceed compensatory damages, and a ratio of single digit (that is, 9:1) is the outer limit of punitive to compensatory damages.[16] The Court further stated "[o]ur jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[17]

Yet, Michael Rustad, in his review of punitive damages legislation across the United States, argued that when state legislatures have decided that punitive damages are a problem, they have enacted substantive or procedural reforms intended to curb excesses.[18] The procedural reforms include restrictions on pleading, discovery, evidence, jury instructions, increases in the standard of

8. 499 U.S. 1 (1991).

9. 517 U.S. 559 (1996).

10. 538 U.S. 408 (2003).

11. 549 U.S. 346 (2007).

12. 128 S. Ct. 2605 (2008).

13. *See BMW*, 517 U.S. at 582.

14. *See BMW*, 517 U.S. at 574-75. *See generally* Virginia Canipe, Note, *Crossing the Excessiveness Line: The Implications of* BMW v. Gore *on Multi-Billion Dollar Tobacco Litigation Punitive Damages*, 36 WAKE FOREST L. REV. 1157 (2001); Son B. Nguyen, Note, BMW of North America, Inc. v. Gore: *Elevating Reasonableness in Punitive Damages to a Doctrine of Substantive Due Process*, 57 MD. L. REV. 251 (1998).

15. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991); *see also* BMW of North America, Inc. v. Gore, 517 U.S. 559, 581 (1996) (reiterating holding in *Haslip*).

16. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

17. *Id.* (citing *Haslip* and *Gore*).

18. *See* Rustad, *supra* note 5, at 1300-01 (noting various state legislative reforms involving punitive damages); *see also* Sheila B. Scheuerman & Anthony J. Franze, *Instructing Juries on Punitive Damages: Due Process Revisited After* Philip Morris v. Williams, 10 U. PA. J. CONST. LAW 1147, 1168-91 (2008) (noting states' revisions to punitive damage instructions after *Haslip* and *State Farm*).

proof for punitive damages, and devices such as bifurcation and restrictions on the use of wealth to ensure greater judicial control over punitive awards, while substantive reforms include caps on the amount of the punitive damage award. Indeed, Rustad argued that the U.S. Supreme Court and state legislatures "have constructed a pro-defendant *iron cage*" around punitive damages.[19] The circumstances under which punitive damages are allowed and the relationship between compensatory and punitive damages vary dramatically from state to state.[20] As shown in Appendix A, in all but five states that allow punitive damages, such awards are substantially limited, either in definition or in application.[21]

Empirical research on punitive damages generally suggests that punitive damages do not endanger the legal system. Specifically, scholars have found that punitive awards have not increased in frequency over time; most awards are modest in size and show a reasonable proportionality between harm and potential harm of conduct; juries pay particular attention to the reprehensibility of conduct; and there is little evidence supporting the claim that juries are biased against businesses.[22] The most recent U.S. Supreme Court case involving punitive damages, *Exxon Shipping Co. v. Baker*, concerned maritime law but has implied relevance for state tort law. Therein, the Court agreed with the empirical findings, but with a major reservation.

Justice Souter, writing for the *Exxon Shipping* majority, reviewed part of the body of empirical evidence bearing on punitive damages.[23] He concluded that empirical research showed that there are "not mass-produced runaway awards"[24] and that "by most accounts the median ratio of punitive to compensatory awards has remained less than 1:1."[25] Justice Souter also concluded that the research showed no marked increase in awards over the past several decades. Nevertheless, he asserted, "the real problem, it seems, is the stark unpredictability of punitive awards."[26] He went on to refer to an analysis of the Civil Justice Survey of State Courts conducted by the Bureau of Justice Statistics (BJS), concluding:

> A recent comprehensive study of punitive damages awarded by juries in state civil trials found a median ratio of punitive to compensatory awards of just

19. *See* Rustad, *supra* note 5, at 1301 (discussing constraints on punitive damage awards).

20. *See* Appendix A (surveying legal and monetary limits on punitive damages by state).

21. *See id.* (indicating punitive damages not allowed in Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington).

22. *See* Brief of Neil Vidmar & Brian Bornstein et al. as Amici Curiae Supporting Respondent, Philip Morris USA v. Williams, 549 U.S. 346 (2007) (No. 05-1256) (reciting empirical findings indicating juries perform reasonably).

23. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2624-27 (2008) (citing punitive damage research)

24. *Id.* at 2624.

25. *Id.*

26. *Id.* at 2625.

> 0.62:1, but a mean ratio of 2.90:1 and a standard deviation of 13.81 . . . . Even to those of us unsophisticated in statistics, the thrust of these figures is clear: the spread is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories . . . . Other studies of some of the same data show that fully 14% of punitive awards in 2001 were greater than four times the compensatory damages . . . with 18% of punitives in the 1990s more than trebling the compensatory damages . . . . And a study of "financial injury" cases using a different data set found that 34% of the punitive awards were greater than three times the corresponding compensatory damages.[27]

Theodore Eisenberg, Michael Heise, and Martin Wells have replied to Justice Souter's analysis, arguing that Justice Souter missed the fact that variability of awards relates to the level of the compensatory awards.[28] To demonstrate this argument, Eisenberg and his co-authors reexamined the results of the study relied upon by the Court in *Exxon Shipping*. By comparing the levels of compensatory awards with the punitive award, those authors concluded that most of the variability in the punitive to compensatory award ratios was associated with cases at the low end of compensatory damage awards, specifically those involving less than $10,000 in compensatory damages.[29] In cases involving compensatory awards under $1000, the mean ratio was roughly 100:1, and cases involving compensatory awards under $10,000 had a ratio of approximately 10:1.[30] However, for cases involving over $10,000 in compensatory damages, the mean ratios were approximately 1.5:1 with standard deviations ranging from 1.31 to 3.58.[31] In short, a substantial amount of the variability in the punitive to compensatory damage ratios was associated with cases on the very low end of the monetary scale.

The research of Eisenberg and his co-authors represents an important contribution to understanding the profile of punitive damages, but it is incomplete. Previous research by Rustad, Eisenberg, and Vidmar and Rose has drawn attention to the causes of action as factors related to the likelihood and magnitude of punitive damages.[32] For example, Vidmar and Rose's research

27. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2625 (2008) (citations omitted); *see generally* Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263 (2006).

28. See Theodore Eisenberg et al., *Variability in Punitive Damages: An Empirical Assessment of the U.S. Supreme Court's Decision in* Exxon Shipping v. Baker (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 09-011), *available at* http://ssrn.com/abstract=1392438.

29. *See id.* at 14 (highlighting punitive-compensatory ratio).

30. *See id.* at 15, Table 2 (presenting summary statistics of jury cases involving punitive and compensatory damages).

31. *See id.* at 15, Table 2 (analyzing summary statistics).

32. *See generally* Theodore Eisenberg et al., *The Predictability Of Punitive Damages*, 26 J. OF LEGAL STUD. 623 (1997) (noting strong correlation between punitive and compensatory damages); Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WISC. L. REV. 15 (1998) (indicating no nationwide punitive damage crisis); Michael Rustad, *In Defense of Punitive Damages in Product Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1 (1992) (suggesting punitive damage awards in

indicates that, in Florida, while the median ratio of punitive to compensatory damages over all cases between 1989 and 1998 was 0.67:1, there was substantial variability across case types.[33] Cases involving funeral homes' improper treatment of dead persons had a median ratio of 6.3:1, while cases involving discrimination or harassment claims had a ratio of 2.3:1.[34] Vidmar and Rose also documented nuances in juries' application of punitive damages within the subset of products and premises liability cases.[35] In one case a jury awarded only compensatory damages against a corporate defendant but levied punitive damages (in a modest amount) against its drunken employee who was driving the delivery truck that injured the plaintiff.[36]

It is important to observe that the Supreme Court itself has been inconsistent in its application of the proportionality ratio. Although in *State Farm* Justice Kennedy, writing for the majority, asserted, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," the Court previously acknowledged that there are cases in which the compensable injury will be small but the reprehensibility of the conduct is great.[37] Thus, in 1993 the Court approved an extremely large ratio in a case involving a financial injury. *TXO Production Corp. v. Alliance Resources Corp.*[38] involved a business dispute over an oil and gas contract. The Court upheld a jury award of $10,000,000 in punitive damages compared to a compensatory damage award of only $19,000 (a 526:1 ratio), describing the behavior of TXO as "egregiously tortious conduct."[39] In March 2009, the Court denied certiorari in a re-appeal of the *Philip Morris USA v. Williams* verdict, thus tacitly allowing a punitive award of $79,500,000 against a compensatory award of $502,100, yielding a punitive to compensatory ratio of 158:1.[40]

In the present research, we focus only on jury verdicts and ignore verdicts rendered by judges in bench trials. We do so on the grounds that most of the criticism regarding punitive damages centers on the jury and that cases decided in bench trials tend to be different than cases decided by juries, making

products liability cases should be studied empirically); Neil Vidmar & M. R. Rose, *Punitive Damages by Juries in Florida: In Terrorem and in Reality*, 38 HARV. J. ON LEGIS. 487 (2001) (studying punitive damage awards in Florida).

33. *See* Vidmar & Rose, *supra* note 33, at 493-94 (noting variability in median across years explained by case type).

34. *See id.* at 500 (discussing variability of awards by cause of action).

35. *See id.* at 496-500 (noting punitives awarded in 16 of 20 products liability, 14 of 17 premises liability cases).

36. *See id.* at 500 (reciting facts of premises liability case involving alcohol consumption).

37. 538 U.S. 408, 425 (2003).

38. 509 U.S. 443 (1993).

39. *Id.* at 466.

40. *See* Philip Morris USA Inc. v. Williams, 129 S. Ct. 1436 (2009) (dismissing writ of certiorari as improvidently granted).

comparisons difficult.[41]

We first develop a profile of punitive damages from the 2005 Civil Justice Survey of State Courts.[42] We supplement these data with a second database involving punitive damages claims in Arizona, California, Florida, Illinois, Missouri, New Jersey, New York, Pennsylvania, and Texas. Using Westlaw, we developed a systematic search method that provided qualitative information on the wide variety of cases reported in 2005 by jury verdict reporters. While verdict reporters are selective in reporting cases, they do contain additional verdicts outside of the selected counties of the BJS data and, more importantly for our present purpose, they often provide rich qualitative details about causes of action and procedural processes associated with the case and resulting verdict. These details provide insight bearing on the litigation outcome.[43]

II. METHOD

The first part of our analysis uses the 2005 Civil Justice Survey of State Courts. Although the 2005 survey added additional counties to its list of surveyed courts, the present report is based upon the publicly available data archived in the Interuniversity Consortium for Political and Social Research (ICPSR) at the University of Michigan. The data provide information on all completed civil jury cases from the forty-six largest county courts in the United States. These data are statistically representative of the seventy-five largest county courts in the United States.[44] As mentioned above, in contrast to previous surveys, the 2005 data include a variable indicating whether, in the pleadings, either party requested punitive damages. These new data on requests for punitive damages allow for a more accurate measure of the rate of prevailing in cases with claims for punitive damages.

To complement the BJS data, we constructed a database from verdict reporters in Westlaw for all jury trial cases resolved in 2005 where the court reporter mentions punitive damages. Using Westlaw's jury verdict reporters for each state, we searched for "punitive damages," excluding all cases that did not match our criteria.[45] The cases are from Arizona (forty-five cases),

41. *See* Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263, 263-65 (2006) (distinguishing jury- from court-awarded damages).

42. *See generally* LYNN LANGTON & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005 (2008) (providing statistics regarding damage award amounts). The 2005 survey added a new variable that was not coded in the 1992, 1996 and 2001 surveys, namely whether punitive damages were requested in the pleadings by one of the parties. This allows us to estimate the success rates when plaintiffs seek punitive damages.

43. *See* Cynthia Lee & Nicole Waters, A Verdict on the Reporters: The Representativeness of Commercially Published Jury Reports, Presentation at the Annual Meeting of the Law and Society Association (May 25, 2009) (noting discrepancy between Civil Justice Survey data and jury verdict reports).

44. *See* http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/23862 (collecting data on general civil and non-trial 2005 matters).

45. We coded by: (1) state; (2) Westlaw number; (3) whether the case was tried by a jury; (4) the date of

California (eighty-five cases), Florida (thirty-four cases), Illinois (twenty cases), Missouri (forty-seven cases), New York (thirty-three cases), New Jersey (fifteen cases), Pennsylvania (thirteen cases), and Texas (110 cases). Although Lee and Waters' 2009 research indicates that verdict reports are often not representative of all the cases appearing in the courts, they often contain information bearing on the procedural details after the filing of the claims and the substantive content of the claims. Both of these pieces of information allow inferences as to why the jury awarded or did not award punitive damages and on the amounts of the awards.

III. RESULTS FROM THE BJS DATABASE

A. Frequency of Punitive Damage Requests

We first examine how frequently either party requests punitive damages. Typically, the party is the plaintiff; but in some instances, such as business disputes, the defendant asks for punitive damages by counterclaim. The bottom row in Table 1 reports that in the forty-six largest counties in the U.S. in 2005, there were 6472 cases tried by juries. Punitive damages were requested in 567 instances, or approximately 9% of all jury trials.

Table 1 disaggregates these overall data by the causes of action as categorized by the BJS coding system reporting the number of times that at least one of the parties requested punitive damages.

TABLE 1: TOTAL AND PUNITIVE DAMAGES, BY CLAIM TYPE

PLAINTIFF CLAIM TYPE	NUMBER OF CASES	PERCENT OF ALL TRIALS	NUMBER OF CASES REQUESTING PUNITIVE DAMAGES	PERCENT OF CASES REQUESTING PUNITIVE DAMAGES
Motor Vehicle Tort	2,673	42%	92	3%
Premises Liability	803	12%	22	3%
Product Liability (Asbestos)	51	1%	6	12%

the verdict; (5) the claim type according to the BJS category,; (6) the type of tort involved, including personal injury, dignitary, and financial injury; (7) the number of plaintiffs; (8) the number of defendants; (9) the amount sought in damages; (10) whether the plaintiff prevailed on any compensatory negligence defense; (11) the total amount of compensatory award; (12) whether the plaintiff prevailed on a punitive negligence claim; (13) the total amount of the punitive award, if any; (14) reasons the plaintiff did not prevail on punitive claim, including that: (a) the judge refused to allow before trial; (b) the judge allowed plaintiff to argue claim but refused to instruct jury; (c) the jury refused to award punitives; (d) the jury awarded punitives, but the judge rejected the award in judgment; (e) the parties settled the punitive damages claim during or before trial; (f) the jury found punitive negligence but gave no punitives; (15) the jury awarded punitives but the judge remitted the amount (1 = yes; 2 = no); (16) a brief synopsis of the case and any unusual characteristics.

Product Liability (Other)	118	2%	13	11%
Intentional Tort	212	3%	49	23%
Malpractice (Medical)	980	15%	58	6%
Malpractice (Other)	51	1%	5	10%
Slander, Libel, Defamation	40	1%	18	45%
Animal Attack	39	1%	6	15%
Conversion	29	0%	12	41%
False Arrest /Imprisonment	22	0%	4	18%
Other Negligence	170	3%	13	8%
Fraud	255	4%	71	28%
Seller Plaintiff (Contract)	166	3%	18	11%
Buyer Plaintiff (Contract)	315	5%	45	14%
Mortgage Foreclosure	5	0%	1	20%
Employment (Discrimination)	117	2%	42	36%
Employment (Other)	117	2%	34	29%
Rental/Lease Agreement	51	1%	9	18%
Intentional/Tortious Interference	51	1%	18	35%
Partnership Dispute	21	0%	7	33%
Other/Unknown Commercial	47	1%	11	23%
Subrogation	6	0%	2	33%
Eminent Domain/Condemnation	54	1%	0	0%
Title or Boundary Dispute	26	0%	8	31%
Other/Unknown Real Property	8	0%	3	38%
Total/ Average Percent	6,427	99%	567	8.8%

Table 1 demonstrates that plaintiffs' requests for punitive damages varied significantly by cause of action. Requests for punitive damages were most frequently made in suits involving slander or defamation (45%), conversion

(41%), real property disputes (38%), employment discrimination (36%), tortious interference (35%), partnership disputes (33%) and subrogated claims (33%). Plaintiffs in cases involving motor vehicle claims (3%), premises liability claims (3%) and medical malpractice claims (6%) rarely sought punitive damages. In non-asbestos product liability cases, one of the most frequently cited topics in the controversy over punitive damages, punitive damages were only requested 11% of the time.[46]

B. The Likelihood of Prevailing on General Negligence and Punitive Damages

Ordinarily, the party requesting punitive damages cannot prevail unless first prevailing on the claim of general compensatory negligence.[47] There is a general presumption that a party making a claim for punitive damages has a strong case for compensatory negligence. The second issue of interest relating to claims for punitive damages is the likelihood of the jury awarding punitive damages. Table 2 reports the frequency with which the party requesting punitive damages prevailed.

TABLE 2: PLAINTIFF WINS BY PLAINTIFF CLAIM TYPE

PLAINTIFF CLAIM TYPE	PUNITIVE DAMAGES REQUESTED	WINS ON COMPENSATORY	PERCENT WIN ON COMPENSATORY	WINS ON PUNITIVE	PERCENT WIN ON PUNITIVE
Motor Vehicle Tort	92	59	64%	12	13%
Premises Liability	22	9	41%	1	5%
Product Liability (Asbestos)	6	2	33%	1	17%
Product Liability (Other)	13	1	8%	0	0%
Intentional Tort	49	33	67%	21	43%
Malpractice (Medical)	58	16	28%	4	7%
Malpractice (Other)	5	3	60%	1	20%
Slander, Libel, Defamation	18	12	67%	9	50%

46. Nineteen of the punitive damages cases arising out of product litigation involved prescription drugs (such as Phen-fen), while three involved tobacco.

47. *See* Wells v. Smith, 297 S.E.2d 872, 881 (W. Va. 1982) (affirming jury award of punitive damages notwithstanding lack of compensatory damages). The West Virginia Supreme Court of Appeals held that a defendant could be liable for punitive damages even if the jury did not award the plaintiff *any* compensatory damages. Indeed, in *Shulman v. Hunderfund*, a New York defamation case discussed later in this paper, the jury found the defendant liable and awarded $100,000 in punitives but gave nothing for compensatory damages. *See* Shulman v. Hunderfund, 852 N.Y.S.2d 178, 180 (N.Y. App. Div. 2008) *rev'd* 905 N.E.2d 1159 (N.Y. 2009).

Animal Attack	6	6	100%	0	0%
Conversion	12	6	50%	4	33%
False Arrest /Imprisonment	4	0	0%	0	0%
Other Negligence	13	7	54%	4	31%
Fraud	71	54	76%	26	37%
Seller Plaintiff (Contract)	18	13	72%	3	17%
Buyer Plaintiff (Contract)	45	31	69%	12	27%
Mortgage Foreclosure	1	1	100%	0	0%
Employment (Discrimination)	42	25	60%	5	12%
Employment (Other)	34	19	56%	11	32%
Rental/Lease Agreement	9	6	67%	2	22%
Intentional /Tortious Interference	18	11	61%	5	28%
Partnership Dispute	7	6	86%	3	43%
Other/Unknown Contract	11	8	73%	4	36%
Subrogation	2	2	100%	1	50%
Eminent Domain/Condemnation	0	0	--	--	--
Title or Boundary Dispute	8	0	--	2	25%
Other/Unknown Real Property	3	0	--	--	0%
TOTAL /MEAN PERCENTAGE	567	330	58%	131	23%

As Table 2 shows, a party's request for punitive damages is generally associated with prevailing on liability for compensatory negligence, but is not a guarantee of winning. Columns three and four of Table 2 present, by cause of action, the frequency with which cases involving punitive damages claims resulted in a party prevailing on liability for general compensatory negligence. The only category in which claims for punitive damages always resulted in a compensatory win for the plaintiff were cases involving animal attacks and mortgage foreclosures. The number of such cases was very small, however, (six and one, respectively) and none of the cases involving animal attacks or mortgage foreclosures resulted in large punitive damage awards. Overall, the

chance of prevailing on a compensatory negligence claim if punitive damages were requested was 58%, but, again, the outcome varied by cause of action. In short, requesting punitive damages in pleadings was no guarantee that a party would prevail even on the general compensatory negligence claim.

The last two columns in Table 2 report the number of instances in which the plaintiff prevailed on the punitive damages claim after prevailing on compensatory liability. The last row in Table 2 shows that, of the 567 instances in which a party requested punitive damages, such damages were awarded 131 times, or in 23% of trials. However, if we examine the rate of success in punitive damages awards by the type of claim, we again find considerable variability. In particular, despite assertions about the dangers posed by product liability cases mentioned in the introduction to this article, there was only one instance of a punitive damage award in product liability cases in the 2005 survey and that involved an asbestos claim. There were no punitive damages awarded in non-asbestos product liability cases. There was only one punitive damage award among the premises liability cases. In contrast, parties requesting punitive damages in slander and defamation cases—some of which, as we will see, appear to arise out of business disputes—prevailed half of the time. In intentional torts and partnership dispute cases where the plaintiff or defendant requested punitive damages, the jury awarded those damages 43% of the time. In short, these data contradict the images fostered by tort reform groups that juries side with individuals suing businesses and provide large punitive damage awards. Rather, the beneficiaries of punitive damages are often business plaintiffs suing business defendants.[48]

C. Variables Associated with Failure to Obtain Punitive Damages

The BJS data show only whether the pleadings indicated that punitive damages were requested. The data, however, do not give further information bearing on what occurred after the parties requested punitive damages. Yet, as Table 2 indicates, asking for punitive damages by no means guarantees that a jury will award compensatory or punitive damages. Indeed, the success rates were quite low for most causes of action. One explanation for these low success rates, as indicated in Table 2, was that the party did not succeed on the claim of compensatory damages.[49]

While we will discuss the Westlaw jury report data in detail in the next section, it is worthwhile digressing to those data here because they provide additional insights about Table 2, specifically, the procedural processes bearing on the failure of plaintiffs to recover punitive damages.[50] Many states have

48. *See* VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (2000) (discussing jury attitudes toward business defendants).

49. Looking at the rates of prevailing on liability, plaintiffs are as likely to prevail on liability whether they ask for punitive damages or not.

50. We caution, again, that the Westlaw data are neither comprehensive nor a random sample of cases.

engaged in limiting punitive damages awards by either requiring "clear and convincing evidence" or by limiting the pleading of punitive damages to a separate stage only after a plaintiff succeeds in winning compensatory damages. Rustad's *Iron Cage* outlines, in detail, the procedural limitations on punitive damages in each state.[51] We focus on the six primary paths that result in the non-award of a plaintiff's punitive damages claim during the trial.

1. *The trial judge refused the plaintiff the opportunity to plead punitive damages before the trial began.*

In *Pena v. Ford Motor Co.*,[52] a product liability case, the defendants received partial summary judgment on the punitive damages claim before the trial started. A Missouri case, *Locke v. Suntrup Hyundai Inc.*[53] involved a sales tax dispute over the purchase of an automobile; the judge denied a claim for punitive damages. In *Nolan v. Myerly*,[54] an animal attack case, the defendant was granted summary judgment before the trial began. We suspect, but cannot prove from the present data, that this is the most frequent cause of failure to win on an initial punitive damages claim. In most jurisdictions, the plaintiff must demonstrate willful, wanton, or malicious behavior, and judges appear to be exercising their statutory or common law discretion in pre-trial proceedings.[55]

2. *The plaintiff decided, for whatever reason, not to plead for punitive damages at the start or end of the trial.*

In *Tual v. Blake*,[56] the plaintiff initially asked for but then did not press for punitive damages in an intentional tort case.

3. *The plaintiff did not prevail on compensatory liability.*

As already noted, Table 2 indicates that failure to prevail on compensatory damages accounted for a substantial number of cases in which punitive damages were sought. Table 2 also shows that the success rates in obtaining punitive damages varied substantially by case type. Generally, regardless of the type of case, asking for punitive damages is not a good predictor of success

Furthermore, the record of procedural details is often incomplete and thus cannot provide reliable estimates of the actual frequencies of the various procedural events. However, despite these shortcomings, the data yield important information bearing on why litigants who request punitive damages in the pleadings often fail to receive them.

51. *See generally* Rustad, *supra* note 5, at 1299 (noting "far-reaching procedural safeguards" constraining punitive damages). Rustad surveys the standards and limits on punitive damages in all 51 United States jurisdictions in his article. *See* Rustad, *supra* note 5, at 1370-1417 (surveying all states and D.C.)

52. No. CV2002-022937, 2005 WL 3288763 (Ariz. Super. Ct. Aug. 26, 2005) (verdict summary) (assessing costs for defendant automobile maker).

53. No. 04CC-003604, 2005 WL 4858939 (Mo. Cir. Ct. Oct. 12, 2005) (verdict summary) (awarding $936 to plaintiff for amount sales tax on claim of misrepresentation of contract).

54. No. RIC359499, 2005 WL 4880604 (Cal. Super. Ct. June 17, 2005) (verdict summary) (awarding $207,600 for plaintiff).

55. *See* Rustad, *supra* note 5, at 1327 (describing different jurisdictions' approaches to punitive damages).

56. No. EC034380, 2005 WL 3677180 (Cal. Super. Ct. Nov. 18, 2005) (verdict summary) (awarding $30,000,000 in damages).

in obtaining compensatory damages.

4. *The judge deferred the decision on punitive damages until the end of the trial, but then ruled against instructing the jury that they could consider punitive damages or, alternatively, allowed the pleading but subsequently remitted the award.*

Leon v. Billings[57] involved a medical malpractice claim accompanied by a claim of battery. The judge allowed the plea and argument of punitive damages but then entered a directed verdict against punitive damages at the close of the plaintiff's case.[58] In *Tummillo v. Gallagher*,[59] plaintiff condominium buyers sued the sellers for fraud, alleging that the sellers failed to disclose the full extent of water damage to the condo. The jury awarded $5000 in punitive damages, but nothing for compensatory damages and the trial judge then remitted the entire punitive award.

5. *The jury awarded compensatory damages but refused to award punitive damages.*

In *Ameri v. Bouzari*,[60] a business dispute involving charges of fraud, the jury found punitive negligence on the part of both the plaintiff and defendant and consequently awarded no punitive damages to either party. *Cappa v. CrossTest Inc.*[61] involved an employment claim in which there was a nonsuit on the plaintiff's claim; the jury found for the cross-complainant on a counterclaim, including a finding of malice, but awarded no punitive damages. *Hall-Edwards v. Ford Motor Co.*[62] involved a product liability claim. The jury found that Ford placed a vehicle on the market with a defect relating to its stability and handling, which was a legal cause of the accident, but no punitive damages were awarded.[63]

6. *The opposing parties reached a private settlement on punitive damages before or during the trial, thus preempting the jury from hearing the punitive damages claim.*

In *Witherow v. Omm, Inc.*,[64] a negligence claim involving a construction death, the parties privately settled the claim for punitive damages, but the negligence claim went to the jury and resulted in nearly $7,000,000 in

57. No. CI002-2769 Div. 33, 2005 WL 3626816 (Fla. Cir. Ct. Aug. 18, 2005) (verdict summary) (awarding $1,250,000 in damages).

58. *See id.* (reciting facts).

59. No. 02 L 844, 2005 WL 3941260 (Ill. Cir. Ct. Sept. 29, 2005) (verdict summary) (noting verdict of $5000 reduced to $0 by judge order).

60. No. CV2004-006498, 2005 WL 3728776 (Ariz. Super. Ct. Oct. 19, 2005) (verdict summary) (noting mixed verdict, no damages on any count).

61. No. CIV 440552, 2005 WL 4708227 (Cal. Super. Ct. Dec. 19, 2005) (verdict summary) (indicating jury elected not to award punitive damages despite finding of malice).

62. No. 99-9450CA 22, 2005 WL 3999843 (Fla. Cir. Ct. Nov. 15, 2005) (verdict summary) (noting jury awarded plaintiff $61,200,000).

63. *See id.*

64. No. 02-09668 Div. F, 2005 WL 3030126 (Fla. Cir. Ct. July 23, 2005) (verdict summary) (noting award of $6,887,000 on negligence claim).

compensatory damages. In *Meuser v. Weaver*,[65] a motor vehicle lawsuit, the parties stipulated to $100,000 in punitive damages in a pre-trial agreement. In *Williams v. Renaissance at Hillside Inc.*,[66] an Illinois case involving claims that nursing home negligence led to bedsores and required a ventilator for the patient over a period of two years, the defendant settled for $2,800,000 shortly after the trial judge ruled that the jury could hear any claims relating to punitive damages.

Finally, attention should be given to the fact that, as already mentioned above, in some cases (especially involving financial disputes), the punitive damages claims were made in counterclaims by defendants. This significantly clouds the picture of who receives punitive damages. In a few instances, the plaintiff asked for punitive damages and the defendant, in a countersuit, asked for punitive damages. In other cases, while the plaintiff did not request punitive damages, the defendant pled for punitive damages.

D. Size and Ratios of Punitive Damages to Compensatory Damages by Type of Case

We turn now to the central concerns of the Supreme Court about the overall size of awards, the ratio of punitive to compensatory damages, and the relationship of case characteristics to the ratio of punitive to compensatory damages. We examine this problem from several directions. First, we consider the Supreme Court's assertion in *BMW* and later in *State Farm* that harms involving financial injury are usually less deserving of high punitive to compensatory damage ratios than harms involving personal injuries. In theory, it would be important to examine each of the individual BJS categories set out in Tables 1 and 2, but doing so would not allow meaningful comparisons because of the small number of cases in most of the categories. However, the BJS database combines the individual categories into four general categories of claims: personal injury torts, financial injury torts, employment related claims and claims related to property. We utilize this same categorization system as the first part of our exploration of the relationship of punitive to compensatory awards. Table 3 reports the punitive to compensatory relationships on a number of statistical dimensions.

65. No. CIV223098, 2005 WL 5266836 (Cal. Super. Ct. Mar. 2, 2005) (verdict summary) (indicating stipulated punitive award of $100,000).

66. No. 02-1-002286, 2005 WL 3054475 (Ill. Cir. Ct. Oct. 19, 2005) (verdict summary) (summarizing $2,800,000 award).

TABLE 3: PUNITIVE AND COMPENSATORY DAMAGES, BY CASE TYPE

VARIABLE	PERSONAL INJURY TORT	FINANCIAL INJURY TORT	EMPLOYMENT	PROPERTY
Number Asking for Punitive Damages	281	152	76	58
Percent Asking for Punitive Damages	6%	16%	32%	22%
Number Winning Punitive Damages	53	45	16	17
Percent Winning Punitive Damages	19%	30%	21%	29%
Mean Compensatory Damages When Punitive Damages Were Awarded	$2,250,987	$2,882,828	$4,425,398	$2,381,849
Modal Compensatory Damages if Punitive Damages Were Awarded	$118,000	$125,000	$305,954	$185,105
Mean Punitive Damages if Punitive Damages Were Awarded	$2,175,978	$2,196,750	$8,327,674	$4,156,070
Modal Punitive Damages if Punitive Damages Were Awarded	$100,000	$150,000	$345,000	$800,000
Mean Punitive: Compensatory Ratio	5:2	3:1	11:6	19:4
Median Punitive: Compensatory Ratio	1:1	1:1	1:1	4:3

We first look at the percent of cases where punitive damages were requested, and the rates at which they were awarded. As Table 3 shows, personal injury torts had the fewest requests for punitive damages (6%) and the lowest success rate (19%). Litigants in financial injury cases requested punitive damages 16% of the time and prevailed on the request 30% of the time. Employment-related claims requested punitive damages about one-third of the time (32% of cases), but the requesting litigant prevailed in only about one case of five (21%). Litigants in property cases requested punitive damages in 22% of cases and prevailed 29% of the time.

Table 3 also shows that the mean compensatory award in all four types of cases exceeded $2,000,000, but claims involving employment were nearly twice as large as the other three categories. This possibly reflects the fact that many employment-related claims involved multiple plaintiffs, including class actions. However, the modal compensatory awards were in the lower hundreds of thousands for all four case types. In short, the differences between mean and modal awards suggest substantial variation in the underlying compensatory negligence claims. Looking at the average and modal punitive awards, Table 3 shows that employment cases had the highest mean and modal punitive awards among the four case types. Examining the ratio between compensatory and

punitive damages, we see that the mean ratio varied across case types. However, the last row of Table 2 shows that the median ratio for three of the case types was 1:1, with the median for property cases slightly above, at 4:3.

There are alternative ways to look at the data that may be more illuminating. For instance, Table 4 presents data regarding the number of cases resulting in punitive to compensatory ratios exceeding a single digit (10:1 or higher).[67]

TABLE 4: THE RATIO OF COMPENSATORY AND PUNITIVE DAMAGES

COMPENSATORY AWARD	NUMBER OF CASES	MEAN PUNITIVE TO COMPENSATORY RATIO	NUMBER OF CASES WITH RATIOS > 9:1
$0-999	6	Undefined	4
$1k-9,999	16	5.3:1	5
$10k-99,999	33	4.2:1	4
$100k-999,999	42	1.8:1	0
$1M-9,999,999	26	2.4:1	1
$10M or Greater	8	1.0:1	0
TOTAL	131		14

Table 4 shows that *only 14* of the 131 cases resulting in a punitive damages award had ratios exceeding a single digit. These figures, however, need further clarification.[68]

E. Punitive Damages Ratios in Cases with Small Compensatory Damages

The data in Tables 3 and 4 provide enough information to compile a basic profile of punitive to compensatory damage ratios. However, as Table 3 shows, dramatically different conclusions can be drawn from the data, depending on whether the summary statistic is the mean or the median award. At some level summary statistics cannot fully address concerns expressed in the various Supreme Court decisions about the uncertainty of punitive damages or the appropriateness of the ratios between punitive and compensatory damages. As we reviewed in the introduction to this article, the Supreme Court has recognized that there are classes of awards where compensable injury will

67. *See generally* Eisenberg, *supra* note 28 (stratifying cases by the amount of money awarded in compensatory damages). Eisenberg found that in the BJS 1992, 1996 and 2000 samples the highest punitive to compensatory ratios involved cases in which compensatory awards were under $10,000. *Id.* at 15-16.

68. The low number of cases with a ratio exceeding the Supreme Court's specification of single digits can also be weighted even lower; all of the cases with a punitive damage award and a compensatory award of less than $1000 (the first row of Table 4) have no compensatory damage award, meaning that the ratio between punitive and compensatory damages is incalculable.

be modest (or nil) but the behavior is judged to be highly reprehensible. *Shulman v. Hunderfund*,[69] was a defamation case in which the jury awarded punitive damages for $100,000, but gave no award for compensatory damages. The BJS database limits our insights about punitive damages cases decided by juries because it lacks substantive details about the cases. Therefore, we now turn to our database constructed from Westlaw, emphasizing both qualitative and quantitative data.[70]

IV. PUNITIVE DAMAGES: A QUANTITATIVE AND QUALITATIVE ANALYSIS BY SELECTED STATES

As we just discussed, some cases (such as *Shulman v. Hunderfund*) appear to demonstrate exceptions to the single-digit standard. Thus, while the BJS quantitative information provides us with representative general patterns, we argue that a qualitative analysis will help to place the jury verdicts in factual context.[71] In the discussion that follows, we focus on punitive to compensatory ratios that exceed the single-digit standard, but in a few instances also draw attention to some very large punitive awards even when the punitive to compensatory ratios were nevertheless below a single digit.

A. Arizona

A search of Arizona's jury verdict reports revealed forty-five cases in which a party requested punitive damages. However, only three cases resulted in punitive damages, one of which exceeded the single-digit ratio. Appendix A shows that Arizona's standard for punitive damages requires that the defendant engage in behavior that involves a substantial risk of harm, for both general and specific deterrence, or behavior that constitutes "outrageous conduct."[72] *Burden v. May*[73] involved an intentional tort claim by an off-duty police officer, still in uniform, who alleged that he had been assaulted in a bar by a hockey player. The jury awarded the plaintiff $1570 in compensatory damages and $25,000 in punitive damages, yielding a punitive to compensatory ratio of 16:1.[74] While this case exceeds the Supreme Court's suggested ratio of 9:1, the actual size of the awards ($1570 and $25,000) are far lower than the "runaway" punitive damage awards that legislators and lobbyists point out when

69. 905 N.E.2d 1159 (N.Y. 2009).

70. The complete data from the Westlaw research is available upon request from the authors.

71. Keep in mind that, unlike the BJS data, the cases are not a random sample and are almost certainly weighted toward plaintiffs emerging as winners, often with large awards.

72. *See* Hawkins v. Allstate Ins. Co., 733 P.2d 1073, 1080 (Ariz. 1987) (noting punitive damages available when plaintiff proves defendant acted with "evil mind"); Smith v. Chapman, 564 P.2d 900, 903 (Ariz. 1977) (indicating punitive damages available in Arizona for outrageous conduct or reckless indifference). *See generally* RESTATEMENT (FIRST) OF TORTS § 908, cmt. b (1939).

73. No. 1 CA-CV 06-0486, 2007 WL 5447050 (Ariz. Ct. App. Dec. 4, 2007)

74. *See id.* at 1-2 (reciting facts).

advocating for changes to the tort system.[75]

B. California

The Westlaw search of verdict reports yielded eighty-six trials in which one of the litigating parties requested punitive damages in the pleadings, but only forty-one of the cases involved punitive damages claims at trial.[76] Some of these trials overlapped with the BJS cases. Fourteen of the cases involved punitive ratios of 1:1 or less; eleven had ratios of 2:1 or less; five had ratios of 4:1 or less; six had ratios of less than 10:1; and five cases exceeded the Supreme Court's single-digit guideline.

The largest punitive to compensatory ratio was in *iTech Group Inc. v. National Semiconductor*.[77] The case involved a commercial dispute in which the economic loss was $234,358 and the punitive award was over $15,000,000, resulting in a ratio of 64:1. iTech was a start-up company that alleged breach of contract by National Semiconductor under the parties' software licensing agreement and fraud for misstatements National made relative to its stated intent to provide source code software to iTech.[78] In certain ways, *iTech* is similar to *TXO*, in which the Supreme Court allowed an extremely large punitive to compensatory ratio in a business dispute. Both *iTech* and *TXO* illustrate again that many of the large punitive damage awards are in cases that involve a business-to-business dispute; these cases are often ignored by those seeking to reform or limit punitive damages by focusing on consumers suing businesses.

A second case demonstrates the use of punitive damages as a method of punishing behavior that society views as reprehensible. In *Goddard v. Holy Cross Catholic Cemetery*,[79] a cemetery lost cremated remains (called cremains) and conspired not to report the loss to the deceased's family while still selling the plaintiffs a headstone for the grave. The jury awarded $12,113 in actual damages and $400,000 in punitives, yielding a ratio of 33:1.[80] *Goddard* is a case where the ability of the jury to award a large punitive damage was limited by the cost of the product, in this case $12,113, which is a small amount. To express the reprehensibility of the action, the jury rendered a large punitive

75. *See* Engle *Verdict Defies Common Sense, Florida Law; PhilipMorris Says Court Created Runaway Jury*, BUSINESS WIRE, July 14, 2000 *available at* http://www.allbusiness.com/legal/trial-procedure-jury-trial/6470981-1html (discussing $145 billion jury verdict).

76. *See* CAL. CIV. CODE § 3294(a) (2010). Compared to Arizona's standard, California's standard for punitive damages is more liberal, allowing for punitive damages when the defendant engages in oppression, fraud, or malice. *Id.*

77. No. 1-02-CV-810872, 2005 WL 3974505 (Cal. Super. Ct. May 27, 2005) (verdict summary) (awarding $15,234,358 in punitive damages).

78. *See id.* (reciting facts).

79. No. GIC833693, 2005 WL 2297579 (Cal. Super. Ct. Sept. 1, 2005) (verdict summary) (noting verdict award of $412,113).

80. *See id.*

award. *Goddard* is a single example of a wide set of cases in California (and a long history of tort cases) involving issues of desecrating dead bodies.[81]

In *Radosevich v. Amco Insurance Co.*,[82] a homeowner sued Amco for bad faith denial of coverage after an Amco adjustor asserted that a water leak in her home was a pre-existing long term leak; the plaintiff produced counter-evidence.[83] The jury awarded $88,830 in compensatory damages and $1,500,000 in punitive damages, resulting in a ratio of 17:1.[84] *Griffin Dewatering Corp. v. Northern Insurance Co. of New York*[85] involved another insurance claim. The plaintiff alleged the insurer failed to defend the policyholder against a claim.[86] The jury awarded $1,061,188 in compensatory damages and $10,000,000 in punitive damages for a ratio of approximately 10:1.[87]

Morris v. Western Convalescent[88] was a lawsuit following allegations of abuse and neglect of a patient in a nursing facility who underwent a leg amputation. The jury awarded $830,108 in compensatory damages and $12,000,000 in punitive damages for a ratio approaching 15:1.[89]

Other cases that yielded large ratios just short of the single-digit guideline apparently took damage to reputation into account. For example, in *O'Lee v. Compuware Corp.*,[90] a wrongful termination and defamation suit, Compuware fired several employees for running a side business with a contractor and falsifying invoices for personal gain, among other reasons, and the employees filed a wrongful termination and defamation suit.[91] The jury found that Compuware falsified evidence relating to the firings and awarded the plaintiffs $1,150,000 in compensatory damages and $10,000,000 in punitive damages, yielding a ratio just short of 9:1.[92] *O'Lee* is consistent with claims that juries (and judges) often examine whether a defendant engaged in a cover-up of a

81. *See* Christensen v. Superior Court, 820 P.2d 181, 193, 202 (Cal. 1991) (ruling family members can sue cemeteries and crematories for negligent mishandling of decedent's remains). The court held, however, that family members must witness the conduct in question to establish intentional infliction of emotional distress. *See id. See generally* Alex W. Craigie, *Burial of a Tort: The California Supreme Court's Treatment of Tortious Mishandling of Remains in* Christensen v. Superior Court, 26 LOY. L.A. L. REV. 909 (1992-1993) (exploring background of tortious liability for mishandling human remains and examining *Christiansen* decision).

82. No. 2002076548, 2005 WL 4126683 (Cal. Super. Ct. Apr. 25, 2005) (verdict summary).

83. *See id.* (reciting facts).

84. *See id.* (indicating amount of award).

85. No. BC310030, 2005 WL 2297571 (Cal. Super. Ct. June 30, 2005) (verdict summary).

86. *See id.* (reciting facts).

87. *See id.* (noting value of damage award).

88. No. BC310030, 2005 WL 2297571 (Cal Super. Ct. June 30, 2005) (verdict summary).

89. *See id.* (indicating amount of award).

90. No. 406409, 2005 WL 2428694 (Cal. Super. Ct. July 7, 2005) (verdict summary).

91. *See id.* (reciting facts). Compuware alleged that the employees were running a side business with a contractor and without Compuware's knowledge; that they had falsified invoices for personal gain and conspired with a contractor, and had an illicit and undisclosed relationship. *See id.*

92. *See id.* (noting damage award).

problem and whether the plaintiff can provide a "smoking gun," or other explicit evidence of the cover-up. For example, in *Mathias v. Accor Economy Lodging*,[93] Judge Posner upheld a ratio of punitive to compensatory damages of 37.2:1.[94] In doing so, Judge Posner argued evidence that the defendant repeatedly engaged in the behavior—and attempted to cover up the behavior when confronted—provided the court with the ability to hand out a large punitive damage award.[95]

In *Hettick v. FedEx Corp.*,[96] a sexual harassment case, two plaintiffs were awarded $328,000 in compensatory damages and $2,000,000 in punitive damages, resulting in a 6:1 ratio. The female plaintiff alleged that her FedEx coworker developed an obsessive crush on her, alleging that his behavior had become so stalker-like over a three-year period that she hid from him at work.[97] According to her testimony, she made many verbal and written complaints to managers, but management never took corrective action. Another plaintiff in Hettick alleged that the same coworker had also sexually harassed her with comments and intimidating behavior.[98] Both plaintiffs alleged that FedEx management failed to take sufficient steps to prevent the harassment and that a manager ratified the oppressive and malicious behavior of the perpetrator, thus entitling them to punitive damages. In defense, FedEx contended that plaintiffs and the alleged perpetrator were friends; that the conduct of the coworker was not pervasive, oppressive, or malicious; and that it did not view the contact between them as sexual harassment, or at least it did not have knowledge of conduct that amounted to sexual harassment. Additionally, FedEx contended that sufficient corrective action had been taken. FedEx also contended that its managing director was not a "managing agent" for purposes of punitive damages.[99] The jury, siding with the plaintiffs, found sufficient evidence of behavior that fit California's requirements for punitive damages (pervasive, oppressive, and malicious behavior), and awarded punitive damages.

Several other California cases merit description because of the magnitude of the punitive damages award even though the punitive to compensatory ratios were modest in size. *Savaglio v. Wal-Mart Stores Inc.*[100] was a class action suit involving 115,919 California hourly workers in Wal-Mart and Sam's Clubs. The workers alleged that Wal-Mart systematically refused to give them meal breaks as required by California law. Evidence from time cards revealed

93. 347 F.3d 672 (7th Cir. 2003).

94. *Id.* at 674, 678.

95. Posner also argues that a case where a large compensatory award is impossible may result in a large ratio, as well as behavior that cannot be addressed by criminal torts.

96. No. 103CV010014, 2005 WL 491167 (Cal Super. Ct. Feb. 1, 2005) (verdict summary).

97. *See id.* (reciting facts).

98. *See id.*

99. *See id.* (indicating FedEx defense).

100. No. C8356877, 2005 WL 3804468 (Cal. Super Ct. Dec. 22, 2005) (verdict summary). *Savaglio* is also in the BJS database.

8,100,000 violations between January 2001 and May 2006.[101] The plaintiffs contended that Wal-Mart knew of these violations but took steps to conceal them.[102] The jury awarded compensatory damages of $66,131,858 and punitive damages of $115,000,000, resulting in a punitive to compensatory ratio of 1.7:1.[103]

Lexar Media v. Toshiba Corp.[104] was a business dispute involving claims of unfair competition, trade secrets, and breach of fiduciary duty. The jury awarded $284,450,000 in compensatory damages and $84,000,000 in punitive damages, yielding a ratio of .3:1.

Baker v. PrivatAir Inc.[105] involved a compensatory award of $51,368,000 and a punitive award of $10,000,000, yielding a ratio of 0.2:1. *Baker* involved an age discrimination claim against PrivatAir and a number of persons associated with the company. Baker, a sixty-three-year-old decorated pilot, was employed by PrivatAir for many years, and, after being accused of safety violations, was replaced with a younger pilot.[106] The jury found that the safety violations were false and that the younger pilot who replaced Baker was a friend of one of the persons involved in the his dismissal.[107]

C. Florida[108]

Turning to Florida, thirty-two cases with requests for punitive damages appeared in our Westlaw database and thirteen resulted in punitive awards. Only one case exceeded the single digit ratio. In *Cabrera v. Eller Media Co.*,[109] a boy died from electrocution while taking cover in a Miami bus shelter. The victim's father alleged that the bus shelter owned by the defendant had faulty wiring because it was improperly installed, lacked fusing bonding, and had an incorrect transformer. Eller argued that lightning caused the boy's death, but at trial evidence was introduced that there was less than a 1% chance that lightning was the cause of the death.[110] The jury awarded $4,100,000 in compensatory damages and $61,000,000 in punitive damages, producing a ratio of 15:1. This case is particularly interesting, because the jury learned that Eller was worth $458,000,000 and it is possible that the jury considered the defendant's financial worth when deciding punitive damages. Under Florida law the jury may consider the net worth of a defendant in determining the

101. *See id.* (reciting facts).
102. *See id.*
103. *See id.* (indicating damage award).
104. No. CV812458, 2005 WL 3729077 (Cal. Super. Ct. Mar. 23, 2005) (verdict summary).
105. No. BC322198, 2005 WL 3729059 (Cal Super. Ct. Dec. 13, 2005) (verdict summary).
106. *See id.* (reciting facts).
107. *See id.*
108. The American Tort Reform Association has routinely referred to Florida as a "judicial hell-hole." AMERICAN TORT REFORM FOUNDATION, JUDICIAL HELLHOLES (2009).
109. No. 98-23808 CA 05, 2005 WL 3030137 (Fla. Cir. Ct. June 24, 2005) (verdict summary).
110. *See id.* (reciting facts).

amount of punitive damages.[111] Many states, in contrast, forbid the use of wealth in assessing punitive damages.

D. Illinois

Illinois had only seven cases in Westlaw in 2005 that resulted in punitive awards, one of which, *Blount v. Stroud*,[112] produced a double-digit ratio. Defendant Stroud owned and served as general manager of Jovon Broadcasting Corp. Plaintiff Blount was an employee who had been promoted to local sales manager, which entailed supervising four account executives. She alleged that Stroud and Jovon contracted to pay her a 2.5% commission on all new business generated by her account executives, but she claimed she never received the commission.[113] She sued, alleging failure to pay commissions, in violation of her contract. Additionally, she claimed retaliatory termination on the grounds that she had refused to agree to commit perjury in connection with a coworker's discrimination lawsuit, seeking punitive damages in connection therewith as well as on the grounds that Stroud made several defamatory statements about her to third parties during her employment and after she was terminated.[114] Stroud and Jovon denied contracting to pay the plaintiff's commissions, attempting to coerce her to commit perjury, or making defamatory comments. The defense also filed two counterclaims alleging breach of duty and unjust enrichment for accepting a consulting fee for services that were never performed. The jury awarded the plaintiff back pay for the employment termination and damages for physical and emotional suffering amounting to $282,350 in compensatory damages, and rendered the $2,800,000 punitive award in relation to the retaliation claim, a ratio of 10:1. However, the jury did not find for the plaintiff on the claims of defamation or intentional infliction of emotional distress.[115]

E. Missouri

Missouri had twelve punitive damages awards reported in 2005 but only two exceeded the single-digit ratio. In *Hampton v. State Farm Mutual Automobile*

111. *See* Bankers Multiple Line Ins. Co. v. Farish, 464 So.2d 530, 533 (Fla. 1985) (emphasizing defendant's net worth one factor to consider when determining punitive damages).

112. No. 01 L 2330, 2005 WL 4001082 (Ill. Cir. Ct. Nov. 21, 2005) (verdict summary).

113. *See id.* (reciting facts).

114. *See id.* Other claims included wrongful termination in violation of Illinois public policy, intentional interference with business expectancy with a prospective business partner and Blount's subsequent employer, as well as conduct involving intention of inflicting emotional distress. *Id.*

115. *Compare* Jablonski v. Ford Motor Co., No. 5-05-0723, 2010 WL 378525 (Ill. App. Ct. Feb. 1, 2010) (verdict summary). After another motorist rear ended Dora Jablonski's Lincoln Town Car and caused the gas tank to explode, she suffered burns to her head, face, ears, nose, shoulders, chest, arms, hands, legs, ankles and feet. Her husband died of thermal burns and inhalation injury. The jury awarded $28,167,715 in compensatory damages and $15,000,000 in punitive damages, yielding a punitive to compensatory ratio of 0.5:1. *See id.*

Insurance Co.,[116] the plaintiff purchased a vehicle that was later stolen and found burned. Hampton filed a claim for replacement but State Farm, alleging fraud, denied the claim and forced criminal charges against Hampton and a codefendant. After acquittal, the defendants filed suit against State Farm alleging malicious prosecution, the tort of outrage, abuse of process, and contract fraud. The case resulted in a compensatory award of $10,300 and a punitive award of $800,000, yielding a ratio of 78:1.[117]

Smith v. Brown & Williamson Tobacco Corp.[118] resulted in a compensatory award of $2,000,000 and a punitive award of $20,000,000, a ratio of 10:1 in favor of a smoker of Kool cigarettes who died of cancer. The jury found that the defendant was only 25% liable, which reduced the compensatory award to $500,000, but the punitive award stood.[119]

F. New Jersey

New Jersey had only three reported punitive damages awards, one of which reached a ratio of 1.2:1. In *Verni v. Lanzaro*,[120] the plaintiff sued both the driver of a vehicle and the concession provider at a major sporting arena in connection with a drunk-driving collision that resulted in the death of another person and a severe disability for plaintiff Verni. Verni alleged that the driver, while spending the afternoon at a professional football game, drank alcohol at a concession stand operated by Aramark and was permitted to drive away from the stadium despite his obvious intoxication.[121] The jury awarded $60,450,000 in compensatory damages and $75,000,000 in punitive damages.[122] *Verni* is an example of one of the few exceptions to the cap on punitive damages—in this case, drunk driving—that is part of the New Jersey punitive damages statute.

G. New York

New York only had five punitive damages awards reported in the Westlaw database, none of which exceeded the single-digit ratio. The largest ratio was *Rose v. Brown & Williamson Tobacco Corp.*,[123] involving a $3,420,000 compensatory award and a $17,100,000 punitive award, a ratio of 5:1. The punitive award was leveled at Brown & Williamson as successor-in-interest to Philip Morris on the finding that it disregarded technology that would have allowed production of safer cigarettes, and intentionally marketed addictive

116. No. 02-CV-211426, 2005 WL 3636236 (Mo. Cir. Ct. Sept. 26, 2005) (verdict summary).
117. *See id.* (noting amount of damage award).
118. No. 03CV212922, 2005 WL 3505692 (Mo. Cir. Ct. Feb. 3, 2005) (verdict summary).
119. *See id.* (discussing result).
120. No. BER-L-10488-00, 2005 WL 427792 (N.J. Super. Ct. Jan. 18, 2005) (verdict summary).
121. *See id.* (reciting facts).
122. *See id.* (noting amount of damage award).
123. No. 101996/02, 2005 WL 1817523 (N.Y. Sup. Ct. Mar. 28, 2005) (verdict summary).

cigarettes.[124]

H. Pennsylvania

Pennsylvania had only three reported punitive awards, none of which exceeded a single-digit ratio. In *Fromm v. Hershey Medical Center*,[125] the jury awarded the estate of a cardiac patient $168,400 in compensatory damages and $1,000,000 in punitive damages, a ratio of 6:1. *Fromm* involved wrongful death and medical malpractice claims by the estate of a sixty-two-year-old man who was scheduled for cardiac surgery at Hershey Medical Center. Upon meeting with the patient, the hospital's financial counselor implied that it would not perform the surgery unless the patient could figure out a way to pay for it. The patient, upset by this, left without scheduling the surgery and before he could reschedule, suffered a heart attack and died. His estate sued, contending that the hospital denied care based on the patient's inability to pay. Additionally, the cardiologists were sued for medical malpractice on the grounds that they should have done more to ensure Boltz had the surgery. The hospital countered that the counselor never told Boltz that his surgery would not be scheduled until he could pay and that Boltz made the decision himself to leave the hospital. Boltz's estate asked for unspecified damages and also asked the jury to find that Hershey's conduct was outrageous, warranting punitive damages. The jury found the two cardiologists not liable but found Hersey hospital liable, and, citing intentional misconduct, awarded a large punitive award.[126]

I. Texas

Texas had only six punitive damages awards in the 2005 Westlaw data, none of which involved a ratio that exceeded the single-digit guideline.

V. INSIGHTS ABOUT PROCESS AND LARGE RATIOS

The data from our constructed Westlaw database add important insights to the understanding of punitive damages. The BJS data indicate that pleadings involving punitive damages claims often do not result in punitive or compensatory damages. The Westlaw data take us further by providing a sketch of the procedural factors that constrain and control punitive damages. Most particularly, they strongly suggest that judicial gate-keeping prevents many routine claims from ever being put to the jury in the first place, as judges apply common law and statutes to eliminate inappropriate claims. The second

124. *See id.* (reciting facts).

125. Nos. 1270s-1999 and 2510s-1999, 2005 WL 1705460 (Pa. Ct. Com. Pl. June 16, 2005) (verdict summary).

126. *See id.*; 40 PA. CONS. STAT. § 1301.812-A(g) (setting range for punitive damages against physicians); Appendix A.

insight is that when ratios exceed the single-digit guideline enunciated by the U.S. Supreme Court, it is arguable that the degree of reprehensibility is no different from *TXO*, in which the Supreme Court approved a high ratio because of the reprehensibility of the defendant's behavior. The data also hint at nuances in jury decisions, similar to those noted by Vidmar and Rose, in that while rendering a punitive damage award, juries rejected other claims made by the plaintiff.[127]

VI. CONCLUSION

In *Exxon Shipping v. Baker,* the Supreme Court acknowledged as empirical fact that there is no significant evidence of runaway punitive awards, that there had been no increase in awards over the past decades, and that the majority of punitive awards did not exceed a single digit ratio. Despite these findings, the Court continued to be concerned about the exceptions to its stated guideline, referring to their stark unpredictability.

The data in this article provide an update consistent with past empirical research. However, we took our research beyond the extant literature by providing a profile of who asks for and who receives punitive damages, and provided a tentative outline of the factors that prevent recovery, including the burden of proving malicious intent accompanied by judicial supervision of statutory guidelines on punitive damages.

A summary of the BJS data is helpful in putting the findings into perspective. The 2005 Civil Justice Survey indicates that for the forty-six courts, representative of the 75 largest county courts in the United States, there were 6427 civil jury trials, and of these punitive damages were requested in pleadings 567 times, or 8.8% of cases. In result, 131 trials involved the awarding of punitive damages—2% of all trials and 23% of cases in which the pleadings included a request for punitive damages. Of the punitive award verdicts, only 14 cases exceeded the single-digit ratio guideline that has concerned the Supreme Court. Additional research, using jury verdict reporters, produced very few (eleven) cases where the ratio of punitive to compensatory damages exceeded a single digit.

The Supreme Court has concluded, in the past, that the appropriateness of awards is a qualitative judgment. In *BMW*, the Court articulated the view that excessive punitive awards were acceptable when the ratio between punitive and compensatory damages was low, when the defendant's conduct was particularly reprehensible, and when alternative state sanctions for similar misconduct are unavailable. In examining the cases in the present article, the vast majority fit the first criterion: the ratio of punitive to compensatory

127. *See generally* Vidmar & Rose, supra note 33. It is worth noting that neither database tells us about post-verdict appeals and settlements of the awards. Such information would permit an even more complete picture of the impact of punitive awards on defendants.

damages is low. In the eleven cases in our Westlaw database with large punitive to compensatory ratios, there is often arguably clear evidence pointing to the reprehensibility of actions by the defendant. In *Goddard v. Holy Cross Catholic Cemetery*, the jury evaluated the effect of the loss of a decedent's remains and the conspiracy of the defendant in failing to report the loss to the plaintiff. In *Hampton v. State Farm Mutual Automobile Insurance Co.*, the jury considered the actions of the defendant (malicious prosecution, abuse of process, and contract fraud) reprehensible. Similar actions by insurance companies in *Radosevich v. Amco Insurance Co.* and *Griffin Dewatering Corp. v. Northern Insurance Co. of New York* also resulted in large punitive awards. In *Blount v. Stroud*, the jury awarded punitive damages after testimony indicating that the plaintiff was fired for refusing to perjure herself in a prior lawsuit against the defendant.

Other cases involved causes of action where there was not a clear substitute in state law. In *Hettick v. FedEx Corp.*, the failure to protect female employees from sexual harassment led to a large punitive award. In *Smith v. Brown & Williamson Tobacco Corp.* and *Rose v. Brown & Williamson Tobacco Corp.*, the plaintiffs were awarded large punitive damages in cases involving the actions of tobacco companies.

Consider again the Supreme Court's conclusion in *TXO*, approving a 526:1 punitive to compensatory damages ratio because the defendant engaged in "egregiously tortious conduct."[128] Our Westlaw data summaries of facts alleged in the trials resulting in verdicts exceeding the single digit guideline allows an arguable position that, like the Supreme Court in *TXO*, the juries found evidence that defendants had engaged in similar reprehensible behavior. We are left with a conclusion that empirical facts do not justify the Supreme Court's continuing concern about the unpredictability and the ratios associated with punitive damage awards.

128. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 466 (1993).

State	Available?[129]	Legal Constraints on Punitive damages[130]	$ Cap?[131]	Monetary Limits on Punitive damages[132]
AL	Yes	Punitive damages are only available "where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff."[133]	Yes	Actual limits on punitive damages are three times compensatory damages or $500,000, whichever is greater.[134] Wrongful death or intentional infliction of physical injury cases have no caps.
AK	Yes	If the plaintiff demonstrates that the "defendant's conduct (1) was outrageous, including acts done with malice or bad motives; or (2) evidenced reckless indifference to the interest of another person" the fact finder can apply punitive damages.[135]	Yes	Punitive damages cannot exceed three times compensatory damages or $500,000. The limit may be raised to the greater of up to four times compensatory damages or aggregate financial gain (maximum $7,000,000) if the defendant was "motivated by financial gain and the adverse consequences of the conduct were actually known by the defendant."[136]
AR	Yes	Punitive damages are only available if the defendant (1) was aware that conduct would result in "injury or damage and that he or she continued the conduct with malice or in reckless disregard of the consequences," or (2) "intentionally pursued a course of conduct for the purpose of causing injury or damage."[137]	Yes	No more than the greater of $250,000 or three times the amount of compensatory damages (maximum $1,000,000). No cap is applied if defendant meant to cause the harm and did cause the harm.[138]
AZ	Yes	Punitive damages are available in Arizona if the defendant acted knowing that the course of conduct caused a substantial risk of harm,[139] for both general and specific deterrence,[140] and in cases of	No	The Arizona Constitution prohibits laws limiting amount of damages in personal injury and wrongful death cases: "No law shall be enacted . . . limiting the amount of damages to be recovered for causing the death or injury of any other person."[142]

[129] Are punitive damages available in the state?
[130] What are the legal requirements, statutorily or by common law, governing the award of punitive damages?
[131] Does the state have a cap in effect for punitive damages?
[132] What are the monetary limits on punitive damages in the state?
[133] ALA. CODE § 6-11-20(a) (2009).

[134] *See* § 6-11-21. The cap is different if defendant is a small business (i.e., with a net worth of less than $2,000,000) In such a case, the cap is $50,000 or 10% of the business's net worth. *Id.*

[135] *See* ALASKA STAT. § 09.17.020(b)(1)-(2) (2009).

[136] *Id.* § 09.17.020 (f), (g).

[137] ARK. CODE ANN. § 16-55-206 (2009).

[138] *Id.* § 16-55-208.

[139] Hawkins v. Allstate Ins. Co., 733 P.2d 1073, 1080 (Ariz. 1987).

[140] *See id.*

		"outrageous conduct."[141]		
CO	Yes	Punitive damages are awarded in "circumstances of fraud, malice, or willful and wanton conduct."[143]	Yes	Generally, punitive damages should not exceed compensatory damages, but the court may increase the punitive damages (to a maximum of three times the amount of actual damages) if the defendant has "continued the behavior," "repeated the action," or "further aggravated" the claimant's damages through their "willful and wanton conduct."[144]
CA	Yes	"In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."[145]	No	
CT	Yes	The single purpose of punitive damages in Connecticut is to compensate the plaintiff for legal expenses.[146]	Yes	Punitive damages are limited to the actual cost of the litigation, including attorney's fees.[147] Punitive damages are capped at two times the compensatory damages in product liability cases and cases involving motor vehicle torts.[148]
DE	Yes	Punitive damages are available in medical malpractice cases if the defendant caused an injury that was "maliciously intended or was the result of willful or wanton misconduct."[149]	No	

[142] ARIZ. CONS. ART. 2, § 31 (2010); see Smith v. Myers, 887 P.2d 541, 544 (Ariz. 1994).

[141] Smith v. Chapman, 564 P.2d 900, 903 (Ariz. 1977); *see also* RESTATEMENT (FIRST) OF TORTS, § 908, cmt. b (1939).

[143] COLO. REV. STAT. § 13-21-102(1)(a) (2008).

[144] *Id.* § 13-21-102 (1)(a)(3). Punitive damages are not allowed in any action against a health care professional that involves the approved use of drugs or clinically justified non-standard uses, within "prudent" health care standards, or written informed consent. *Id.* § 13-64-302.5(5) (2001) (limiting punitive damage awards against health care professionals).

[145] CAL. CIV. CODE § 3294(a) (West 1997).

[146] *See* Berry v. Loiseau, 614 A.2d 414, 433 (1992) (upholding limit on punitive damages). The Connecticut Supreme Court noted that a "longstanding rule in Connecticut limit[ed] common law punitive damages to a party's litigation costs," and declined to overturn the "well established rule governing punitive damages awards." *See id.*

[147] *See generally* Freeman v. Alamo Mgmt. Co., 607 A.2d 370 (Conn. 1992).

[148] *See* CONN. GEN. STAT. § 14-295, 52-240(b) (2005).

[149] DEL. CODE. ANN. tit. 18, § 6855 (1999).

FL	Yes	The defendant's conduct must be "intentional misconduct or gross negligence"[150] for punitive damages; punitive damages are available even if compensatory damages are not awarded.[151]	Yes	Punitive damages are capped unless the plaintiff demonstrates a specific intent to harm. The cap is the greater of three times compensatory damages or $500,000, unless a supervisor ratified the behavior, in which case the cap is the greater of four times compensatory damages or $2,000,000.[152]
GA	Yes	Punitive damages are allowable if the defendant showed "willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences."[153]	Yes	Punitive damages may not exceed $250,000,[154] except in cases of product liability[155] and "if it is found that the defendant acted, or failed to act, with the specific intent to cause harm, or that the defendant acted or failed to act while under the influence of alcohol, drugs other than lawfully prescribed,"[156] where there is no cap.
HI	Yes	"The plaintiff must prove by clear and convincing evidence that the defendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations, or where there has been some willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences."[157]	No general limit	In medical malpractice, there is a limit on noneconomic damages for physical pain and suffering of $375,000.[158]
IA	Yes	Punitive damages are available if the defendant engaged in conduct that constituted a "willful and wanton disregard for the rights and safety of another."[159]	No	

[150] FLA. STAT. ANN. § 768.72(2) (West 2005).

[151] *See id.* § 768.72(2).

[152] *See id.* §§ 768.725, 768.72(2).

[153] GA. CODE ANN. § 51-12-5.1(b) (West 2005).

[154] *Id.* § 51-12-5.1(g).

[155] *Id.* § 51-12-5.1(e)(1).

[156] *Id.* § 51-12-5.1(f).

[157] Masaki v. General Motors Corp., 780 P.2d 566, 579 (Haw. 1989)

[158] *See* HAW. REV. STAT. § 663-8.7) (2009) (enumerating tort actions exempt from $375,000 cap, not including medical malpractice). *But see* § 663-10.9(2) (2009) (stating $375,000 cap on damages for pain and suffering).

[159] IOWA CODE ANN. § 668A.1(1)(a) (1998).

ID	Yes	The plaintiff is required to show the defendant engaged in "oppressive, fraudulent, malicious or outrageous conduct"[160]		Punitive damages may not exceed the greater of $250,000 or three times the compensatory damages.[161]
IL	Yes	Punitive damages may be awarded if the defendant is shown to act "with evil motive or with a reckless and outrageous indifference to a highly unreasonable risk of harm and with a conscious indifference to the rights and safety of others."[162]	No	
IN	Yes	Punitive damages may be awarded if the defendant "acted with the malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing."[163]	Yes	Punitive damages may not exceed the greater of three times the compensatory award or $50,000.[164]
KS	Yes	The plaintiff must demonstrate that the defendant "acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice."[165]	Yes	The punitive damages must not exceed the lesser of the defendant's annual income, up to 50% of the net worth of the defendant, as determined by the court, or $5,000,000.[166] However, if the conduct of the defendant results in a profit that exceeds these caps, the cap is raised to "1 1/2 times the amount of profit which the defendant gained or is expected to gain as a result of the defendant's misconduct."[167]
KY	Yes	Punitive damages are available when the defendant acted with "oppression, fraud or malice."[168]	No	"The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."[169]

[160] IDAHO CODE ANN. § 6-1604(1) (2004).

[161] *Id.* § 6-1604(3) (2004).

[162] 735 ILL. COMP. STAT. ANN 5/2-1115.05(b) (West 2009).

[163] Nelson v. Jimison, 634 N.E.2d 509, 511 (Ind. Ct. App. 1994).

[164] *See* IND. CODE ANN. § 34-51-3-4 (West 2009); *see also* USA Life One Ins. Co. of Ind. v. Nuckolls, 682 N.E.2d 534, 541 (Ind. 1997) (setting forth general requirements for recovery of punitive damages in Indiana).

[165] KAN. STAT. ANN. § 60-3702(c) (2009).

[166] *Id.* § 60-3702(e)

[167] *Id.* § 60-3702(f).

[168] KY. REV. STAT. ANN. § 411.184(2) (West 2009).

[169] KY. CONST. § 54 (2009).

LA	No	Punitive damages are prohibited by statute in Louisiana, yet there are exceptions for drunk driving,[170] the unlawful interception of communications,[171] and for those engaged in housing discrimination in violation of the Open Housing Act.[172]	No	
MA	No	Punitive damages are prohibited by common law.[173]	No	
ME	Yes	"[I]n order to recover punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant acted with malice."[174]	No general limit	$250,000 for wrongful death actions.[175]
MD	Yes	"The purpose of punitive damages is not only to punish the defendant for egregiously bad conduct toward the plaintiff, but also to deter the defendant and others contemplating similar behavior."[176]	No general limit	In medical malpractice cases, the award of noneconomic damages is limited to $500,000. There is a $350,000 limit on noneconomic damages in personal injury actions.[177]
MI	Yes	In Michigan, punitive (or exemplary) damages are limited to "compensation for injury to feelings."[178]		"The purpose of exemplary damages is not to punish the defendant, but to render the plaintiff whole. When compensatory damages can make the injured party whole, exemplary damages must not be awarded."[179]
MN	Yes	The defendant must "show deliberate disregard for the rights and safety of others."[180]	No	

[170] LA. CIV. CODE ANN. art 2315.4 (2009).

[171] LA. REV. STAT. ANN. § 15:1312(A) (2009).

[172] *Id.* § 51:2613(E).

[173] *See* Caperci v. Huntoon, 397 F.2d 799, 801 (1st Cir. 1968); *see also* Dorothea C. Cadiff et al., Note, *Punitive Tort Damages in New England*, 41 B.U. L. REV. 389, 390 (1961).

[174] Tuttle v. Raymond, 494 A.2d 1353, 1354 (Me. 1985).

[175] 18 ME. REV. STAT. ANN. tit 18, § 2-804(b) (2009).

[176] Owens-Corning Fiberglas Corp. v. Garrett, 682 A.2d 1143, 1161 (Md. 1996); *see also* Bowden v. Caldor Inc., 710 A.2d 267, 276 (Md. 1998) (reaffirming punitive damages stated in *Garrett*); Stephen J. Shapiro, *Punitive Damages in Maryland: Reconciling Federal Law, State Law, and the Pattern Jury Instructions*, 38 U. BALT. L. REV. 27, 33 (2007) (noting purpose of punitive damages in Maryland as stated in *Garrett*).

[177] *See* MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (West 2004); *Murphy v. Edmonds*, 601 A.2d 102, 116 (Md. 1992) (upholding cap on personal injury actions).

[178] Jackson Printing Co., Inc. v. Mitan, 425 N.W.2d 791, 794 (Mich. Ct. App. 1988); *see also* Veselenak v Smith, 327 N.W.2d 261, 264 (Mich. 1982).

[179] *Jackson Printing Co., Inc.*, 425 N.W.2d at 794.

[180] MINN. STAT. ANN § 549.20(1)(a) (2010).

MO	Yes	"Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or reckless indifference to the rights of others."[181]	No	
MS	Yes	The defendant must have acted with "actual malice, gross negligence which evidences a willful, wanton, or reckless disregard for the safety of others" or committed actual fraud.[182]	Yes	Punitive damages are capped, with the caps relating to the net worth of the defendant. If the defendant is worth more than $1,000,000,000, the damages are capped at $20,000,000. For a defendant worth more than $750,000,000 but less than $1,000,000,000, the cap is $15,000,000. Defendants worth more than $500,000,000 but less than $750,000,000 cannot pay more than $5,000,000. Those worth between $100,000,000 and $500,000,000 have a cap of $3,750,000. A cap of $2,500,000 is in place for those worth more than $50,000,000 but less than $100,000,000. All other cases have a cap of 2% of the defendant's net worth.[183]
MT	Yes	Punitive damages can be awarded if the plaintiff demonstrates that the defendant is "guilty of actual fraud or actual malice."[184]	Yes	Punitive damage awards may not exceed the lesser of $10,000,000 or 3% of a defendant's net worth.[185]
NC	Yes	Punitive damages are available "to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts."[186]	Yes	The punitive award may not exceed the greater of three times the compensatory award or $250,000.[187]
ND	Yes	Exemplary damages may be awarded if the defendant is	Yes	Punitive damages are capped at the greater of $250,000 or two times the

[181] RESTATEMENT (SECOND) OF TORTS § 908(2) (1979); *see also* Altenhofen v. Fabricor, Inc., 81 S.W.3d 578, 590 (Mo. 2002) (citing *Burnett*); Burnett v. Griffith, 769 S.W.2d 780, 787 (Mo. 1989) (laying out Missouri's punitive damages standard).

[182] MISS. CODE ANN. § 11-1-65(1)(a) (2009).

[183] *Id.* § 11-1-65(3)(a)(i)-(vi).

[184] MONT. CODE. ANN. § 27-1-221(1) (2009).

[185] *Id.* § 27-1-220(3). Actual malice exists "if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff." *Id.*. Furthermore, defendant must: "deliberately proceed[] to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or . . . deliberately proceed[] to act with indifference to the high probability of injury to the plaintiff." *Id.* § 27-1-221(2). Actual fraud exists when a defendant: "makes a representation with knowledge of its falsity; or . . . conceals a material fact with the purpose of depriving the plaintiff of property or legal rights or otherwise causing injury." *Id.* § 27-1-221(3).

[186] N.C. GEN. STAT. § 1D-1 (2009).

[187] *Id.* § 1D-25.

		guilty of "oppression, fraud, or actual malice."[188] Exemplary damages are awarded "for the sake of example and by way of punishing the defendant."[189]		compensatory damages.[190]
NE	No	Prohibited by common law. "It has been a fundamental rule of law in this state that punitive, vindictive, or exemplary damages will not be allowed, and that the measure of recovery in all civil cases is compensation for the injury sustained."[191]	No	
NH	No	"No punitive damages shall be awarded in any action, unless otherwise provided by statute."[192]	No	
NJ	Yes	Punitive damages are available if the "defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions."[193]	Yes	The cap on punitive damages is the greater of five times the compensatory damages or $350,000.[194] Hate crimes, discrimination, AIDS testing disclosure, sex abuse, and drunk drivers are excluded from the cap.[195]
NM	Yes	"Punitive or exemplary damages may be awarded	No	

[188] N.D. CENT. CODE ANN. § 32-03.2-11(1) (2009).

[189] *Id.* § 32-03.2-11(1).

[190] *Id.* § 32-03.2-11(4).

[191] *See* Abel v. Conover, 104 N.W.2d 684, 688 (Neb. 1960) (calling prohibition on punitive damages "fundamental rule of law" in Nebraska); *see also* Wilfong v. Omaha & Council Bluffs St. Ry. Co., 262 N.W. 537, 540 (Neb. 1935) (holding damages for torts limited to compensation for actual injury sustained); Bee Pub. Co. v. World Pub. Co., 82 N.W. 28, 29 (Neb. 1900) (stating measure of recovery compensation for injury sustained); Atkins v. Gladwish, 41 N.W.347, 350 (Neb. 1889) (acknowledging rule limiting recovery to damage for injury sustained). *See generally* Boyer v. Barr, 8 Neb. 68 (Neb. 1878) (calling question of punitives "tabulraza").

[192] N.H. REV. STAT. ANN. § 507:16 (2010).

[193] N.J. REV. STAT. ANN. § 2A:15-5.12(4)(a) (2009).

[194] *See id.* § 2A:15-5.14.

[195] *See id.* § 2A:15-5.14(c) (indicating exceptions to punitive damage cap).

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The provisions of subsection b. of this section shall not apply to causes of action brought pursuant to P.L.1993, c.137 (C.2A:53A-21 et seq.), P.L.1945, c.169 (C.10:5-1 et seq.), P.L.1989, c.303 (C.26:5C-5 et seq.), P.L.1992, c.109 (C.2A:61B-1) or P.L.1986, c.105, (C.34:19-1 et seq.), or in cases in which a defendant has been convicted pursuant to N.J.S.2C:11-3, N.J.S.2C:11-4, R.S.39:4-50 or section 2 of P.L.1981, c.512 (C.39:4-50.4a) or the equivalent under the laws of any other jurisdiction.

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Id. § 2A: 15-5.14(c).

		only when the conduct of the wrongdoer may be said to be maliciously intentional, fraudulent, oppressive, or committed recklessly or with a wanton disregard of the plaintiff['s] rights."[196]		
NV	Yes	Punitive damages can be awarded when the defendant is "guilty of oppression, fraud, or malice."[197]	Yes	Damages are capped at three times the compensatory damages if the compensatory damages are more than $100,000 and $300,000 if the compensatory damages are less than $100,000.[198] Cases involving product liability, insurance fraud, toxic waste, housing discrimination, and defamation are not subject to these caps.[199]
NY	Yes	The defendant must act with "intentional or deliberate wrongdoing, aggravating or outrageous circumstances, fraudulent or evil motive, or conscious act in willful and wanton disregard of another's rights."[200]	No	
OH	Yes	Punitive damages are available if the defendant acted with, or authorized acts of, malice or aggravated fraud.[201]	No	
OK	Yes	An award of punitive damages depends on the degree to which the defendant: engaged in behavior that was a hazard to the public; profited from the behavior, involved concealment of the acts; was aware of the acts; the number of employees involved in the act (for corporations); and the financial worth of the defendant.[202]	Yes	If the defendant acted with reckless disregard, punitive damages are capped at the greater of $100,000 or actual damages.[203] In cases where the defendant acted with malice, the cap is the greatest of $500,000, two times the compensatory damages, or the financial benefit of the behavior to the defendant.[204] If it is found beyond a reasonable doubt that the defendant acted in a manner that threatened a human life, there is no cap.[205]

[196] Loucks v. Albuquerque Nat. Bank, 418 P.2d 191, 199 (N.M. 1966).

[197] NEV. REV. STAT. ANN. § 42.005(1) (2009).

[198] *Id.* §§ 42.005(1)(a)-(b).

[199] *Id.* § 42.005(2).

[200] Pearlman v. Friedman Alpren & Green LLP, 750 N.Y.S.2d 869, 869 (N.Y. App. Div. 2002) (holding punitive damages unwarranted absent deliberate wrongdoing,, evil motive, etc.); *see also* Don Buchwald & Assocs., Inc. v. Rich, 723 N.Y.S.2d 8, 8 (N.Y. App. Div. 2001) (allowing punitive damages only for intentional wrongdoing, outrageous fraud, or willful and wanton acts); Le Mistral, Inc. v. Columbia Broad. Sys., 402 N.Y.S.2d 815, 817(N.Y. App. Div. 1978) (stating exemplary damages only allowed when wrong aggravated by evil, willful, intentional or reckless indifference).

[201] OHIO REV. CODE ANN. § 2315.18 (2010).

[202] OKLA. STAT. ANN. tit. 23 § 9.1(A) (2008).

OR	Yes	Punitive damages are available when it is proven by clear and convincing evidence that the defendant acted with malice or "a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others."[204]	No general limits	Punitive damages are unavailable in medical malpractice cases.[207]
PA	Yes	Punitive damages are available when the defendant engages in outrageous conduct, or has an "evil motive or [a] reckless indifference to the rights of others."[208]	Yes	Punitive damages are capped at 200% of the compensatory damages, unless the defendant is guilty of intentional misconduct, which has no cap. Punitive damages cannot be less than $100,000, unless the compensatory damages are less than $100,000.[209]
RI	Yes	"[P]unitive damages are proper only in situations in which the defendant's actions are so willful, reckless, or wicked that they amount to criminality."[210]	No	
SC	Yes	The defendant must engage in conduct demonstrating "malice, ill will, a conscious indifference to the rights of others, or a reckless disregard thereof" for punitive damages to be awarded.[211]	No	
SD	Yes	Punitive damages are available when the defendant engages in "oppression, fraud, or malice, actual or presumed, or in any case of wrongful injury to animals, being subjects of property, committed intentionally or by	No	

[203] *Id.* § 9.1(B).

[204] *Id.* § 9.1(C).

[205] *Id.* § 9.1(D).

[206] OR. REV. STAT. ANN. § 31.730 (West 2009).

[207] *Id.* § 31.740.

[208] Martin v. Johns-Manville Corp., 494 A.2d 1088, 1096 (Pa. 1985) (stating Pennsylvania guidelines for awarding punitive damages).

[209] 40 PA. CONS. STAT. § 1301.812-A(g) (1999).

[210] Greater Providence Deposit Corp. v. Jenison, 485 A.2d 1242, 1244 (R.I. 1984) (illustrating use of punitive damages in punishing offender and deterring future conduct, not compensating plaintiff); *see also* Serra v. Ford Motor Credit Co., 463 A.2d 142, 151 (R.I. 1983) (upholding principle that punitive damages only for willful, reckless, or wicked actions).

[211] King v. Allstate Insurance Co., 251 S.E.2d 194, 263 (S.C. 1979); *see also* S.C. CODE ANN. § 15-33-135 (2009).

		willful and wanton misconduct, in disregard of humanity."[212]		
TN	Yes	Punitive damages are awarded "only if [the court] finds a defendant has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly . . . ."[213]	No	
TX	Yes	Punitive damages are available if the defendant engaged in fraud, malice, or gross negligence.[214]	Yes	The cap is the greater of: the award for non-economic damages up to $750,000 plus twice the award for economic damages, or $200,000.[215]
UT	Yes	If the defendant engaged in "willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others," punitive damages may be awarded.[216]	No	
VA	Yes	Punitive damages are available when the defendant engages in "negligence which is so willful or wanton as to evince a conscious disregard of the rights of others, as well as malicious conduct, will support an award of punitive damages . . . ."[217]	Yes	Maximum cap of $ 350,000.[218]
VT	Yes	Punitive damages are allowed when the defendant engages in "conduct manifesting personal ill will, evidencing insult or oppression, or showing a reckless or wanton disregard of [a party's] rights."[219]	No	
WA	No	Punitive damages are not permitted.[220]	No	

[212] S.D. CODIFIED LAWS § 21-3-2 (2009).

[213] *See* Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992) (setting out Tennessee punitive damages rule).

[214] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (a)(1)-(3) (2008).

[215] *See id.* § 41.008(b)(1)-(2) (2009).

[216] UTAH CODE ANN. § 78B-8-201(b) (2008).

[217] Booth v. Robertson, 374 S.E.2d 1, 3 (Va. 1988) (quoting King v. Commonwealth, 231 S.E.2d 312, 316 (Va. 1977)).

[218] VA. CODE ANN. § 8.01-38.1 (2007).

[219] Crump v. P & C Food Markets, Inc., 576 A.2d 441, 449 (Vt. 1990).

[220] *See* Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1073 (Wash. 1891) (noting doctrine of punitive damages rests on unstable basis).

WI	Yes	Damages are allowed when the defendant's behavior is "willful, wanton or reckless."[221]	No	
WV	Yes	Punitive damages are awarded in circumstances where the defendant engaged in malice, oppression, wanton, willful, reckless conduct, or criminal indifference.[222]	No	"[T]here can be no mathematical bright line relationship between punitive damages and compensatory damages."[223]
WY	Yes	"[P]unitive damages are awarded to punish the defendant and deter others from such conduct in the future."[224]	No	"No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person."[225]

[221] WIS. STAT. § 895.037(3)(b) (2006). The Wisconsin Supreme Court has since set forth the standard that punitive damages can be awarded if the plaintiff acts purposefully disregard the plaintiff's rights, or engages in the conduct despite awareness that his or her acts will result in the plaintiff's rights being disregarded. *See generally* Wischer v. Mitsubishi Heavy Ind. America, 694 N.W.2d 320 (Wis. 2005), Strenke v. Hogner, 694 N.W.2d 296 (Wis. 2005) (discussing Wisconsin punitive damages statute).

[222] *See* TXO Prod. Corp. v. Alliance Res. Corp., 419 S.E.2d 870, 887 (W. Va. 1992) (noting *Haslip* guidelines); Wells v. Smith, 297 S.E.2d 872, 878-81 (W. Va. 1982) (discussing nature of punitive damage awards).

[223] *TXO*, 419 S.E.2d at 887.

[224] *See* State Farm Mut. Auto. Ins. Co. v. Shrader, 882 P.2d 813, 837 (Wyo. 1994) (explaining theory of punitive damages).

[225] WYO. CONST. ART. 10 § 4 (2008).