



## **HOW THE CASH-RICH INSURANCE INDUSTRY FAKES CRISES AND INVENTS SOCIAL INFLATION**

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# HOW THE CASH-RICH INSURANCE INDUSTRY FAKES CRISES AND INVENTS SOCIAL INFLATION

## INTRODUCTION AND MAJOR FINDINGS

Businesses that depend on reasonably priced insurance to function have, for decades, faced periodic spikes in prices known as “hard markets.” Businesses endured these events in the mid-1970s, mid-1980s and the early 2000s. Prior to these periods of staggering price hikes, as we document in this report, insurance industry leaders did and said many things to signal to their erstwhile “competitors” that companies need to move in lockstep to raise prices now. News reports and insurance executives’ public statements indicate that we are deep into this signaling period again and insurance prices have begun to rise.

This study documents current signaling and also documents, in significant detail, why there is absolutely no basis for a hard market to begin now.

Today, this overcapitalized industry is already charging many businesses far too much in premiums while threatening even greater increases, all while attempting to create the perception that it is too financially troubled to pay claims. Yet this is an industry that has stored away so much excess profit that it now sits on more surplus than at any time in history – a record level of well over \$800 billion.

For most Americans who do not pay close attention to insurance markets, it is easy to be misled by this industry when it tries to justify rate hikes after years of stable or decreasing premiums. This is exactly the situation in which some businesses find themselves today.

Insurance companies have never been forthcoming about why ups and downs in insurance premiums happen. In these cyclical hard markets, they have internally admitted that the cause is the industry’s own self-made boom and bust economic cycle. But publicly they have attempted to cover up their mismanaged underwriting and accounting practices by blaming lawyers, juries, and the legal system. Today they are making such claims even though both litigation data and the industry’s own loss data show that claims are not spiking and “tort costs” are stable.

In previous crises, the industry pointedly blamed the legal system, but that old attack has been exposed as incorrect in each of the three previous hard market periods. So, in the current run-up to a new hard market, the insurance industry needed a new public relations term to make the case for higher rates. It has settled on a new name to describe its current interest in raising prices: “social inflation.” Over the last several months, insurance industry representatives have begun a seemingly coordinated effort to market the idea that “social inflation” (*i.e.*, lawsuits by injured, harmed, and defrauded consumers and policyholders) are hurting insurers financially. The term has appeared in numerous news articles since the summer of 2019 and the mounting drumbeat appears to be coordinated. But it is a hoax, a way for insurers to once again try to deflect blame away

from the industry's own accounting and underwriting practices as an attempt to justify unnecessary rate hikes.

This study finds:

- The insurance industry claims it is suffering losses, but it is actually massively prospering. Indeed, the foundation for its argument for raising rates on businesses – that it is in some kind of financial peril – is easily proven to be untrue. In fact, insurers' surplus – the money held above that reserved for expected losses – doubled from 2004 to 2018, quadrupled since 1994, and has risen by more than 5,000% over the past 60 years. It is now at all-time record levels.
- For five decades, insurance rates have gone up and down in sync with the insurance industry's economic cycle. The cycle leads to what are known as “hard” (increasing rates) and “soft” (low or decreasing rates) insurance markets. Since around 2006, the nation has been in a “soft” insurance market, but the industry is now attempting to end it by signaling to each other to raise prices and tighten markets. Given the industry's excessively capitalized financial condition, there is no reason why the soft market should be turning.
- The industry can get away with signaling among themselves that rate action is about to occur because the industry enjoys an exemption from antitrust laws.
- Over the last few months, insurance executives and consultants have been boldly declaring to the entire industry that it is time to raise rates on business policyholders because of a concept known as “social inflation.” This vague industry-created marketing term is supposed to reference either spiking lawsuits or spiking jury verdicts. Yet the existence of “social inflation” is contradicted by all credible evidence: litigation trends, jury verdict trends, insurance claims data and other basic facts. “Social inflation” does not exist.
- The insurance industry inflates losses by manipulating its own claim reserves at key moments to justify rate hikes particularly as it is trying to trigger a hard market as is likely happening today. Raising reserves is used not only to raise rates but also to lower tax liabilities at times of significant profits.
- While reserve hikes lead to price increases, these reserves are later released into profits by insurers. The excessive reserves of the previous hard market in the early 2000s are still being released by insurers even as they spike current reserves to create false support for price increases.
- Since 1999, total commercial insurance payouts have never spiked and have generally tracked the rate of inflation and population. Premiums and reserves,

however, have gone up and down in sync with the insurance industry's economic cycle and are not reflective of any trends in paid claims.

- Over the last 20 years, adjusted losses (*i.e.*, after making reasonable adjustments for inflation, population growth, and mileage driven for auto) have stayed generally flat or increased relatively little. What's more, these losses actually decreased in three major areas of commercial insurance: Commercial Multi-Peril, Commercial Auto Liability, and Medical Malpractice.
- During the last hard market (2002 to 2005), insurers offering specific commercial lines of coverage overestimated their annual claim-related losses by 16.9%. Adjusted premiums grew faster (or shrunk less) than losses.
- When it comes to Medical Malpractice, new evidence shows clearly that doctors were price-gouged during the last hard market (2002 to 2005). Doctors paid increasingly high premiums while paid claims actually dropped. Medical malpractice insurers were misrepresenting their actual losses by an incredible annual average of 33%.
- Several specific lines or sub-categories of insurance have been the target of recent rate hike discussion. None of this is justified.
  - Directors and Officers (D&O). This type of insurance is part of a larger line of coverage called "Other Liability." Adjusted "Other Liability" claims have stayed essentially flat for two decades while premiums have gone up and down in sync with the insurance industry's economic cycle. In 2004, in the middle of the last hard market, insurers were overstating "Other Liability" losses by about \$7.3 billion or 30%. Claims data suggest that any current premium spike is not justified.
  - Commercial Auto. High premiums charged between 2003 and 2005 were not nearly matched by paid claims or even incurred claims. Today, data show that while there is upward loss movement likely due to distracted driving and more drivers on the road, the industry is once again over-correcting through excessive reserving and unnecessary rate increases.

For five decades, businesses and consumers have been victims of periodic eruptions in insurance premiums caused by the property/casualty insurance industry's economic cycle, the industry's unique accounting methods, and laws that allow anti-competitive pricing by this industry. While insurers try to convince the public that lawsuits and juries, or "social inflation," are to blame for this, historical data are clear that this has never been true – and it is not true today. The only way to stop volcanic eruptions in insurance premiums is through better oversight and regulation of the industry's mismanaged accounting, and the cyclical nature of the insurance business.

## UNDERSTANDING INSURANCE

The property/casualty insurance industry is one of the most important but least understood industries in the nation. Every person and business in America need insurance. Yet for the past 40 years, policyholders have been victims of this industry's little recognized economic cycle, created by anti-competitive (yet legal) underwriting practices, unique and opaque accounting policies, and virtually unchecked power because of the generally weak regulation of insurance rates. Before presenting and interpreting current data for this study, the following are some key facts that shed light on how this industry operates.

### Losses, Reserves, and Surplus

The unique accounting practices of the property/casualty insurance industry allow companies to identify "losses" that are really not losses at all. To an insurance company, the word "loss" is short for the term "incurred loss." When a company has an "incurred loss," this does not mean the insurer has actually paid out this money. This figure includes estimates of future claims that they know about (reserves) and claims they do not even know about yet, called "incurred but not reported" (IBNR). *Some of these claims may not even exist and others may take years for payout to occur.* It is *this* figure that insurers file with state insurance departments when seeking rate hikes.

As we show later in this study, during hard markets (when rates are increasing), insurers inflate their incurred losses by increasing or padding reserves (including IBNR) – the money set aside to pay claims – despite, at the same moment, experiencing no increase in payouts or any trend suggesting large future payouts. This "over-reserving" is often politically-inspired and used by insurers as a way to show poor income statements, which in turn is used to justify imposition of large premium increases.

During subsequent soft markets (when rates stabilize and later, at times, decrease), reserves are often released through income statements as profits, since they are actually proven not to be needed to pay future claims. Also, during the soft phase of the cycle, insurers try to gain market share, and they must show profits to keep rates down. Insurers may use reserve releases to help them look more profitable than they are when aggressively seeking new business. Sometimes in order to stay competitive in very soft market periods, they can release too many reserve dollars. In other words, reserves – and incurred losses – are manipulated for reasons having nothing whatsoever to do with actual paid losses.

Surpluses are the extra cushion insurers hold in addition to the amount they have set aside to pay estimated future claims. It comes largely from profits, including excess profits in the wake of hard market periods of excessive prices based on padded reserves.

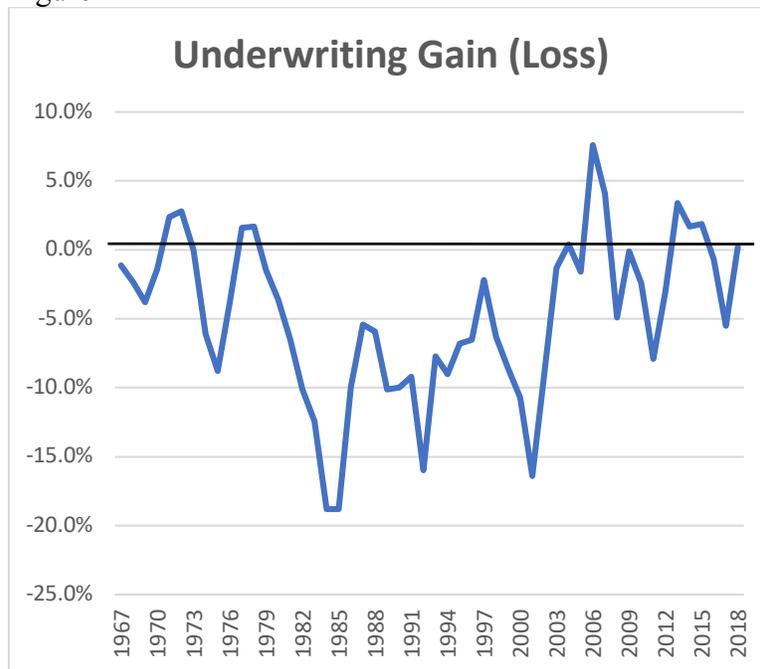
## Investments and Underwriting

Insurers make their money primarily from investment income, investing the premium dollars they receive from policyholders. They invest the “float” that occurs during the time between when premiums are paid to the insurer and losses are paid out by the insurer – *e.g.*, there is about a 15-month lag in auto insurance, while there is a 5- to 10-year lag in “long tail” lines like medical malpractice.<sup>1</sup>

As a corollary to this, rarely do insurers achieve an underwriting profit (*i.e.*, when premiums taken in are more than “losses” and underwriting expenses). In many lines of insurance, an underwriting profit would produce a wildly excessive overall profit because the investment yield on the float is so great.

The table below illustrates this point, namely that this industry has hardly ever had an underwriting profit, occurring *in only 12 of the last 51 years*.

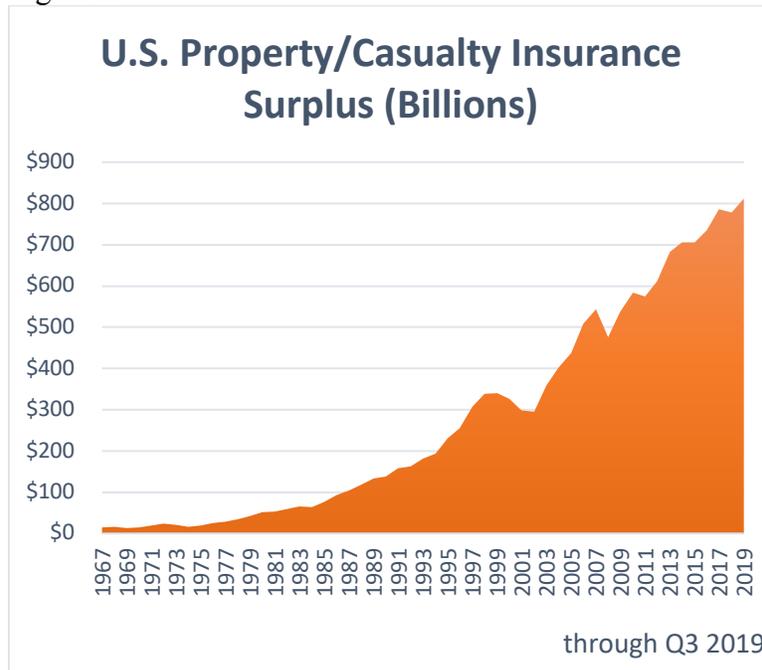
Figure 1



<sup>1</sup> Indeed, Warren Buffett points to the float as a key factor in his strategy of owning insurance companies. *See, e.g.*, Warren Buffett, Letter to Berkshire Hathaway Shareholders, February 23, 2019. (“One reason we were attracted to the P/C business was the industry’s business model: P/C insurers receive premiums upfront and pay claims later.... This collect-now, pay-later model leaves P/C companies holding large sums – money we call “float” – that will eventually go to others. Meanwhile, insurers get to invest this float for their own benefit.”)

Over this same period, despite almost always having an underwriting loss, the property/casualty industry thrived. As shown in the table below, insurers’ surplus – the money held above that reserved for expected losses – doubled from 2004 to 2018, quadrupled since 1994, and has risen by more than 5,000% over the past 60 years. At the end of the third quarter of 2019, the industrywide surplus reached an all-time record level of \$812.2 billion.

Figure 2



In sum, graphing these data shows how this industry massively prospers while often saying it is “suffering” losses. It is truly “crying all the way to the bank.”<sup>2</sup>

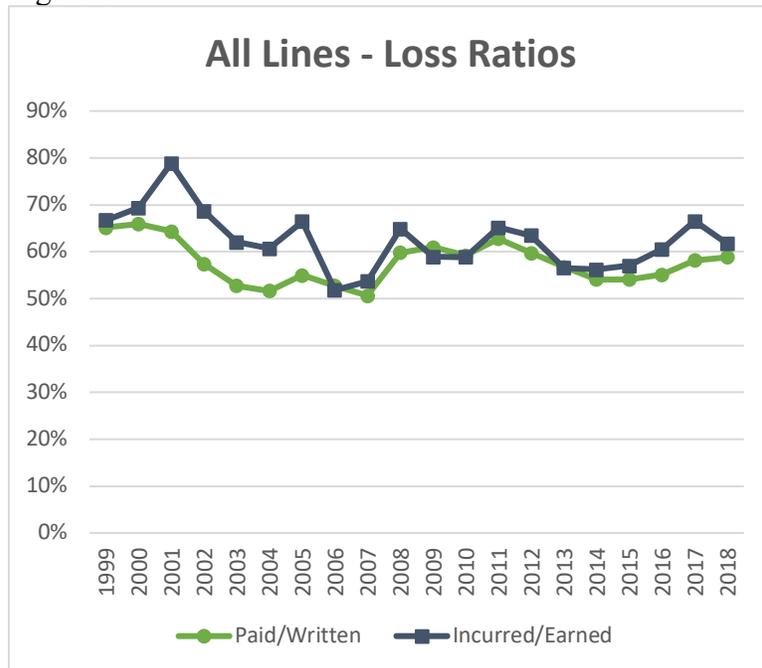
### Loss Ratio

Profitability can also be measured by the loss ratio, which compares the premiums that insurers take in and the money expected to be paid in claims. The lower the loss ratio, the less the insurer expects to pay for claims relative to the premiums it charges and the more profitable the insurer likely is (assuming all other things are equal). The rest of the money goes towards overhead and profit, which is *in addition* to the profit the insurer makes by investing premiums during the “float” period.

<sup>2</sup> American pianist Liberace is often quoted as originating this phrase. The *Oxford English Dictionary*’s first entry is from the *Daily Mirror* of September 26, 1956: “On the occasion in New York at a concert in Madison Square Garden when he had the greatest reception of his life and the critics slayed him mercilessly, Liberace said: ‘The take was terrific but the critics killed me. My brother George cried all the way to the bank.’” Later, he was quoted as saying, “Remember that bank I cried all the way to? I bought it.” Insurers could make even grander claims of riches as they cry their way to the bank, which they often own.

According to A.M. Best data, as shown in the graph below, the industry’s adjusted paid loss ratios have barely gone above 60 percent since 1999, which is remarkably low and is another key to demonstrating how well insurers have been performing. For an industry that delivers a return of 60 cents on the consumer dollar to be raking in such huge profits is remarkable.

Figure 3



### Insurance Cycle – Hard and Soft Markets

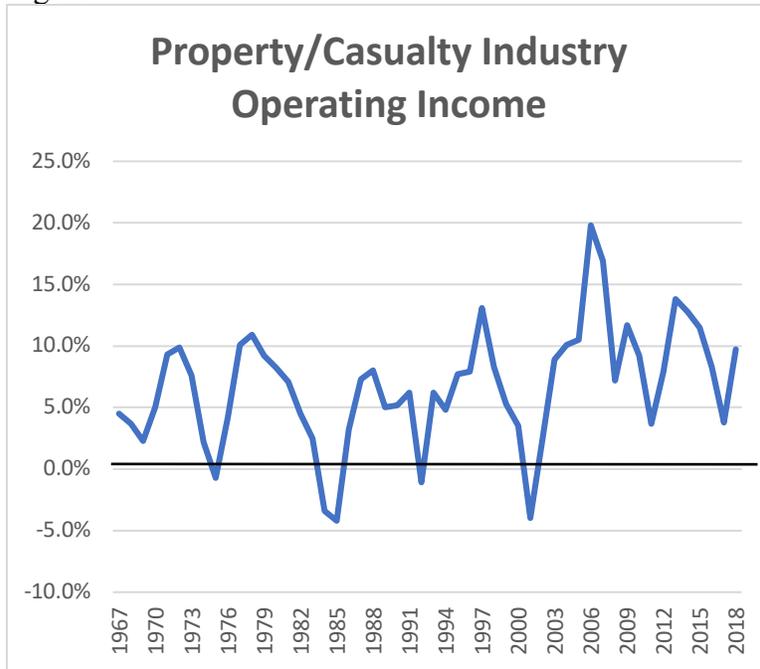
As mentioned above, insurance companies make most of their profits from investment income. During years of a strong stock market, high interest rates, and/or excellent insurer profits, insurance companies engage in fierce competition for premium dollars to invest for maximum return.<sup>3</sup> This results in competitive underpricing of policies when rates rise less than inflation. This is called the “soft market,” the most recent of which began in 2006 (and may now be ending although this is as yet unclear, as will be explained later). As we will also show, the extended soft market we have been in is also the result of excessive pricing and over-reserving that took place during the last hard market.

<sup>3</sup> This is particularly true with regard to commercial insurance, like liability insurance for businesses or malpractice insurance. The personal lines market, like auto and homeowners insurance, is not as competitive because of the lack of knowledge of consumers and the resulting inertia in the marketplace.

When investment income decreases because the stock market plummets or interest rates are low, and/or cumulative price cuts during the soft market render profits unbearably low, the industry responds by increasing premiums and reducing coverage, creating a “hard market.” For businesses, an “insurance crisis” can result. Hard markets are followed by soft markets, when rates stabilize and even decline.

The country experienced a hard insurance market in the mid-1970s, particularly in the medical malpractice and product liability lines of insurance. A more severe crisis took place in the mid-1980s, when most liability insurance was affected. Again, from late 2001 through 2006, a “hard market” took hold, primarily in the property and medical malpractice lines. Each of these periods was followed by a soft phase. The following chart shows this economic cycle at work, demonstrating how those three past hard markets were coordinated with the industry’s operating profit at or below zero.

Figure 4



Source: A.M. Best, *Best’s Aggregates and Averages – Property/Casualty* (2019)

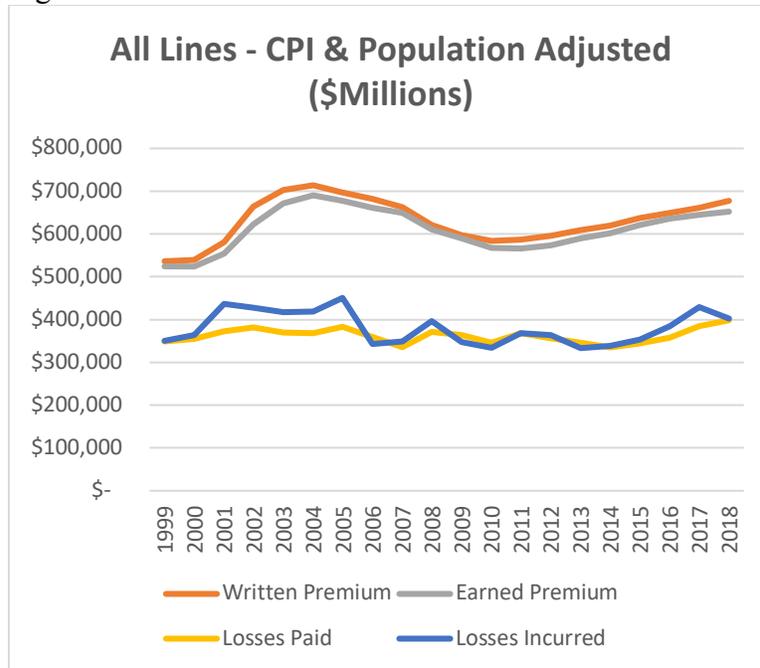
(Note that the 1992 data point was not a classic cycle bottom, but rather reflected the impact of Hurricane Andrew and other catastrophes in that year.)

The following chart illustrates the last hard and soft markets. It shows “Direct Premiums Written” (the amount of money that insurers collected in premiums from policyholders during that year) and “Direct Losses Paid” (what insurers actually paid out that year for properties that were damaged or people who were injured – all claims, jury awards, and settlements – as well as what insurance companies pay their own lawyers to fight claims), in addition to “Incurred Losses,” which as explained earlier, includes reserves for future claims. It also includes “Earned Premiums,” which excludes the portion of premium

collected for policies that extend past the end of the calendar year and includes premiums from the previous year that extended beyond that year.

The chart illustrates that at least since 1999 (the end of the last soft market), Direct Losses Paid never spiked and have generally tracked the rate of inflation<sup>4</sup> and population growth.<sup>5</sup> However, during the last hard market (2002-2005), insurers increased their reserves (Incurred Losses) above paid losses. This allowed them to sharply increase premiums beginning in 2002, which is clearly indicated.

Figure 5



Source: A.M. Best, *Best's Aggregates & Averages – Property/Casualty* (2019)

There are three important additional points to note.

First, this cycle is national in scope but it occurs in every state irrespective of a state's catastrophes or tort law.

Second, for a hard market to begin, which requires a major cycle turn, a great deal of industry coordination is necessary since the entire industry must collude and raise rates together. (See Appendix showing cooperation in run-ups to past hard markets). This collusion usually begins with industry leaders pressuring their own competitors to stop competing for premium dollars and to raise rates and reserves industry-wide. As part of

<sup>4</sup> Inflation adjustments, labeled as "CPI Adjusted" throughout this report, are derived from the Bureau of Labor Statistics Consumer Price Index.

<sup>5</sup> Population adjustments used throughout this report are derived from World Bank population data (based on United States Census data) available at <https://data.worldbank.org/indicator/SP.POP.TOTL?end=2018&locations=US&start=1999&view=chart>

their narrative, these leaders publicly push the idea that the industry is financially beleaguered and cannot pay claims without significantly raising rates.

Third, the most common story presented historically by industry leaders to argue that the industry is financially beleaguered and cannot pay claims is that lawyers, lawsuits, judges, and juries have suddenly become more “aggressive.” It is a narrative used not only to push for a cycle turn, but also to maintain rate hikes for the entirety of a three- to four-year hard market.

To buy this argument, one would have to accept the notion that lawyers became “aggressive” while juries (coincidentally at the same time) engineered large awards in the mid-1970s, then stopped in complete sync for about eight years, then started again in the mid-1980s, then stopped for 13 years, then started again in 2002, and stopped in 2006. And now, 13 or 14 years later they have somehow started again. Such an assertion seems ludicrous. It is also demonstrably untrue. At no time did claims or payouts spike during any of these past periods<sup>6</sup> and, as we will show, it is certainly not happening now.

### **How Certain Laws Allow for the Creation of These Accounting Practices**

To understand how the property casualty insurance industry is allowed to collude in this manner, it is necessary to start with one key observation: in 1944, Congress passed the McCarran-Ferguson Act, a law that exempts the insurance industry from anti-trust laws<sup>7</sup> and allows the industry to collude on important components of insurance prices, an anti-competitive practice that is illegal for other industries.

The exemption has also allowed creation of an industry-controlled, for-profit company called the Insurance Services Office, Inc. (ISO) – a subsidiary of Verisk Analytics – which presents rate data to state insurance departments on behalf of the insurance companies using their services. State insurance departments often approve rates based on ISO data, which then are used by many insurance companies in their pricing models. Even more companies use the ISO-selected risk classification and territories, further reducing competition.

While exempting the industry from anti-trust laws, Congress also prohibited any federal regulation of insurance.<sup>8</sup> It delegated insurance regulation to the states, with no standards and no oversight. Most state insurance departments have weak or non-existent authority over insurance rates through prior approval or rejection of requests for rate increases. Most state insurance departments also lack adequate investigators, auditors, and other professionals, preventing them from recommending appropriate insurance rates and

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<sup>6</sup> See Americans for Insurance Reform, *Stable Losses/Unstable Rates 2016* (November 2016), <http://centerjd.org/content/stable-losses-unstable-rates-2016>

<sup>7</sup> 15 U.S.C. 1012-1015. However, insurance companies may not boycott their insureds by agreeing to deny them coverage entirely. *St. Paul Fire & Marine Inc. Co. v. Barry*, 438 U.S. 531 (1978).

<sup>8</sup> 15 U.S.C. 1012-1015. Title V of the 2010 Public Law 111-203, the Dodd-Frank Wall Street Reform and Consumer Protection Act, allows the Federal Insurance Office to collect insurance data. However, the law maintains exclusive state regulation over “insurer’s rates, premiums, underwriting, [and] sales practices.”

coverage. In other words, with few exceptions, state insurance departments have neither the authority nor the funding to exercise proper control over insurance industry pricing.

As for reinsurance, which insurance companies carry to spread their risk (a sort of lay-off bookie arrangement), the situation is even worse. Not only is there no federal regulation, but state insurance departments do not even minimally regulate rates or terms of coverage in reinsurance contracts. State reinsurance regulation is focused only on assuring the solvency of the reinsurer. States do not require foreign reinsurers, like Swiss Re or Lloyd's of London, to be licensed to do business in the United States. They require only that the foreign reinsurer maintain some security in the United States to back up its obligations, such as a U.S. trust fund or a letter of credit. And states have no data collection requirements for foreign reinsurers.<sup>9</sup>

## **A NEW HARD MARKET? INSURANCE INDUSTRY GURUS SENDING MIXED MESSAGES FROM ATOP THEIR MOUNTAINS OF MONEY**

Is the insurance industry today so financially troubled that it cannot pay claims and must raise rates? Answering this question must start with some basic facts. The market has been soft, with insurance premiums for businesses stable for an extended period of about 13 or 14 years. This is reflected in the fact that when surveyed, businesses put the issue “cost of liability insurance” at the bottom of any list of current concerns.<sup>10</sup> Even though interest rates have also stayed low, insurance industry surpluses have grown substantially during this period, and are now at the astounding level of \$812.2 billion.<sup>11</sup>

When it comes to litigation trends, the statistics similarly confirm why businesses virtually always put issues like “lawsuits,” “liability,” and “tort reform” at the bottom of any list of concerns.<sup>12</sup> According to the National Center for State Courts (NCSC), which compiles nationwide litigation data, “The picture of civil caseloads that emerges from [its] study is very different than one might imagine from listening to current criticism about the American civil justice system.”<sup>13</sup>

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<sup>9</sup> See, e.g., *The Liability Insurance Crisis*, Hearings Before the Subcomm. On Economic Stabilization of the House Comm. On Banking, Finance and Urban Affairs, 99th Cong., 2nd Sess. 83 (1986)(Statement of Mindy Pollack, Assistant General Counsel, Reinsurance Association of America). See also, Joanne Doroshov and Adrian J. Wilkes, *Goliath: Lloyd's of London in the United States*, Center for Study of Responsive Law (1988), pp. 27-30.

<sup>10</sup> See Center for Justice & Democracy, *Limiting Lawsuits: Small Businesses' Least Concern* (October 2017), <http://centerjd.org/system/files/SmallBiz2017UpdateF2.pdf>

<sup>11</sup> Insurance Services Office, “Property/Casualty Insurers See Increase in Net Underwriting Gains and Record Surplus in the First Nine Months of 2019,” January 16, 2020, <https://www.verisk.com/press-releases/2020/january/propertycasualty-insurers-see-increase-in-net-underwriting-gains-and-record-surplus-in-the-first-nine-months-of-2019/>

<sup>12</sup> See Center for Justice & Democracy, *Limiting Lawsuits: Small Businesses' Least Concern* (October 2017), <http://centerjd.org/system/files/SmallBiz2017UpdateF2.pdf>

<sup>13</sup> National Center for State Courts, *The Landscape of Civil Litigation in State Courts* (November 2015), <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>

In their latest look at legal judgements, NCSC found that 75 percent of tort judgments were less than \$12,200.<sup>14</sup> Just as significantly, a “0” (*i.e.*, defense) judgment in favor of an insurance company is more likely than anything.<sup>15</sup> NCSC found judgments exceeding \$0 in only 11 percent of tort cases, which even if likely an underestimate, “may be interpreted as a very rough proxy for the plaintiff win rate.”<sup>16</sup>

As far as jury verdicts, only a tiny percentage of tort cases are resolved by juries – just 2.1 percent in 2018.<sup>17</sup> For medical malpractice cases, that number is similarly low: 7.2 percent.<sup>18</sup> As to the size of verdicts, jury awards exceeded \$500,000 in only 3% of cases in which judgment exceeded zero, and exceeded \$1 million in only 2%.<sup>19</sup>

Even trends seen in unscientific jury verdict reporting services, which tend to skew high because they rely on self-reported information and are not inflation-adjusted, show a steady decline in the size of large verdicts over the last decade. ALM’s Verdict Search data, for example, show nearly three times the number of \$1 million plus verdicts in 2010 (1542) as compared to 2019 (550),<sup>20</sup> with a continuous drop each year. As for verdicts over \$10 million, there were about half the number in 2019 (131) as there were in 2010 (256),<sup>21</sup> also with a steady decline each year. Whether looking at \$5 million verdicts or \$20 million verdicts, the same trends appear.

And importantly, none of these figures show the greatly-reduced sums that insurers actually pay out to claimants, if anything. Jury verdict data do not reflect reductions by remittitur, verdicts overturned on appeal, or settlements reached later at reduced sums. As one medical malpractice researcher put it, “[J]ury verdicts that attract popular attention are not at all representative and often are slashed dramatically by judicial oversight or through other means,” that “the larger the verdict, the more likely and larger the haircut,” and that generally injured people are undercompensated.<sup>22</sup>

Insurance industry data are certainly consistent with these observations. As shown previously and repeated below, since 1999 (the end of the last soft market), total commercial insurance payouts have never spiked and have generally tracked the rate of inflation and population.

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<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Twenty-three states provided the National Center for State Courts with state court caseload data related to the percentage of tort cases resolved by juries. National Center for State Courts, “2018 Civil Caseloads – Trial Courts: 2018 Tort Jury Trials and Rates,” [http://popup.ncsc.org/CSP/CSP\\_Intro.aspx](http://popup.ncsc.org/CSP/CSP_Intro.aspx)

<sup>18</sup> Twenty-one states provided NCSC with state court caseload data related to the percentage of medical malpractice cases resolved by juries. National Center for State Courts, “2018 Civil Caseloads – Trial Courts: 2018 Medical Malpractice Jury Trials and Rates,” [http://popup.ncsc.org/CSP/CSP\\_Intro.aspx](http://popup.ncsc.org/CSP/CSP_Intro.aspx)

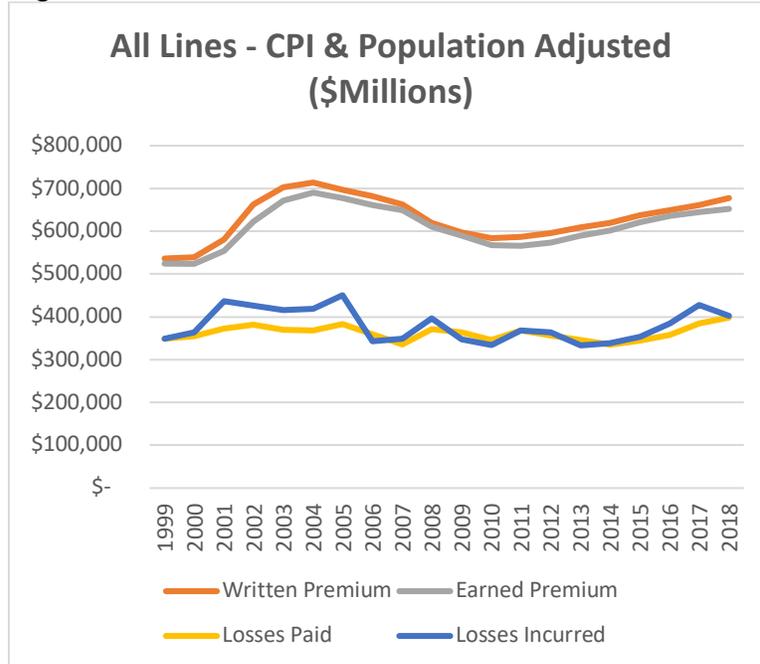
<sup>19</sup> National Center for State Courts, *The Landscape of Civil Litigation in State Courts* (November 2015), [https://www.ncsc.org/~/\\_media/Files/PDF/Research/CivilJusticeReport-2015.ashx](https://www.ncsc.org/~/_media/Files/PDF/Research/CivilJusticeReport-2015.ashx)

<sup>20</sup> Verdict Search, data retrieved February 12, 2020, <https://verdictsearch.com/>

<sup>21</sup> Ibid.

<sup>22</sup> David A. Hyman and Charles Silver, “Five Myths of Medical Malpractice,” 143 *CHEST* 222 (January 2013), <https://journal.publications.chestnet.org/article.aspx?articleid=1512512>

Figure 6



Source: A.M. Best, *Best's Aggregates & Averages – Property/Casualty* (2019)

### Suddenly, “Social Inflation”?

The low prices, even underpricing of policies – the very definition of a “soft market” – went on for a number of years.<sup>23</sup> Throughout the current soft market, insurance executives have been complaining. For example, in 2010, four years into the soft market,

Nick Cortezi, chief executive officer at All Risks, a national specialty insurer based in Hunt Valley, Md., said he was “pessimistic” about the end of the soft market. “We are all competing more aggressively with more capital for a pie that keeps shrinking,” he said, explaining why the market is not hardening. “It’s going to take outside forces. ... I think a natural disaster, a natural property disaster, could be a causative event that could turn the market.”<sup>24</sup>

Now well over a decade into the current soft market, the industry has decided to try again to end it and burden commercial policyholders with higher premiums. According to the

<sup>23</sup> See S&P Global, “The Outlook On The U.S. Property/Casualty Insurance Sector Remains Stable; ‘Social Inflation’ Puts A Spotlight On Pricing Complacency,” January 20, 2019, <https://www.spglobal.com/ratings/en/research/articles/200113-the-outlook-on-the-u-s-property-casualty-insurance-sector-remains-stable-social-inflation-puts-a-spotlight-o-11309412> (“After a prolonged period of pricing remaining too low for too long in many product lines, things began to change in 2018.”)

<sup>24</sup> Bob Graham, “Property-casualty ‘soft market’ to continue for year or two, execs say.” This story originally appeared in the June 2010 print edition of *Insurance & Financial Advisor* but was found at <http://ifawebnews.com/2010/07/09/property-casualty-soft-market-to-continue-for-year-or-two-execs-say/>

*Wall Street Journal*, they are making this move for two main reasons: “several years of large catastrophe losses and continued low interest rates, which have weighed on their investment returns.”<sup>25</sup>

First is the issue of low interest rates. As noted earlier, this is one of the most predictable reasons for insurers to try to flip the nation into a hard market after years of underpricing. What is different and particularly objectionable about this excuse today is that the industry has been storing away excess profits for decades, and has accumulated record-breaking surpluses, now totaling \$812.2 billion. The strong stock market pushed up the massive insurer investments, also extending the soft market.

Second are property-related “catastrophe losses” similar to the types of “natural disasters” described above by Nick Cortezi. In his April 2019 first quarter earnings call, for example, W.R. Berkley CEO William R. Berkley announced that nearly every commercial line was “firming,” calling it a “delay” but that, “We are now seeing early but meaningful signs that [rates are] responding to the cat [or ‘catastrophe’] activity.”<sup>26</sup> Similarly, reinsurers say they are largely focused on hurricanes and wildfires.<sup>27</sup>

However, analysts say that the industry’s “record levels of policyholder surplus” have been “sufficient to absorb” such catastrophes.<sup>28</sup> Indeed, the industry seems to be weathering these storms spectacularly well, with both AIG and Travelers boasting about “beating analyst estimates in the second quarter [of 2019] amid weather losses.”<sup>29</sup>

And there are other indications of how well the industry is doing. According to a recent S&P Global analysis, the industry now has too much capital (20%) even based on the generous Risk Based Capital (RBC) methods of the National Association for Insurance

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<sup>25</sup> Nicole Friedman and Leslie Scism, “Insurers Drive Up Prices for U.S. Businesses; Large catastrophe losses and low interest rates force insurers’ hand after years of no increases,” *Wall Street Journal*, February 11, 2020, <https://www.wsj.com/articles/insurers-drive-up-prices-for-u-s-businesses-11581417009>

<sup>26</sup> Mark Hollmer, “Two Years Late, the P/C Insurance Market Is Finally Hardening: W.R. Berkley CEO,” *Carrier Management*, April 25, 2019, <https://www.carriermanagement.com/news/2019/04/25/192504.htm>. Notably at that point, U.S. liability rates were only up 2.8 percent mostly due to a 6 percent hike in a single sub-line of insurance, Directors and Officers. “Commercial Insurance Prices Were Up 3% Globally, 1.1% in U.S. in Q1: Marsh, Insurance Journal,” May 16, 2019, <https://www.insurancejournal.com/news/national/2019/05/16/526683.htm>

<sup>27</sup> “Loss Creep Brings End to Soft Market: Guy Carpenter,” *Carrier Management*, September 9, 2019, <https://www.carriermanagement.com/news/2019/09/09/197608.htm>

<sup>28</sup> Press release, “KBRA Releases Research – U.S. Property and Casualty Insurance 2020 Outlook: Bedrock Capital Underpins Stability,” January 28, 2020, <https://apnews.com/Business%20Wire/7398fd73bc3045e599d8d1dbecb890a0>

<sup>29</sup> Katherine Chiglinsky, “AIG trumps highest profit estimate after P&C resurgence,” *Bloomberg*, August 7, 2019, <https://www.insurancebusinessmag.com/us/business-news/aig-trumps-highest-profit-estimate-after-pandc-resurgence-174738.aspx>

Commissioners.<sup>30</sup> In addition, the industry is expected to continue releasing reserves,<sup>31</sup> is still making an underwriting profit,<sup>32</sup> and loss ratios are barely changing.<sup>33</sup> S&P also says the industry is saving to get bigger, not to cover “losses.”<sup>34</sup>

In sum, neither of these reasons – low interest rates or catastrophes – justify substantial rate hikes on businesses at this time. Perhaps realizing the weakness of their arguments and the need to deflect attention away from their own their greed, insurers “in recent months”<sup>35</sup> began promoting a new narrative, one they have used in run-ups to prior hard markets to great political effect: blaming lawyers and juries.

Specifically, as insurers began hitting businesses with *liability* rates hikes too (although only moderately<sup>36</sup> with a few commercial lines getting most of the attention<sup>37</sup>), rhetoric about the legal system began saturating the discussion. By the Fall of 2019, the industry had begun using an industry-created term, “social inflation,” to argue why it was no longer possible for insurers to pay liability claims without raising rates. (In run-ups to past hard markets, discredited terms like “lawsuit crisis” or “litigation explosion” were used. See Appendix. But because such terms were heavily criticized as unsupported by evidence, the industry likely realized that re-using them would have everyone “crying

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<sup>30</sup> See S&P Global, “The Outlook On The U.S. Property/Casualty Insurance Sector Remains Stable; ‘Social Inflation’ Puts A Spotlight On Pricing Complacency,” January 20, 2019, <https://www.spglobal.com/ratings/en/research/articles/200113-the-outlook-on-the-u-s-property-casualty-insurance-sector-remains-stable-social-inflation-puts-a-spotlight-o-11309412> (“The industry’s very strong capitalization is the cornerstone of our stable outlook. We estimate that rated U.S. P/C insurers have a 20% risk-based capital buffer at the ‘AA’ level per our capital analysis as of 2018, significantly up from a 9.5% buffer in 2017. As capital increases, it becomes less of a ratings differentiator.”)

<sup>31</sup> Ibid. (“Prospectively, we are cautiously optimistic that overall reserve development for the industry will remain favorable given the steady positions for short-tailed lines and improving WC loss emergence, albeit somewhat offset by a 40% cumulative rate decrease for this line (for private carriers) since 2003, according to National Council on Compensation Insurance (NCCI).”)

<sup>32</sup> Ibid. (“Based on S&P Global Market Intelligence data, the industry’s statutory combined ratio (including policyholders’ dividends) of 97.9% in the first nine months of 2019 was modestly up from 97.5% during the same period in 2018. Underwriting performance through the first nine months of 2019 compared favorably with the average 2014-2018 year-end combined ratio of 99.8%.”)

<sup>33</sup> Ibid. (“By segment, commercial lines’ direct incurred loss ratio modestly deteriorated to 56% in the first nine months of 2019 from 55% during the same period the prior year... Personal lines recorded a 64% direct incurred loss ratio in the first nine months of 2019 compared with 63% for the same period in 2018 due to improved homeowners loss experience offset by a modest uptick in personal auto losses.”)

<sup>34</sup> Ibid. (“We think the sector is strategically holding onto more capital as a matter of prudence over growth opportunities.”)

<sup>35</sup> Nicole Friedman and Leslie Scism, “Insurers Drive Up Prices for U.S. Businesses; Large catastrophe losses and low interest rates force insurers’ hand after years of no increases,” *Wall Street Journal*, February 11, 2020, <https://www.wsj.com/articles/insurers-drive-up-prices-for-u-s-businesses-11581417009>

<sup>36</sup> See, e.g., Council of Insurance Agents & Brokers, “Q3 P/C Market Survey 2019: Executive Summary,” November 25, 2019, <https://www.ciab.com/resources/q3-p-c-market-survey-2019/> (“Premium pricing across all-sized accounts increased moderately at 6.2% in Q3 2019”); Matthew Lerner, “Commercial pricing in Q2 increases almost 4%: Willis, Lerner,” *Business Insurance*, September 9, 2019, <https://www.businessinsurance.com/article/00010101/NEWS06/912330569/Commercial-pricing-in-Q2-increases-almost-4-Willis>

<sup>37</sup> These lines include Commercial Auto, Medical Malpractice, and sub-categories like Directors and Officers insurance.

wolf.”) “Social inflation” is so vague on its face that any reference to it requires – and allows for – virtually any interpretation. It is generally used to refer to a wide variety of industry complaints about aggrieved policyholders or consumers who go court, “aggressive” attorneys who represent them, or local juries.

A review of news articles shows that in the Spring of 2019, not everyone in the industry was using this terminology.<sup>38</sup> But by November of 2019 and into 2020, everyone seems to have “gotten the memo.” Thus began a growing drumbeat of articles throughout business and trade publications,<sup>39</sup> supplemented by conferences hosted by industry trade

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<sup>38</sup> Nicole Friedman, Allison Prang, “Travelers’ Profit Declines; Company added to reserves due to increase in claims payments for lawsuits, jury awards,” *Wall Street Journal*, October 22, 2019, <https://www.wsj.com/articles/travelers-profit-declines-11571743477>; Claire Wilkinson, “Large med mal verdicts drive hospital liability up: Report,” *Business Insurance*, October 15, 2019, <https://www.businessinsurance.com/article/20191015/NEWS06/912331165/Large-medical-malpractice-verdicts-drive-hospital-liability-up>; “Loss Creep Brings End to Soft Market: Guy Carpenter,” *Carrier Management*, September 9, 2019 <https://www.carriermanagement.com/news/2019/09/09/197608.htm>; Jim Auden, CFA, and Gerry Glombicki, “MPL Insurance Market Slowly Reacting To Poorer Profits,” *Medical Liability Monitor* (September 2019); Katherine Chiglinsky, “Travelers Joins Insurers Gripping About More Aggressive Lawsuits,” *Bloomberg*, July 23, 2019, <https://www.bloomberg.com/news/articles/2019-07-23/travelers-joins-insurers-gripping-about-more-aggressive-lawsuits>; “Lawyers Professional Liability Insurance Claims Grow in Severity, Complexity, Cost,” *Insurance Journal*, May 31, 2019, <https://www.insurancejournal.com/news/national/2019/05/31/527978.htm>; Katherine Chiglinsky, “Squeezed by Class-Action Suits, Insurers Are Finally Responding,” *Bloomberg*, May 14, 2019, <https://www.bloomberg.com/news/articles/2019-05-14/squeezed-by-class-action-suits-insurers-are-finally-responding>; Gloria Gonzalez, “Medical malpractice insurers under pressure: Best,” *Business Insurance*, May 7, 2019, <https://www.businessinsurance.com/article/20190507/NEWS06/912328310/Medical-malpractice-insurers-under-pressure-AM-Best-report>

<sup>39</sup> Luke Gallin, “Social inflation adding pressure on loss costs for insurers: Analysts,” *Reinsurance News*, January 27, 2020, <https://www.reinsurancene.ws/social-inflation-adding-pressure-on-loss-costs-for-insurers-analysts/>; Matt Sheehan, “Bermuda re/insurers set for improved pricing trends in 2020: Fitch,” *Reinsurance News*, January 27, 2020, <https://www.reinsurancene.ws/bermuda-re-insurers-set-for-improved-pricing-trends-in-2020-fitch/>; Angela Childers, “Travelers reports profit jump, but ‘social inflation’ weighs,” *Business Insurance*, January 23, 2020, <https://www.businessinsurance.com/article/20200123/NEWS06/912332708/Travelers-insurance-fourth-quarter-results-social-inflation>; Charlie Wood, “Social inflation to drive commercial pricing across 2020: Morgan Stanley,” *Reinsurance News*, January 21, 2020, <https://www.reinsurancene.ws/social-inflation-to-drive-commercial-pricing-across-2020-morgan-stanley/>; Claire Wilkinson, “Social inflation keeps rising for insurers: Panelists,” *Business Insurance*, January 17, 2020, <https://www.businessinsurance.com/article/20200117/NEWS06/912332630/Social-inflation-a-growing-industry-disruptor-Insurance-Information-Institute-Jo>; William Wilt and Alan Zimmermann, “It’s Not Over: Social Inflation Will Be Around for Some Time,” *Carrier Management*, January 9, 2020, <https://www.carriermanagement.com/features/2020/01/09/202058.htm>; Gavin Souter, “Liability rates rise; excess limits curtailed,” *Business Insurance*, January 7, 2020, <https://www.businessinsurance.com/article/20200107/NEWS06/912332447/General-liability-insurance-rates-rise-policy-limits-curtailed>; Bethan Moorcraft, “What is social inflation, and why is it hurting insurance?” *Insurance Business America*, January 3, 2020, <https://www.insurancebusinessmag.com/us/news/breaking-news/what-is-social-inflation-and-why-is-it-hurting-insurance-195626.aspx>; Telis Demos, “The Specter of Social Inflation Haunts Insurers; Insurance executives’ talk about bigger jury awards and increased litigation worry investors,” *Wall Street Journal*, December 27, 2019, <https://www.wsj.com/articles/the-specter-of-social-inflation-haunts-insurers-11577442780>; Willis Towers Watson, *Insurance Marketplace Realities 2020*, November 13, 2019; “Social

groups,<sup>40</sup> with industry leaders and industry consultants pushing the idea that “social inflation” was going to force them to start hitting businesses with rate hikes. And now, “[v]irtually every publicly traded company in their quarterly earnings reports” is talking about the idea of “social inflation.”<sup>41</sup>

However, those same earnings reports also tell a different story. In its January 23, 2020 earnings call, Travelers, the nation’s second-largest commercial property/casualty insurance company, went so far as to blame social inflation for “losses.”<sup>42</sup> They said this with a straight face even as they were announcing that their fourth quarter 2019 profit jumped to \$873 million, up from \$621 million in 2018, or about 40 percent. Not only did Travelers have great profits, it also continued to release reserves that it had previously set aside to pay claims – money it had collected but apparently didn’t need.<sup>43</sup>

In its February 4, 2020 earnings conference call, Hartford’s Chairman and CEO Christopher Swift began with rhetorical observations about “social inflation” as the “current hot topic” in industry conversations. Yet President Douglas Elliot then made clear that with regard to litigation, nothing new was going on at all. He said, “Our teams actively monitor these claim trends and currently do not see significant shifts in either representation or litigation rates.” The most Swift could say about the “severity” of claims – which typically leads to misleading attacks on jury verdicts – is that it is “probably” up “a little bit.” (Notably, some increases are expected due to *actual economic* inflation.) He also said that “there isn’t anything outside of norm that we see.”<sup>44</sup>

And at the end of January 2020, Kroll Bond Rating Agency (KBRA) released its *U.S. Property and Casualty Insurance 2020 Outlook: Bedrock Capital Underpins Stability* report. In KBRA’s view, despite what it described as industry “offsets” like “social inflation, ongoing catastrophe losses, rising reinsurance costs and retentions, and low interest rates,” the U.S. property/casualty industry is “stable,” acknowledging, “The industry has achieved record levels of policyholder surplus.”<sup>45</sup>

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Inflation Is Back and Carrier Execs Should Worry: Berkley,” *Carrier Management*, October 24, 2019 <https://www.carriermanagement.com/news/2019/10/24/199437.htm>

<sup>40</sup> Claire Wilkinson, “Social inflation keeps rising for insurers: Panelists,” *Business Insurance*, January 17, 2020, <https://www.businessinsurance.com/article/20200117/NEWS06/912332630/Social-inflation-a-growing-industry-disruptor-Insurance-Information-Institute-Jo>

<sup>41</sup> Press Release, “AM BestTV: Climate Change, Interest Rates, Social Inflation Challenge Insurers,” January 22, 2020, <https://www.businesswire.com/news/home/20200122005668/en/BestTV-Climate-Change-Interest-Rates-Social-Inflation>

<sup>42</sup> Nicole Friedman and Allison Prang, “Travelers Posts Higher Profit But Warns About Lawsuit Payments,” *Wall Street Journal*, January 23, 2020, <https://www.wsj.com/articles/travelers-catastrophe-losses-fall-profit-rises-11579782286>

<sup>43</sup> Transcript, “The Travelers Companies Inc., Q4 2019 Results Earnings Conference Call, January 23, 2020, 9:00 AM ET.”

<sup>44</sup> Transcript, “Hartford Financial Services Group, Inc., Q4 2019 Results Earnings Conference Call, February 4, 2020, 9:00 AM ET.”

<sup>45</sup> Press Release, “KBRA Releases Research – U.S. Property and Casualty Insurance 2020 Outlook: Bedrock Capital Underpins Stability,” January 28, 2020, <https://apnews.com/Business%20Wire/7398fd73bc3045e599d8d1dbecb890a0>

Even S&P Global admitted in a recent analysis that attributing losses to “social inflation” was completely unproven, noting, “Perhaps the fact that losses are now piercing the excess casualty layer is more of a function of general inflationary loss experience rather than rising social inflation.”<sup>46</sup>

And on February 26, 2020, in keynote address before the Professional Liability Underwriting Society D&O Symposium, Arch Insurance North America CEO Matt Shulman disputed any notion that social inflation was responsible for the hardening of the market, noting that the same litigation trends have “‘been here for a while’ even though in the past two or three quarters industry executives have identified it as one of the key drivers of losses.”<sup>47</sup>

Despite this, the rhetorical hype around lawsuits and juries is still growing and, in the end, may be becoming a self-fulfilling prophecy, not only regarding the concept of “social inflation”<sup>48</sup> but also when it comes to industry actions to limit the affordability and availability of insurance. The IRMI (Insurance Research and Management Institute) recently distributed an email calling on companies to review their reserves and told them to be careful in renewing business.<sup>49</sup> Sadly, commercial policyholders will be the ultimate victims of this.

### **What are the Specifics of Social Inflation?**

Industry complaints about juries and lawsuits run the gamut: from petty and odd to the typical grumbling we’ve heard for decades. All lack credibility. They include:

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<sup>46</sup> See S&P Global, “The Outlook On The U.S. Property/Casualty Insurance Sector Remains Stable; ‘Social Inflation’ Puts A Spotlight On Pricing Complacency,” January 20, 2019, <https://www.spglobal.com/ratings/en/research/articles/200113-the-outlook-on-the-u-s-property-casualty-insurance-sector-remains-stable-social-inflation-puts-a-spotlight-o-11309412>

<sup>47</sup> Judy Greenwald, “Social inflation not to blame for hardening market: Arch exec,” *Business Insurance*, February 27, 2020, <https://www.businessinsurance.com/article/20200227/NEWS06/912333295/Social-inflation-not-to-blame-for-hardening-market-Arch--Insurance-Group-exec-M>

<sup>48</sup> James H. Gordon and Michael E. Bonner, Ansa Assuncao LLP, “The Self-Fulfilling Prophecy of Social Inflation,” *Lexology*, February 5, 2020 <https://www.lexology.com/library/detail.aspx?g=f87055ad-b2df-4837-8d94-df5d3772775d>

<sup>49</sup> Email, Subject: IRMI Update, “Hard Market Tips + 5 Articles,” January 22, 2020.

**Child sexual abuse cases.**<sup>50</sup> Most states have extremely restrictive laws that block access to the courts for most survivors,<sup>51</sup> but even when legitimate claims are allowed to go forward, the insurance industry often will not cover them.<sup>52</sup>

**The #MeToo movement.**<sup>53</sup> When it comes to workplace sexual harassment, well over half of nonunion private-sector workers are now subject to forced arbitration clauses and class action bans, which keep victims completely out of court. By 2024, it is estimated that more than 80 percent of the private-sector nonunion workforce will be bound by these clauses.<sup>54</sup>

**The 2008 financial crisis.**<sup>55</sup> While alleging that a crisis that occurred *over a decade ago* is causing today's jurors to treat corporations unfairly, neither jury nor paid loss data show any such trend.<sup>56</sup>

**Litigation finance companies.**<sup>57</sup> While arguing that third party litigation funding “fuels frivolous litigation,” empirical research shows the exact opposite to be true (*i.e.*, these

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<sup>50</sup> See, e.g., Willis Towers Watson, *Insurance Marketplace Realities 2020*, November 13, 2019 (“Consider the reviver statutes that are aimed at clerical abuse.”) See also, Telis Demos, “The Specter of Social Inflation Haunts Insurers; Insurance executives’ talk about bigger jury awards and increased litigation worry investors,” *Wall Street Journal*, December 27, 2019, <https://www.wsj.com/articles/the-specter-of-social-inflation-haunts-insurers-11577442780>

<sup>51</sup> Center for Justice & Democracy, “Fact Sheet: State Tort Limits In Sexual Assault Cases; Caps and Statutes of Limitations,” February 14, 2019, <http://centerjd.org/content/fact-sheet-state-tort-limits-sexual-assault-cases-caps-and-statutes-limitations>

<sup>52</sup> Marci A. Hamilton, “Insurance Carriers Hold a Key to Prevent Child Sex Abuse,” *Verdict*, April 25, 2019, <https://verdict.justia.com/2019/04/25/insurance-carriers-hold-a-key-to-prevent-child-sex-abuse> (“Some insurers also reacted to the scandals by removing negligent child sex abuse from coverage. This is pretty galling when you consider that they were content to reap premiums when victims were silent but cut off the coverage once the child sex abuse movement and then the #MeToo movement empowered victims to name their perpetrators and enabling institutions.”)

<sup>53</sup> Telis Demos, “The Specter of Social Inflation Haunts Insurers; Insurance executives’ talk about bigger jury awards and increased litigation worry investors,” *Wall Street Journal*, December 27, 2019, <https://www.wsj.com/articles/the-specter-of-social-inflation-haunts-insurers-11577442780>

<sup>54</sup> Kate Hamaji et al., *Unchecked corporate power; Forced arbitration, the enforcement crisis, and how workers are fighting back*, Economic Policy Institute, May 20, 2019, <https://www.epi.org/publication/unchecked-corporate-power/>; Alexander Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute, April 6, 2018, <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>

<sup>55</sup> Claire Wilkinson, “Social inflation keeps rising for insurers: Panelists,” *Business Insurance*, January 17, 2020, <https://www.businessinsurance.com/article/20200117/NEWS06/912332630/Social-inflation-a-growing-industry-disruptor-Insurance-Information-Institute-Jo>

<sup>56</sup> National Center for State Courts, “2018 Civil Caseloads – Trial Courts: 2018 Tort Jury Trials and Rates,” [http://popup.ncsc.org/CSP/CSP\\_Intro.aspx](http://popup.ncsc.org/CSP/CSP_Intro.aspx); National Center for State Courts, *The Landscape of Civil Litigation in State Courts* (November 2015), <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>. See also, Verdict Search, data retrieved February 12, 2020, <https://verdictsearch.com/>

<sup>57</sup> See, e.g., Bethan Moorcraft, “Guy Carpenter explains three areas of pressure at January reinsurance renewals,” *Insurance Business America*, January 29, 2020, <https://www.insurancebusinessmag.com/us/news/breaking-news/guy-carpenter-explains-three-areas-of->

companies screen out meritless cases),<sup>58</sup> and even business attorneys have written that “linking litigation funding to social inflation exposes the specious nature of the social inflation theory itself.”<sup>59</sup>

**Millennials on juries.**<sup>60</sup> Millennials have been serving on juries since 1999, throughout the entire soft market.

**Juries “numb to monetary values” because of “nine-figure incomes for CEOs, sports stars and celebrities.”**<sup>61</sup> Neither jury data nor paid loss data show such a trend.<sup>62</sup>

**Several recent large verdicts against giant corporations.** For *decades* “there have been massive and well-publicized jury verdicts”; there are compelling reasons why juries decide as they do, and the industry always complains about them.<sup>63</sup> This is nothing new.<sup>64</sup>

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[pressure-at-january-reinsurance-renewals-211862.aspx](#). Litigation finance allows someone suffering an injury the means to bring a case and not be forced into accepting low-ball offers from insurance companies simply because they can't pay rent.

<sup>58</sup> See Ronen Avraham and Anthony Sebok, “An Empirical Investigation of Third Party Consumer Litigant Funding,” 104 *Cornell L. Rev.* 1133 (2019), <https://scholarship.law.cornell.edu/clr/vol104/iss5/1> (“First, we show that consumer litigant funding is based on underwriting criteria that result in a significant number of applications being screened out and rejected.... As a matter of economics, it would make sense for a funder to take steps to screen potential lawsuit investments in favor of those they reasonably believe are stronger, both because they profit from screening better cases and because they can further profit from credibly signaling to adverse parties that the lawsuit they face is credible. The fact that, in our sample set, the funder rejected more than half of the cases presented to it is consistent with this prediction.... The tort reform argument has not held up well under serious academic scrutiny.”)

<sup>59</sup> See also, James H. Gordon and Michael E. Bonner, Ansa Assuncao LLP, “The Self-Fulfilling Prophecy of Social Inflation,” *Lexology*, February 5, 2020, <https://www.lexology.com/library/detail.aspx?g=f87055ad-b2df-4837-8d94-df5d3772775d> (“We also hear a lot about litigation financing. But juries don't know whether litigation financing is at play in any particular case. While the presence of a litigation loan might influence what a plaintiff is willing to accept in order to settle a case (similar to the way in which a lien would), that is not social inflation. Similarly, to the extent litigation financing allows plaintiffs to obtain medical treatment they otherwise would not have or retain experts they otherwise could not afford, that is not social inflation either.”)

<sup>60</sup> See, e.g., Claire Wilkinson, “Social inflation keeps rising for insurers: Panelists,” *Business Insurance*, January 17, 2020, <https://www.businessinsurance.com/article/20200117/NEWS06/912332630/Social-inflation-a-growing-industry-disruptor-Insurance-Information-Institute-Jo>

<sup>61</sup> Willis Towers Watson, *Insurance Marketplace Realities 2020*, November 13, 2019.

<sup>62</sup> National Center for State Courts, “2018 Civil Caseloads – Trial Courts: 2018 Tort Jury Trials and Rates,” [http://popup.ncsc.org/CSP/CSP\\_Intro.aspx](http://popup.ncsc.org/CSP/CSP_Intro.aspx); National Center for State Courts, *The Landscape of Civil Litigation in State Courts* (November 2015), <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>. See also, Verdict Search, data retrieved February 12, 2020, <https://verdictsearch.com/>

<sup>63</sup> James H. Gordon and Michael E. Bonner, Ansa Assuncao LLP, “The Self-Fulfilling Prophecy of Social Inflation,” *Lexology*, February 5, 2020, <https://www.lexology.com/library/detail.aspx?g=f87055ad-b2df-4837-8d94-df5d3772775d> (“For example, in 2002, a Los Angeles jury awarded Betty Bullock, a 50-year smoker, \$28 billion against a tobacco company. That same year, a Missouri jury awarded more than \$2.25 billion to a plaintiff, Georgia Hayes, in her suit against a pharmacist who diluted cancer drugs.”)

<sup>64</sup> See, e.g., Judy Greenwald, “Social inflation not to blame for hardening market: Arch exec,” *Business Insurance*, February 27, 2020, <https://www.businessinsurance.com/article/20200227/NEWS06/912333295/Social-inflation-not-to-blame-for-hardening-market-Arch--Insurance-Group-exec-M> (“Discussing the impact of social inflation, [Arch

### **Verdicts for catastrophically-injured people hurt in big-rig truck accidents.**<sup>65</sup>

Federal law only requires \$750,000 insurance coverage for trucks, a minimum that hasn't been increased in decades, which means that many victims are undercompensated.<sup>66</sup>

**Cases brought by defrauded shareholders against public companies.**<sup>67</sup> The frequency of these cases has been flat for the last three years, and in 2019, the average settlement value dropped to the lowest in a decade.<sup>68</sup>

### **Rates, Industry Pushback, and Inconsistency**

The “social inflation” drumbeat, as with similar drumbeats running up to previous hard markets (*see* Appendix), signals to insurers that they should start raising reserves and rates. Lower level technicians get the message to start these actions. The old industry adage that no one was ever fired for raising rates holds true.

Businesses are starting to hear about at least some rate hikes for the first time in many years as industry leaders continue their push to flip the nation into a destructive hard market.<sup>69</sup> A December 2019 article from *Insurance Business America* called “How can insurance agents mitigate challenges around the hard market?”<sup>70</sup> noted,

Ultimately, the biggest problem we face is that for the last six or seven years, we saw a steady decline in pricing, and this caused some amnesia among our clients about what they paid back in the mid-2000s and late-2000s. They became used to seeing a rate reduction year over year, and now that property insurance pricing is rising for the first time in the better part of a decade, it has caused quite a frenzy.

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Insurance North America CEO Matt] Shulman said an article he found in the course of his research pointed to social inflation, including nuclear jury awards, as a factor in the market – yet that article was written in 2010.”)

<sup>65</sup> *See, e.g.*, Kim Palmer, “A few industries drive commercial insurance rates higher for everyone,” *Crain's Cleveland Business*, January 26, 2020, <https://www.craincleveland.com/government/few-industries-drive-commercial-insurance-rates-higher-everyone>

<sup>66</sup> *See, e.g.*, Rob Low, “Trucking company involved in I-70 crash only carries \$750,000 of liability insurance,” *Fox 31 Denver*, April 30, 2019, <https://kdvr.com/2019/04/30/trucking-company-involved-in-i-70-crash-only-carries-750k-of-liability-insurance/>

<sup>67</sup> Contessa Brewer and Katie Young, “Companies are paying big bucks to insure boards against liability as class-action suits soar,” *CNBC*, January 9, 2020, <https://www.cNBC.com/2020/01/09/companies-are-paying-big-bucks-to-insure-boards-against-liability-as-class-action-suits-soar.html>

<sup>68</sup> “Trends in 2019 Securities Class Actions: Filings Remain High, Resolutions Have Slowed, and Median Settlement Rises,” *Business Wire*, January 21, 2020, <https://finance.yahoo.com/news/trends-2019-securities-class-actions-140000884.html>

<sup>69</sup> Gavin Souter, “Average price hikes hit double-digits: Marsh,” *Business Insurance*, February 11, 2020, <https://www.businessinsurance.com/article/20200211/NEWS06/912333006/Average-price-hikes-hit-double-digits-Marsh>

<sup>70</sup> *See, e.g.*, Bethan Moorcraft, “How can insurance agents mitigate challenges around the hard market?” *Insurance Business America*, December 30, 2019, <https://www.insurancebusinessmag.com/us/news/breaking-news/how-can-insurance-agents-mitigate-challenges-around-the-hard-market-195127.asp>

This has caused a lot of problems beyond just annoyed clients. ... Now, as prices are going back up, it's causing a backlog in underwriting because instead of one agent marketing the account, the client is freaking out about their rate increase.

There is no question that some industry leaders have declared that the nation is now in the midst of a liability crisis, perhaps intended to spook the rest of the industry into a quicker or more severe hardening market. W.R. Berkley CEO William R. Berkley is a particularly aggressive representative of this strategy and has been for a while. In 2011, for example, he announced incorrectly that the market was “definitively” hardening, saying, “We’re just at the beginning of price increases.”<sup>71</sup> Others joined in the chorus, as described in the Appendix. This was false.

Fast forward eight years when in October 2019, Berkley announced that the nation was experiencing a new liability crisis so severe as to resemble the nation’s two prior crises: the 2002-2005 hard market, and “the mid-80s liability insurance crisis.”<sup>72</sup>

Clearly, however, not everyone agrees. In a recent letter to Congress in which the industry expressed views about a bill dealing with risk-retention groups, major industry representatives said, “There is certainly no ‘crisis’ in the commercial market similar to the liability insurance crisis of the 1980s.”<sup>73</sup>

Similarly, in December 2019, A.M. Best Associate Director Sharon Marks said the market is not in crisis because of “‘robust’ capacity’ ... I think when you use the word ‘crisis’ that evokes a time when doctors couldn’t find carriers to write their medical professional liability coverage... There’s still a lot of capacity in the marketplace.” Brian Atchinson, chief executive officer of the Medical Professional Liability Association “agreed, saying availability of coverage is strong for physicians and hospitals... Cycles are inevitable.”<sup>74</sup>

## **Overall Commercial Insurance – What is Happening**

When the insurance industry decides it is time to end a soft market, as at least major components of the industry appear to be trying to do now,<sup>75</sup> it always alleges that losses

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<sup>71</sup> Phil Gusman, “Berkley: Market Is Hardening; Good Companies Can Seize Opportunities,” *National Underwriter Online*, December 7, 2011.

<sup>72</sup> “Social Inflation Is Back and Carrier Execs Should Worry: Berkley,” *Carrier Management*, October 24, 2019, <https://www.carriermanagement.com/news/2019/10/24/199437.htm>

<sup>73</sup> Letter from Independent Insurance Agents and Brokers of America and National Association of Mutual Insurance Companies to Rep. Maxine Waters, Chairwoman, and Rep. Patrick McHenry, Ranking Member, Committee on Financial Services, United States House of Representatives, October 7, 2019.

<sup>74</sup> “Observers Say Medical Liability Market Beginning to Harden as Higher Jury Awards, Eroding Tort Reform Sink In,” *Best’s Insurance News & Analysis*, December 23, 2019, <http://news.ambest.com/newscontent.aspx?refnum=222664&altsrc=23>

<sup>75</sup> Nicole Friedman and Leslie Scism, “Insurers Drive Up Prices for U.S. Businesses; Large catastrophe losses and low interest rates force insurers’ hand after years of no increases,” *Wall Street Journal*, February 11, 2020, <https://www.wsj.com/articles/insurers-drive-up-prices-for-u-s-businesses-11581417009>

are increasing so: 1) business and individual consumers should expect premium increases; and 2) state regulators should allow all price hikes with little delay (lest insurers have to start non-renewing policies). Because of the nature of insurance loss valuation, however, regulators, lawmakers, the media, and the public cannot easily test in real time whether the industry assessment of spiking losses is fact or fiction.

The key data point here, the one that insurers put on graphs that suggest a crisis is afoot, is *losses incurred* during the calendar year. As explained earlier, an “incurred loss” is not what an insurer has paid out. This figure includes estimates of future claims that they know about (reserves) and claims they do not even know about yet (incurred by not reported, or IBNR). These figures are calculated using undisclosed, unregulated, and variable methodologies. They then become the figure insurers report for the year. If those figures are higher than expected (or are padded to lower taxes or raise rates), the industry follows with noise about an impending crisis and uses these data to demonstrate that and raise prices.

While a small, random error up or down in the annual valuation of claims can reasonably be expected, evidence suggests that insurers are off by much more than that, and in ways to specifically correlate to the industry’s economic cycle rather than to any trends in claims. There are a number of ways to show this.

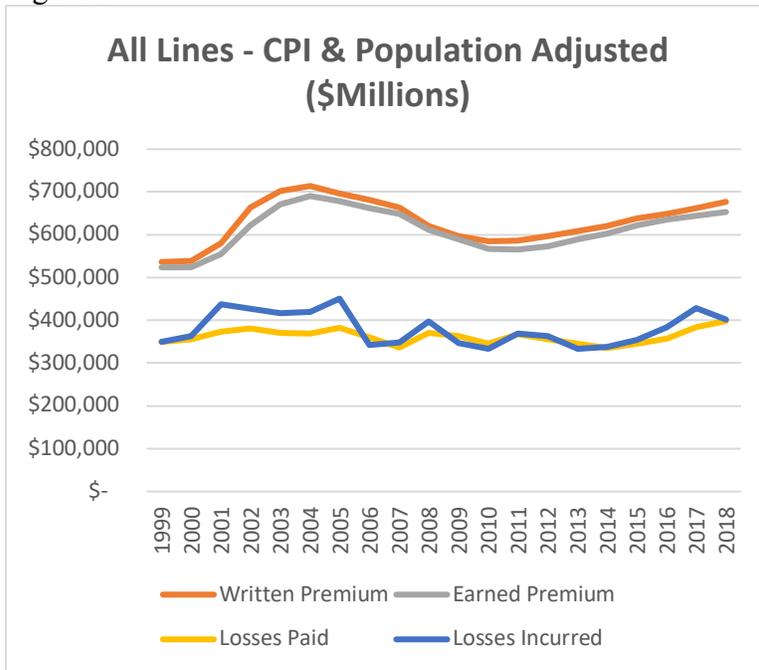
The following chart of data from A.M. Best shows<sup>76</sup> that adjusted claims have stayed essentially flat for two decades while premiums have gone up and down in sync with the insurance industry’s economic cycle. But this chart also shows something else. It shows how the industry manipulated its own reserves during periods when it has been trying to push the nation into a hard market.

One example of this took place during the last hard market (2002-2005), when incurred losses rose higher than actual paid losses. That suggests the industry was inflating its reserves without basis. The same thing started to happen in recent years when the industry began a drumbeat about the need to end the soft market after 13 years. In 2017, reserves pushed incurred losses above paid losses. However, they fell back again in 2018. This indicates that the industry is not yet in a classic cyclical turn.

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<sup>76</sup> The chart includes “Direct Premiums Written” (the amount of money that insurers collected in premiums from doctors during that year), “Premiums Earned” (the portion of premium collected that applies to the expired portion of a policy), “Direct Losses Paid” (what insurers actually paid out that year to people who were injured – all claims, jury awards, and settlements – as well as what insurance companies pay their own lawyers to fight claims), “Incurred Losses” (which as explained earlier, includes reserves and IBNR), and “Earned Premiums” (which excludes the portion of premium collected for policies that extend past the end of the calendar year and includes premiums from the previous year that extended beyond that year). All data are adjusted for inflation and population changes, and miles driven for commercial auto.

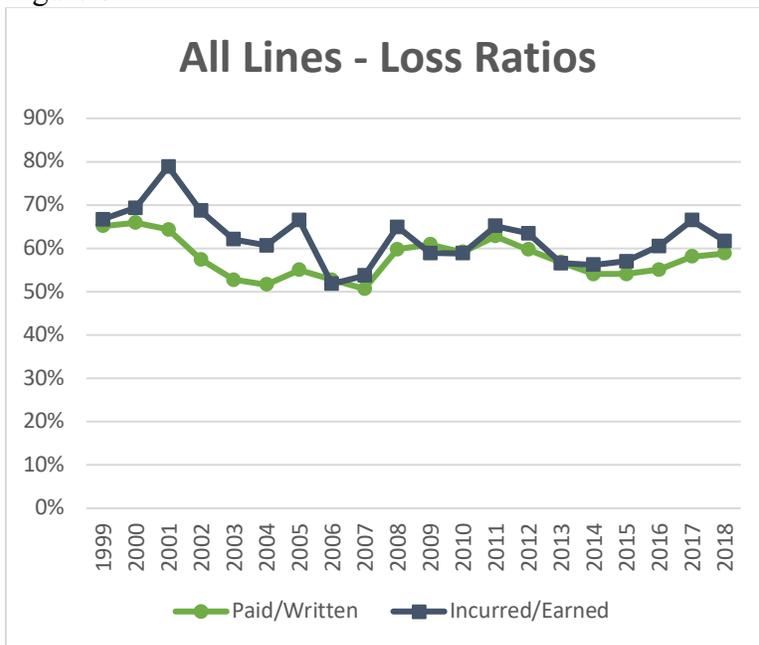
Figure 7



Source: A.M. Best, *Best's Aggregates & Averages – Property/Casualty* (2019)

By comparing losses incurred to earned premiums, and losses paid to written premiums, we see this pattern in the loss ratios of the industry. The incurred ratios rose above the paid ratios during the 2002-2005 hard market, and again, more recently, when reserves jumped in 2017, though they dropped back in line with paid ratios in 2018.

Figure 8



Source: A.M. Best, *Best's Aggregates & Averages – Property/Casualty* (2019)

Breaking industry-wide data into specific lines that have received some attention lately, the following table is instructive.

Figure 9

<b>Average year over year change after adjustments 1999-2018</b>				
	Written Premium	Earned Premium	Losses Paid	Losses Incurred
All Lines	1.33%	1.24%	0.81%	1.25%
Commercial Multi-Peril	0.63%	0.52%	0.26%	1.26%
Med-Mal	-0.46%	-0.62%	-2.15%	-2.04%
Private Passenger Auto Liability	0.81%	0.73%	0.23%	0.68%
Commercial Auto Liability	1.20%	0.91%	-0.36%	0.61%
Other Liability	2.97%	2.79%	1.01%	2.62%
<b>Cumulative change after adjustments 1999-2018</b>				
	Written Premium	Earned Premium	Losses Paid	Losses Incurred
All Lines	26.27%	24.47%	14.07%	15.08%
Commercial Multi-Peril	10.34%	8.30%	-3.49%	-5.50%
Med-Mal	-12.99%	-15.45%	-36.98%	-45.94%
Private Passenger Auto Liability	15.45%	13.95%	4.09%	12.09%
Commercial Auto Liability	21.53%	15.45%	-8.20%	7.14%
Other Liability	62.36%	58.73%	15.05%	36.06%

This chart shows that when making reasonable adjustments for inflation, for mileage<sup>77</sup> driven for auto insurance, and population growth for the other lines, losses have increased relatively little over the last 20 years and have actually decreased in three major areas: Commercial Multi-Peril, Commercial Auto Liability, and Medical Malpractice. At the same time, adjusted premiums have grown faster (or shrunk less) than losses. With regard to Medical Malpractice, for example, insurers saw major loss reductions yet doctors' premiums dropped only \$1 for every \$3 in reduced claim payments.

Finally, another way to show how the industry inflates losses at key moments to justify rate hikes is by examining form Schedule P. This is a form created by the National Association of Insurance Commissioners (NAIC) for insurance companies' annual statements, and the data companies file in this Schedule are compiled annually into the

<sup>77</sup> Throughout this report, mileage adjustments for the commercial auto liability data are derived from "ANNUAL VEHICLE - MILES OF TRAVEL, 1980 – 2018," published by the Federal Highway Administration and available at <https://www.fhwa.dot.gov/policyinformation/statistics/2018/pdf/vm202.pdf>

NAIC's *Statistical Compilation of Annual Statement Information for Property/Casualty Insurance Companies*. On Part 2 of this form, insurers present the amount they have reserved for their incurred losses in the most recent year. Additionally, they provide revised data about how much money they had to set aside for losses incurred in each of the prior 10 years. For the most part, by the time a carrier has conducted 10 annual reviews of its losses from a given year, it has an accurate read of the cost of those claims, since they are all or nearly all settled and closed within 10 years.

For example, as the table below from Schedule P illustrates, insurers selling medical professional liability (occurrence) policies set aside \$1.9 billion to cover losses incurred in 2018 (see row 11, column 10). Coincidentally, that is about the same amount reserved by these carriers in 2009 for losses that were incurred in 2009 (see row 2, column 1). Following the 2009 row to the right, insurers annually revised the estimated losses from that year downward, so that by 2018 (see row 2, column 10), insurers determined that they actually only faced \$1.4 billion in losses back in 2009. That means they over-reserved by about a half billion dollars, or 36% more than they needed. Thus, insurers were claiming losses much higher than they actually faced in 2009.

Figure 10

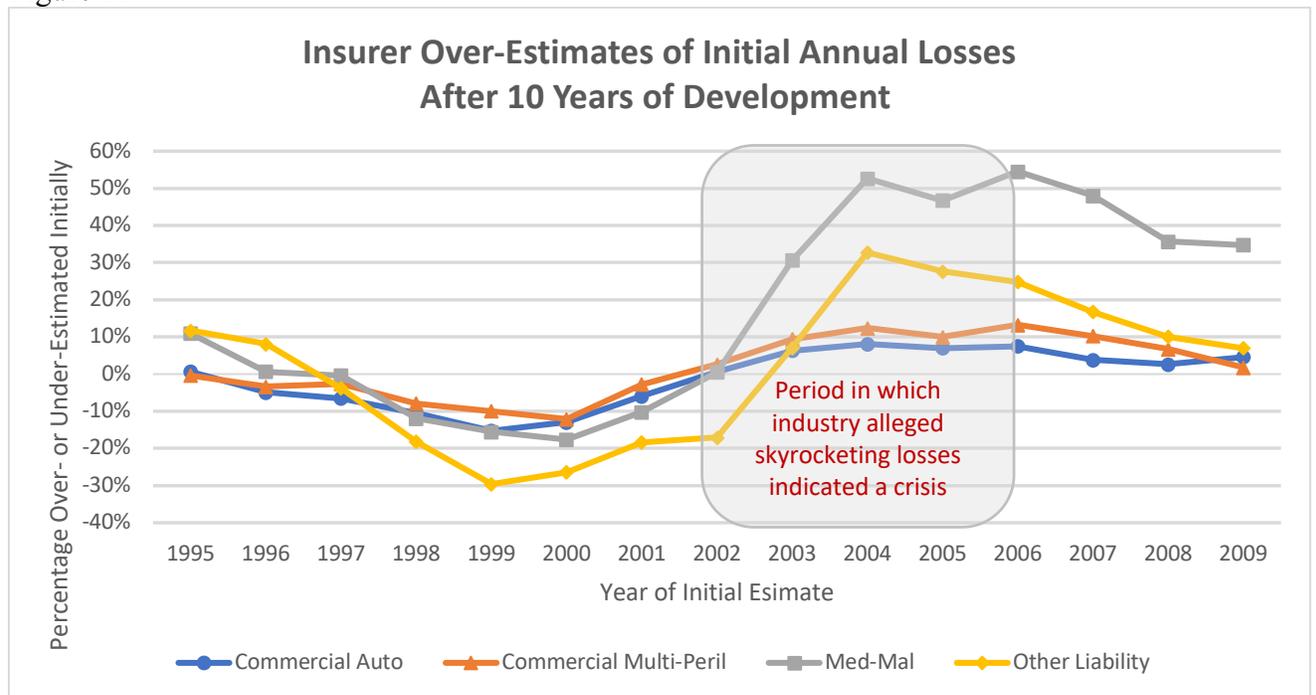
**SCHEDULE P - PART 2F - SECTION 1 - MEDICAL PROFESSIONAL LIABILITY - OCCURRENCE**

Years in Which Losses Were Incurred	Incurred Net Losses and Defense and Cost Containment Expenses Reported at Year End (\$000 Omitted)									
	1	2	3	4	5	6	7	8	9	10
	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
01 Prior	9,112,018	8,686,197	8,335,767	8,024,756	7,692,937	7,410,344	7,223,203	7,130,304	6,954,242	6,929,674
02 2009	1,901,454	1,851,511	1,803,838	1,752,592	1,692,548	1,590,371	1,539,469	1,504,627	1,472,817	1,438,435
03 2010	XXX	1,901,577	1,822,496	1,805,503	1,767,000	1,678,633	1,613,453	1,602,440	1,504,498	1,475,242
04 2011	XXX	XXX	1,988,244	1,933,542	1,863,322	1,776,087	1,665,318	1,617,479	1,557,287	1,454,613
05 2012	XXX	XXX	XXX	2,022,021	1,955,696	1,887,950	1,765,323	1,765,057	1,691,123	1,592,091
06 2013	XXX	XXX	XXX	XXX	1,997,155	1,943,411	1,886,358	1,864,752	1,814,640	1,745,659
07 2014	XXX	XXX	XXX	XXX	XXX	1,980,017	1,947,128	1,891,744	1,892,268	1,797,752
08 2015	XXX	XXX	XXX	XXX	XXX	XXX	1,901,037	1,873,266	1,857,258	1,768,624
09 2016	XXX	XXX	XXX	XXX	XXX	XXX	XXX	1,900,040	1,861,159	1,790,981
10 2017	XXX	XXX	XXX	XXX	XXX	XXX	XXX	XXX	1,853,699	1,770,177
11 2018	XXX	XXX	XXX	XXX	XXX	XXX	XXX	XXX	XXX	1,903,007
										12. Totals

Source: NAIC. *Statistical Compilation of Annual Statement Information for Property/Casualty Insurance Companies in 2018*

Examining 15 years of Schedule P data for several commercial insurance lines including Medical Malpractice but also Commercial Auto, Commercial Multi-Peril, and Other Liability (which includes Directors and Officers coverage) allows an evaluation of the difference between original loss projections and final loss assessments for each year after 10 years of revisions. As the chart below shows, during the last hard market, insurers offering these lines of coverage overestimated their annual claim-related losses by 16.9%. Medical malpractice insurers were misrepresenting their actual losses by an incredible annual average of 37% during that period, according to the revised losses reported in Schedule P.

Figure 11



Source: NAIC. *Statistical Compilation of Annual Statement Information for Property/Casualty Insurance Companies* (Annual Reports from 2004-2018)

### Directors and Officers Insurance

One category of insurance that has been targeted for recent rate hikes is Directors and Officers (D&O) Insurance, which many businesses carry. The insurance industry has been saying that it needs to raise premiums and has publicly provided one main explanation: lawsuits brought by shareholders who are defrauded by public companies.<sup>78</sup> The industry has a clearly defined political agenda here, which is to stop class action lawsuits by these shareholders.

One would think that if such litigation were a growing problem for a large company like Travelers, the topic would have been discussed during its recent earnings call. Not only was it not discussed, it was not even mentioned. There was no indication of any increased litigation affecting D&O insurance, and the D&O business appeared to be quite profitable for them.<sup>79</sup>

<sup>78</sup> Willis Towers Watson, *Insurance Marketplace Realities 2020*, November 13, 2019. See also, e.g., Judy Greenwald, “D&O prices surge: Aon,” *Business Insurance*, January 16, 2020, <https://www.businessinsurance.com/article/20200116/NEWS06/912332618/D&O-policy-pricing-for-Aon-clients-surges-29-in-third-quarter>

<sup>79</sup> Transcript, “The Travelers Companies Inc., Q4 2019 Results Earnings Conference Call, January 23, 2020, 9:00 AM ET.”

Given current trends in shareholder litigation, this lack of concern would make sense. According to recent data:<sup>80</sup>

- The number of filings has been flat for the last three years. There was “0” growth in the number of filings from 2018. The number of filings in 2019 is literally the same as last year – 433. That number was similar in 2017.
- “The average settlement value dropped sharply to \$31 million, the lowest in a decade.”
- The median settlement was \$12.4 million. While that amount is reportedly the highest since 2012, even industry consultants Willis Towers Watson say that median settlements are constant<sup>81</sup> (Note the lack of any inflation adjustment.)
- Investor Losses for filed cases decreased from 2018’s \$929 billion to \$519 billion, largely due to a decline in cases with Investor Losses of \$5 billion or more.
- Ninety-eight cases were settled in 2019, the fewest this decade.

Insurance industry data also seem to bear this out. D&O insurance is part of a larger line of coverage called “Other Liability,” so it is instructive to examine data in this line.<sup>82</sup> The following chart shows<sup>83</sup> that adjusted claims have stayed essentially flat for two decades

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<sup>80</sup> “Trends in 2019 Securities Class Actions: Filings Remain High, Resolutions Have Slowed, and Median Settlement Rises,” *Business Wire*, January 21, 2020, <https://finance.yahoo.com/news/trends-2019-securities-class-actions-140000884.html>

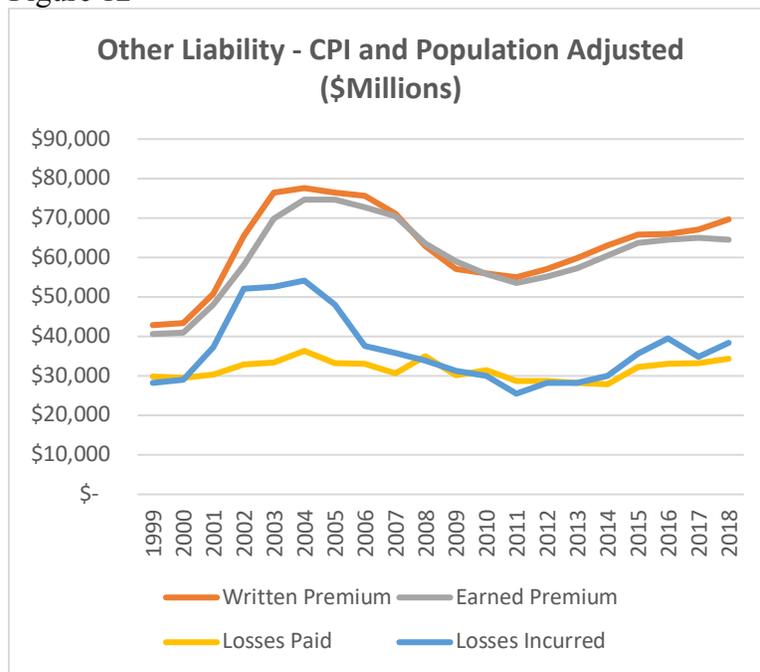
<sup>81</sup> Willis Towers Watson, *Insurance Marketplace Realities 2020*, November 13, 2019. See also, e.g., Judy Greenwald, “D&O prices surge: Aon,” *Business Insurance*, January 16, 2020, <https://www.businessinsurance.com/article/20200116/NEWS06/912332618/D&O-policy-pricing-for-Aon-clients-surges-29-in-third-quarter>

<sup>82</sup> It is interesting to note that D&O Insurance is such a minor line that the National Association of Insurance Commissioners (NAIC) has not even broken it out in the Annual Statement data insurers must file. If this sub-line is to be studied, NAIC will have to make a closed claim study to analyze the issue. If this study is not done, the public cannot trust the claims of insurers that this sub-line is in crisis. We know this because once before, insurers created a crisis based on lack of data, which ultimately proved not be based on any increase in paid claims. In 1975, the insurance industry asserted that medical malpractice and product liability insurance were in crisis, but closed claims data did not exist to establish this. Such a study was then ordered by the NAIC at the request of President Ford. That study revealed that the so-called “crisis” was not based on a jump in paid claims at all. This led the NAIC, for the first time, to break out those two lines on the Annual Statement, providing the necessary data to prove that later “crises” in the mid-1980s and early 2000s were fraudulent and drummed up by industry leaders, who were unafraid of any charge of price fixing because of the McCarran-Ferguson Act’s antitrust exemption.

<sup>83</sup> The chart includes “Direct Premiums Written” (the amount of money that insurers collected in premiums from doctors during that year), “Premiums Earned” (the portion of premium collected that applies to the expired portion of a policy), “Direct Losses Paid” (what insurers actually paid out that year to people who were injured – all claims, jury awards, and settlements – as well as what insurance companies pay their own lawyers to fight claims), “Incurred Losses” (which as explained earlier, includes reserves and IBNR), and “Earned Premiums” (which excludes the portion of premium collected for policies that extend past the end of the calendar year and includes premiums from the previous year that extended beyond that year). All data are adjusted for inflation and population changes.

while premiums have gone up and down in sync with the insurance industry’s economic cycle. But the manipulation of reserves (“incurred losses”) is even more striking. There was an astonishing jump in reserves during the last hard market (2002-2005), driving up premiums even though paid losses were flat (both during those years and the decade thereafter). The concurrent premium spike shows that businesses were being price-gouged. Again, in more recent years, reserves started rising above paid losses with an odd drop back in 2017 and then up again. Other Liability may be moving into a hard market phase as insurers react to the “social inflation” drumbeat, but more information is required to determine this.

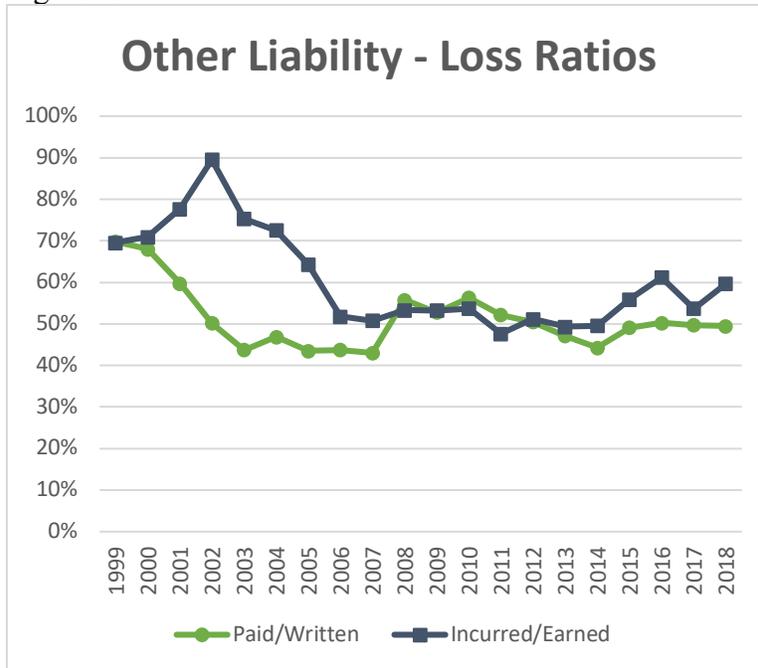
Figure 12



Source: A.M. Best, *Best’s Aggregates & Averages – Property/Casualty* (2019)

This pattern can also be seen on the loss ratio chart. Doubtless, these terrible incurred loss ratios were paraded as evidence of a need for rate increases, even though the alleged losses underlying these spiking ratios never had to be paid.

Figure 13



Source: A.M. Best, *Best's Aggregates & Averages – Property/Casualty* (2019)

The Schedule P forms for “Other Liability” also show this pattern. In 2004, the combined Other Liability (comprised of Claims made and Occurrence sub-lines) incurred losses reported that year were about \$29.5 billion. By 2013, the industry revised its 2004 incurred losses down to about \$22.2 billion, which means that in 2004, in the middle of the last hard market, they were overstating losses by about \$7.3 billion or 30%! The table below presents the Claims Made and Occurrence data from Schedule P as combined, though they are reported separately to NAIC, and the over-reserving in 2004 is present in both sub-lines of Other Liability.

Figure 14

Years in Which Losses Were Incurred	Incurred Net Losses and Defense and Cost Containment Expenses Reported at Year End (\$'000 Omitted)									
	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
2004	29,539,470	26,338,832	25,079,052	24,354,041	23,392,336	23,091,038	22,758,254	22,627,567	22,329,768	22,256,459
2005	xxx	28,878,092	26,939,601	26,198,509	24,572,578	23,966,502	23,424,584	22,985,201	22,826,558	22,696,400
2006	xxx	xxx	30,333,168	29,660,645	27,957,281	26,919,877	26,131,862	25,363,667	24,869,776	24,423,863

Today, there is definitely no crisis in the Other Liability line of insurance although one may be in the process of being created by insurer “social inflation” rhetoric. Paid claims remain flat but reserves are tentatively jumping up. Since 2017, the frequency of securities class actions has been essentially flat as well. There is no evidence whatsoever that companies are not perfectly able to pay these claims. Company profits remain high in this area of business, and industry surplus is now obscenely excessive. If businesses are experiencing D&O rate hikes, they should be up in arms with their insurers about it.

## Commercial Auto

For several years, the hottest topic in auto insurance industry discussions has been distracted driving as well as the impact of more drivers on the road due to the improving economy and lower gas prices. The *Wall Street Journal* recently reported,<sup>84</sup>

[C]ar insurers like Allstate have won approval from many state insurance departments for rate increases on a fairly steady basis since 2015, when a spike in traffic deaths caught the industry by surprise.

At that time, more drivers were suddenly on the road with increased mileage amid the economic recovery and distracted driving was growing as a concern. An overall jump in claims contributed to widespread profit declines, as did higher costs of repairing new vehicles due to sophisticated safety equipment.

When it comes to commercial auto insurance, these concerns have been evident for a long time. In its Q3 2019 commercial insurance report, the Council of Insurance Agents & Brokers wrote,<sup>85</sup>

The possible causes for Auto’s increased claims – distracted driving and more people on the road – have been discussed before, but they remain important as ever. For example, just last year an estimated 60% of all drivers in the United States used their phone while driving, going hand in hand with the second time U.S. motor-vehicle deaths surpassed the 40,000 mark.

Even industry consultants Willis Towers Watson wrote in November, “A strong economy means more vehicle traffic, leading to more accidents, especially when the plague of distracted driving continues to be a factor.”<sup>86</sup>

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<sup>84</sup> Leslie Scism, “Allstate, Chubb Profits Rise on Disaster Claim Decline, Premium Growth,” *Wall Street Journal*, February 5, 2020, <https://www.wsj.com/articles/allstate-chubb-profits-rise-on-disaster-claim-decline-premium-growth-11580917889>

<sup>85</sup> Council of Insurance Agents & Brokers, *Commercial Property/Casualty Market Report Q3 2019 (July 1 – September 30)*, <https://www.ciab.com/download/20368/>

<sup>86</sup> Willis Towers Watson, *Insurance Marketplace Realities 2020*, November 13, 2019.

Yet at some point in the Fall of 2019, the commercial auto industry began coordinating messaging around “social inflation,” specifically tying rate hikes to jury verdicts.<sup>87</sup> This was not always true, even in 2019. For example, in October, W.R. Berkley’s chief executive Robert Berkley Jr. raised the “social inflation” argument, declaring, “We have for two-and-a-half or three years been beating the social inflation drum [and] as much as four or five years ago in commercial auto [with] these type of awards coming out of the legal system.”<sup>88</sup> Yet, when making his case for a hardening market just a few months earlier, Berkley made no mention of litigation issues at all.<sup>89</sup> Even more disturbing, by the end of 2019, the widely-accepted problems of distracted driving and more drivers on the road were no longer being highlighted. Now the issue had become the competence of juries in cases involving catastrophic injuries caused by large truck crashes.<sup>90</sup>

Before analyzing the insurance data in this area, it is worth examining the troubling safety record of the trucking industry. In 1999, the U.S. Department of Transportation Inspector General (DOT IG) told Congress there were so many large truck- and bus-related injuries and fatalities on U.S. roads that motor carrier safety had become “the number one public safety issue in the Department of Transportation.”<sup>91</sup> Yet 2018 marked the highest number of large-truck occupant fatalities since 1988.<sup>92</sup> As of June 2019, fatalities in crashes involving large trucks or buses had grown from 4,455 in 2013 to 4,949 in 2018, an 11 percent increase.<sup>93</sup> In 2017, there were 102,000 injury crashes involving large trucks, a 5 percent increase from the previous year and a 59 percent increase from a decade earlier.<sup>94</sup> Of the nearly 5,000 people killed in these crashes each year, 82 percent of victims are *not* large-truck occupants.<sup>95</sup>

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<sup>87</sup> Jennifer Smith, “Surging Truck Insurance Rates Hit Freight Operators,” *Wall Street Journal*, January 13, 2020, <https://www.wsj.com/articles/surging-truck-insurance-rates-hit-freight-operators-11578934834>

<sup>88</sup> “Social Inflation Is Back and Carrier Execs Should Worry: Berkley,” *Carrier Management*, October 24, 2019 <https://www.carriermanagement.com/news/2019/10/24/199437.htm>

<sup>89</sup> Mark Hollmer, Two Years Late, the P/C Insurance Market Is Finally Hardening: W.R. Berkley CEO, *Carrier Management*, April 25, 2019. <https://www.carriermanagement.com/news/2019/04/25/192504.htm>

<sup>90</sup> See, e.g., Kim Palmer, “A few industries drive commercial insurance rates higher for everyone,” *Crains Cleveland Business*, January 26, 2020, <https://www.crainscleveland.com/government/few-industries-drive-commercial-insurance-rates-higher-everyone>

<sup>91</sup> U.S. Senate Commerce, Science, and Transportation Committee, Subcommittee on Surface Transportation and Merchant Marine hearing on S. 1501, “The Motor Carrier Safety Improvement Act of 1999,” September 29, 1999, <https://www.govinfo.gov/content/pkg/CHRG-106shrg73433/pdf/CHRG-106shrg73433.pdf>

<sup>92</sup> National Highway Transportation Safety Administration, *2018 Fatal Motor Vehicle Crashes: Overview* (October 2019), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812826>

<sup>93</sup> Office of Inspector General, U.S. Department of Transportation, Memorandum, “INFORMATION: Audit Announcement | FMCSA’s Oversight of Commercial Driver Disqualifications | Project No. 19S3009S000 Federal Motor Carrier Safety Administration,” October 22, 2019, <https://www.oig.dot.gov/sites/default/files/FMCSA%20CDL%20DQ%20Audit%20Announcement.pdf>

<sup>94</sup> Federal Motor Carrier Safety Administration, *Large Truck and Bus Crash Facts 2017* (May 2019), <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/safety/data-and-statistics/461861/ltrcbf-2017-final-5-6-2019.pdf>

<sup>95</sup> National Highway Transportation Safety Administration, *2018 Fatal Motor Vehicle Crashes: Overview* (October 2019), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812826>

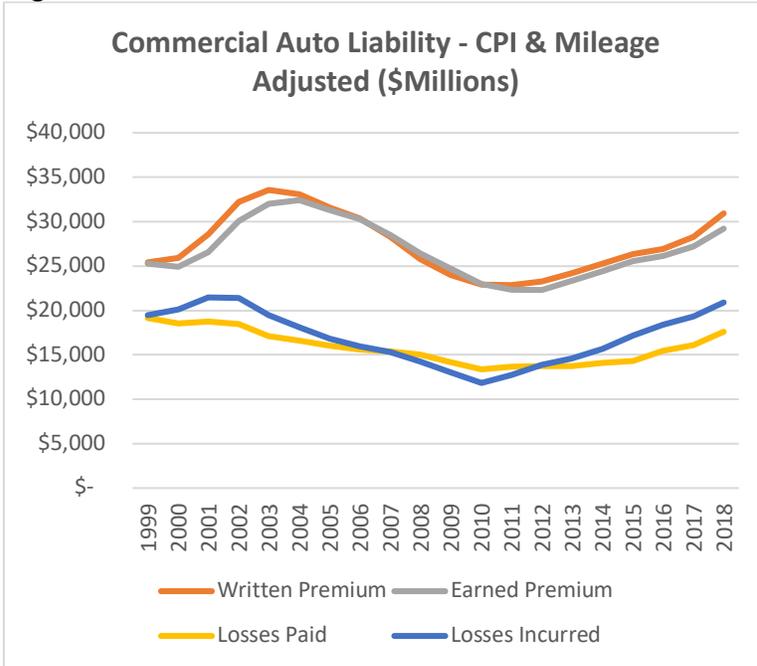
Trucks transporting non-hazardous cargo must carry a minimum of only \$750,000 per accident in insurance liability coverage, a number that has stayed constant since the 1980s.<sup>96</sup> In addition to failing to take inflation into account and increasing medical costs for the injured, this low insurance minimum can function as a cap, providing a single fund of woefully inadequate available compensation that is indifferent to the number of victims hurt or killed in a crash. Moreover, this low insurance limit fails to properly incentivize insurers to make safer practices a condition of coverage, thereby allowing trucking companies to treat deaths and catastrophic injuries as part of the cost of doing business.

In terms of the commercial auto claims and premium data, the following chart, which is adjusted for inflation and miles driven, shows a clear cyclical pattern. In fact, it is even more pronounced than other lines. The high premiums charged between 2003 and 2005 were not nearly matched by paid claims or even incurred claims. As far as today's market, reserves (*i.e.*, incurred losses) jumped above paid losses starting in 2013 and have stayed that way. In other words, while there is upward loss movement, it appears that the industry is once again over-correcting through excessive reserving and unnecessary rate increases.

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<sup>96</sup> Federal Motor Carrier Safety Administration, "Insurance Filing Requirements," <https://www.fmcsa.dot.gov/registration/insurance-filing-requirements> (viewed October 21, 2019). *See also*, Mike Hendricks, "Truck safety systems that could save lives go unused. New legal tactic may change that," *Kansas City Star*, September 29, 2019, <https://www.kansascity.com/news/local/article235481007.html>; Matt Cole, "Congress eyes trucking insurance changes, mandating automatic emergency braking," *Overdrive*, July 18, 2019, <https://www.overdriveonline.com/congress-eyes-trucking-insurance-changes-mandating-automatic-emergency-braking/>; Rob Low, "Trucking company involved in I-70 crash only carries \$750,000 of liability insurance," *Fox 31 Denver*, April 30, 2019, <https://kdvr.com/2019/04/30/trucking-company-involved-in-i-70-crash-only-carries-750k-of-liability-insurance/>; James Jaillet, "FMCSA officially nixes rule on increasing minimum liability insurance required for carriers," *Overdrive*, June 2, 2017, <https://www.overdriveonline.com/fmcsa-officially-nixes-rule-on-increasing-minimum-liability-insurance-required-for-carriers/>. As of publication, Congress is considering legislation "that would increase the minimum levels of financial responsibility for [large trucks] transporting property to an appropriate amount (one that accounts for medical cost inflation between 1980 and 2019), and then index future increases to changes in inflation relating to medical care." Truck Safety Coalition, "One Page Issues Summary – 2019 – Pro," <http://trucksafety.org/wp-content/uploads/2019/07/One-Page-Issues-Summary-2019-Pro.pdf>. *See also*, Office of U.S. Rep. Jesús "Chuy" García (D-Ill.), "García, Johnson, and Cartwright Introduce Two Truck Safety Measures to Make Roads Safer," July 16, 2019, <https://chuygarcia.house.gov/media/press-releases/garc-johnson-and-cartwright-introduce-two-truck-safety-measures-make-roads>

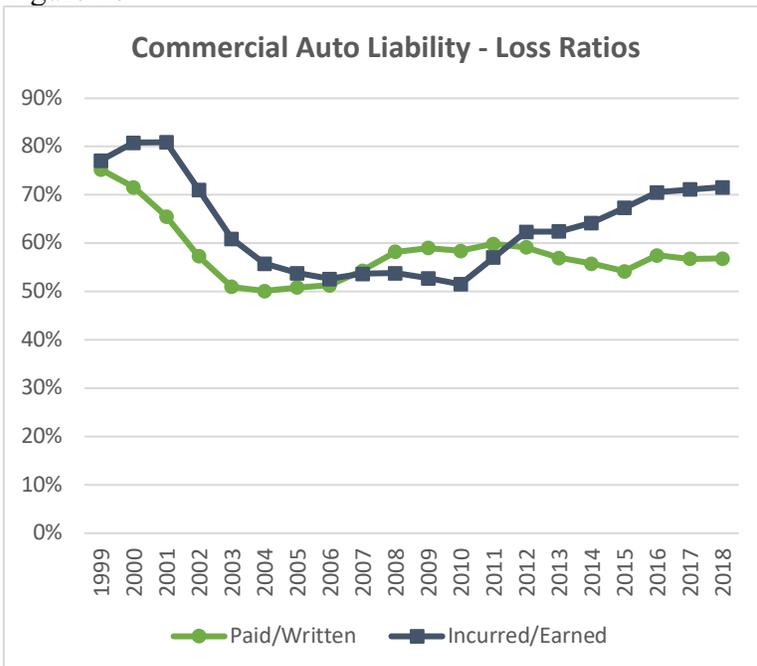
Figure 15



Source: A.M. Best, *Best's Aggregates & Averages – Property/Casualty* (2019)

The loss ratios chart also shows that reserve “inflation” began in 2013.

Figure 16



Source: A.M. Best, *Best's Aggregates & Averages – Property/Casualty* (2019)

The commercial auto insurance industry seems focused today on hitting companies with across-the-board rate hikes and blaming this on litigation brought by everyday motorists who have been injured, or families of those killed, in serious truck crashes. Yet many of these victims are grossly undercompensated because of outdated insurance minimums for truckers. Clearly, the nation would benefit, as would the insurance industry itself, if the industry would use its economic power to better incentivize risk-reducing behavior by all motorists, including truckers, and reduce deaths and injuries through loss prevention rather than attacking juries and victims.

## Medical Malpractice

Perhaps no commercial insurance policyholders have been bigger victims of the industry's manufactured economic cycle crises than doctors. Many may recall that at the start of the last hard market in 2002, medical malpractice insurance rates abruptly increased. Trauma centers were closing<sup>97</sup> and doctors were picketing state capitols.<sup>98</sup> But once the soft market began in 2006, medical liability rates stabilized and began dropping. The last time we examined rates in 2016, per physician, inflation-adjusted premiums were at their lowest level since these data were first collected four decades ago.<sup>99</sup>

Doctors also had experienced a hard market between 1985 and 1988. Insurance rates suddenly skyrocketed not only for doctors but also manufacturers, municipalities, day-care centers, non-profit groups, and many other commercial customers of liability insurance. Many could not find coverage at any price. News stories like *Time Magazine's* 1986 cover story, "Sorry, America, Your Insurance has been Canceled,"<sup>100</sup> began to appear. Congress held hearings.<sup>101</sup> But within three years, the crisis simply ended as rates again stabilized.

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<sup>97</sup> Ken Ritter, "Vegas trauma center closes as doctors balk at malpractice costs," *Associated Press*, July 5, 2002.

<sup>98</sup> See, e.g., Bruce Bartlett, "Doctors on Strike," National Center for Policy Analysis, March 3, 2003, [http://townhall.com/columnists/brucebartlett/2003/02/28/doctors\\_on\\_strike](http://townhall.com/columnists/brucebartlett/2003/02/28/doctors_on_strike)

<sup>99</sup> See Americans for Insurance Reform, *Stable Losses/Unstable Rates 2016* (November 2016), <http://centerjd.org/content/stable-losses-unstable-rates-2016>; Paul Greve and Alison Milford, "Do Still Waters Still Run Deep, Medical Professional Liability in 2016," *Medical Liability Monitor, Annual Rate Survey* (October 2016); "Medical Malpractice Liability Premiums Remain Flat: Survey," *Insurance Journal*, October 10, 2016. For example, Illinois' largest medical liability insurer, ISMIE Mutual Insurance Company, announced on August 5, 2016 that rates would not go up this year. ISMIE Chairman Harold L. Jensen, M.D., said, "For nearly a decade ISMIE Mutual has held Illinois premiums essentially flat. Many of our policyholder partners are actually paying less than they were 10 years ago when factoring in premium credits for participation in our risk management program and dividend distributions." ISMIE, "ISMIE Mutual Announces No Change for Base Premiums in 2016-17," August 5, 2016, <https://www.ismie.com/News-and-Publications/News-and-Announcements/ISMIE-Mutual-Announces-No-Change-for-Base-Premium/>

<sup>100</sup> George J. Church, "Sorry, Your Policy Is Canceled," *Time Magazine*, March 24, 1986, <http://content.time.com/time/covers/0,16641,19860324,00.html>

<sup>101</sup> *The Liability Insurance Crisis*, Hearings Before the Subcomm. On Economic Stabilization of the House Comm. On Banking, Finance and Urban Affairs, 99th Cong., 2nd Sess. 83 (1986).

Incredibly, a volcanic eruption in insurance prices for doctors happened once before. In the years 1974 through 1978, medical malpractice rates for doctors jumped. California physicians went on a four-week strike, “causing public hospitals to overflow with patients” leading to “a number of ‘job actions’ in other states.”<sup>102</sup> On June 9, 1975, *Newsweek* ran a cover story entitled, “Malpractice: Doctors in Revolt.” And then, as with the latter two crises, it just ended.

Each time the industry raised rates, it blamed lawyers, lawsuits, and juries even though experts knew this was not true,<sup>103</sup> and claims never jumped.<sup>104</sup> But when panicked state lawmakers looked for quick solutions to bring down rates for picketing doctors, insurance lobbyists told them that establishing legal roadblocks in the way of injured patients (and allowing insurance companies to pocket more money) was the only way to reduce high insurance premiums. And many lawmakers did just that. Between 1975 and 1977, at least half the states enacted laws restricting injured patients’ and consumers’ rights to sue. Even worse, from 1985-1989, some 46 states passed “tort reform” laws. And when the third crisis hit between the years 2002 and 2006, at least half the states passed laws limiting patients’ legal rights, with 14 states enacting new or *lowering* already existing caps on damages for injured patients. (See Appendix.)

However, these tort law limits failed to decrease insurance rates despite what the insurance industry promised lawmakers. In fact, on average, states that chose not to enact “tort reform” or caps on damages during the last insurance crisis saw an even greater drop in pure premiums/rates than states that stripped away victims’ rights.<sup>105</sup>

As each of these three hard markets ended, evidence emerged that the industry misrepresented to their policyholders, lawmakers, and the public why rates had skyrocketed. For example, in 1989, following the mid-1980s crisis, Michael Hatch, then Commerce Commissioner of Minnesota, released an investigation of two malpractice insurers including the country’s largest at the time, St. Paul. Hatch found that during the prior six years, these companies had increased doctors’ malpractice premiums some 300 percent. Yet neither the number of claims against doctors nor the amount paid out by insurance companies had increased.

A 2005 study of the 15 leading medical malpractice insurance companies by former Missouri Insurance Commissioner Jay Angoff found that between 2000 and 2004, the

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<sup>102</sup> Jona Goldschmidt, “Where Have All the Panels Gone? A History of the Arizona Medical Liability Review Panel,” 23 *Ariz. St. L.J.* 1013, 1023-4 (Winter 1991); “Malpractice ‘job actions’ spread,” *Facts on File World News Digest*, July 5, 1975.

<sup>103</sup> See, e.g., Francis X. Bellotti, Attorney General of Massachusetts, et al., *Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance* (Boston, Mass.: Ad Hoc Insurance Committee of the National Association of Attorneys General, May 1986).

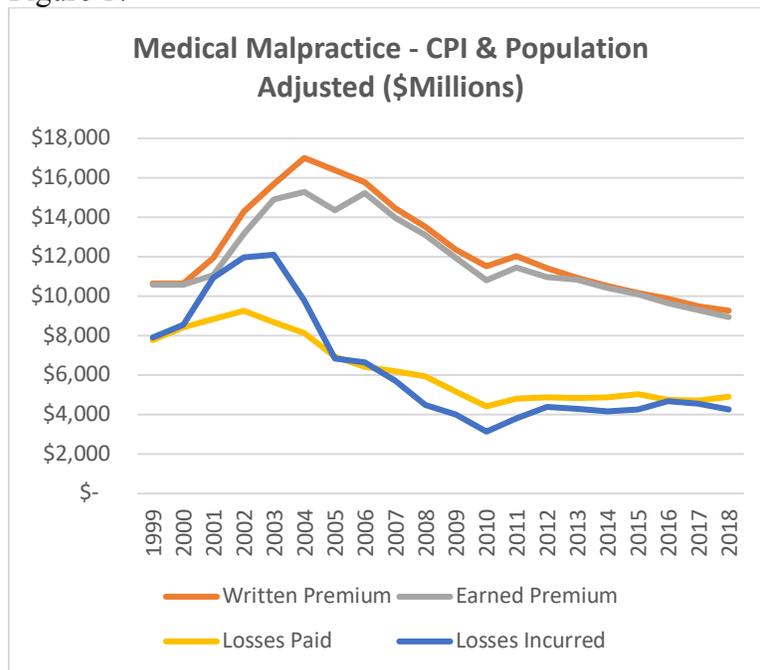
<sup>104</sup> See Americans for Insurance Reform, *Stable Losses/Unstable Rates 2016* (November 2016), <http://centerjd.org/content/stable-losses-unstable-rates-2016>

<sup>105</sup> See Americans for Insurance Reform, *Premium Deceit: The Failure of “Tort Reform” to Cut Insurance Prices* (November 2016), <http://centerjd.org/content/premium-deceit-2016-failure-tort-reform-cut-insurance-prices>.

amount that major medical malpractice insurers collected in premiums more than doubled, while their claims payments remained essentially flat.<sup>106</sup> The report also found that many insurers substantially increased their premiums while their claims payouts were decreasing, and that some insurers also reduced projections of their ultimate payouts while increasing their premiums. Specifically, the insurers increased their net premiums by 21 times the increase in their net claims payments.

Now looking back at the most recent data accumulated since the last insurance crisis, the evidence is overwhelming that doctors were price-gouged as reserves (*i.e.*, incurred losses) jumped above paid losses in 2000-2005. The high premiums charged during this last crisis were occurring even while paid claims actually were dropping.

Figure 17



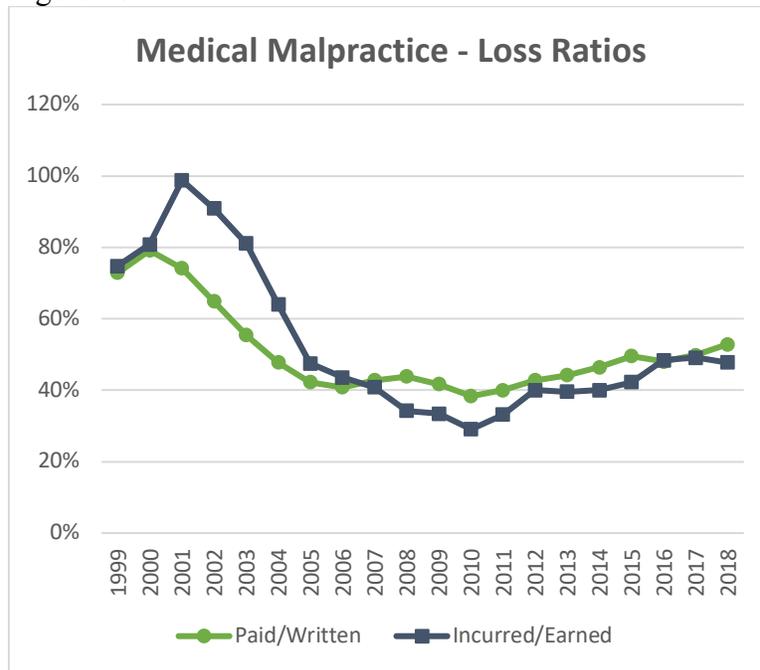
Source: A.M. Best, *Best's Aggregates & Averages – Property/Casualty* (2019)

Also, as noted earlier, the Schedule P-Part 2 data show that during the last hard market, med mal insurers misrepresented their actual losses by an incredible annual average of 37%. With the medical malpractice line, this over-reserving persisted into the soft market, allowing insurers to limit their rate reductions despite their relatively low losses. As noted above, the overstatement of 2009 medical professional liability-occurrence losses was about a half billion dollars. This meant that their actual losses were about 24% less than they were claiming to regulators, lawmakers, the media, and the public that year.

<sup>106</sup> Jay Angoff, *Falling Claims and Rising Premiums in the Medical Malpractice Insurance Industry* (July 2005), <http://centerjd.org/system/files/ANGOFFReport.pdf>

What this has meant for the medical malpractice insurers is extremely low loss ratios (as illustrated below) and the associated high profits that go along with low loss ratios.

Figure 18



Source: A.M. Best, *Best's Aggregates & Averages – Property/Casualty* (2019)

That the medical professional liability (MPL) segment of the insurance market has achieved extraordinary profits and surplus is no secret. According to A.M. Best, as of the Spring of 2019, “Overall, the MPL insurance sector has achieved better than average profitability, increased its capital and surplus and generated favorable loss reserve development – the only segment to do so in each of the last 15 years.”<sup>107</sup>

In other words, it is simply extraordinary that the industry may be trying to repeat history by hitting doctors with premium increases – despite incredible profits, no increase in claims payments, no trend suggesting any such increase – and blaming juries for this action. Fortunately, as the above premium chart shows, as of today the data do not indicate any significant rate hikes for doctors as of yet.

Nonetheless, in December 2019, insurance consultant Milliman’s actuary Susan Forray said, “We’re seeing rate increases in multiple states, which was only mildly true earlier this year.”<sup>108</sup> In addition, in October 2019 Aon began publicly complaining about a

<sup>107</sup> Gloria Gonzalez, “Medical malpractice insurers under pressure: Best,” *Business Insurance*, May 7, 2019, <https://www.businessinsurance.com/article/20190507/NEWS06/912328310/Medical-malpractice-insurers-under-pressure-AM-Best-report>

<sup>108</sup> Timothy Darragh, “Observers Say Medical Liability Market Beginning to Harden as Higher Jury Awards, Eroding Tort Reform Sink In,” *Best’s Insurance News & Analysis*, December 23, 2019, <http://news.ambest.com/newscontent.aspx?refnum=222664&altsrc=23>

supposed uptick in the “frequency and average severity of losses greater than \$5 million.”<sup>109</sup> Specifically, Aon said in its *2019 Hospital and Physician Benchmark Analysis*: “After an increasing number of large medical malpractice verdicts following years of premium decreases, all stakeholders in malpractice liability are under pressure. These pressures include premium rate increases, self-insured retention increases and insurance carrier capacity reductions.”<sup>110</sup> This is all very reminiscent of how anti-jury rhetoric began entering discussions of medical liability in the run-ups to all three prior hard markets. (See Appendix.)

If nothing else, quotes like Aon’s show the disconnect between the insurance industry’s rhetoric and what is actually happening. This is not an accident; it is intentionally misleading. For example, the American Medical Association’s top litigator failed to even mention juries or insurance rates in an interview about the “legal challenges” facing doctors and patients for 2020.<sup>111</sup> This stands in stark contrast to the AMA’s response to the 2002 to 2005 hard market, when the AMA embarked on a huge campaign around this issue, with its then President Richard Corlin claiming that limits on juries were needed because “[m]any practitioners, both generalists and specialists, just can’t afford the liability premiums, forcing them to retire early, limit their practice or relocate.”<sup>112</sup>

Other data also show how misleading assertions from companies like Aon actually are. For example, CRICO Strategies’ 2019 report, *Medical Malpractice in America: A 10-Year Assessment With Insights*, found as follows:<sup>113</sup>

- **Frequency of claims:** “Overall [Medical Professional Liability] MPL case frequency dropped 27% from 2007-2016, with an especially compelling trend for obstetricians-gynecologists.” And “[f]ewer cases are being asserted relative to the physician population. The 2016 rate, 3.7 cases per 100 physicians, reflects a steady downward trend.”

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<sup>109</sup> Aon/ASHRM, *Hospital and Physician Professional Liability: Benchmark Analysis, October 2019 (Executive Summary – Abridged Version)*, <https://aoncomauthoring.blob.core.windows.net/aoncom2017media/aon.com/media/attachments/risk-services-3/2019-hpl-benchmark-report-execsum.pdf>

<sup>110</sup> Ibid. See also, Lyle Adriano, “Study reveals surge in US medical malpractice claims costs,” *Insurance Business America*, November 27, 2019, <https://www.insurancebusinessmag.com/us/news/healthcare/study-reveals-surge-in-us-medical-malpractice-claims-costs-193271.aspx> (“The double-digit million dollar claims are having a chilling effect on the medical liability community,” the expert concluded, adding that awards of such size could drive hospitals to increase their self-insurance, leading premiums to rise and industry capacity to decrease. It is because of this adverse domino effect that [Beazley US hospitals focus group leader Valentina] Minetti suggests that there is a ‘shared interest in seeing these rising costs stabilize.’”)

<sup>111</sup> Tanya Albert Henry, “What legal challenges will affect patients and physicians in 2020?,” American Medical Association, January 29, 2020, <https://www.ama-assn.org/health-care-advocacy/judicial-advocacy/what-legal-challenges-will-affect-patients-and-physicians>

<sup>112</sup> Simon Avery, “Doctors vow tort reform to reduce insurance costs,” *Associated Press*, March 11, 2002. See also, “AMA: To Campaign For Malpractice Tort Reform,” *American Health Line*, March 13, 2002.

<sup>113</sup> CRICO Strategies, *Medical Malpractice in America: A 10-Year Assessment With Insights* (2019), [https://cdn2.hubspot.net/hubfs/217557/crico\\_medmal\\_in\\_america\\_web.pdf](https://cdn2.hubspot.net/hubfs/217557/crico_medmal_in_america_web.pdf)

- **Severity of claims:** “MPL indemnity payment trends for the 10-year study period were not dramatic. The median payment increased in line with inflation (from \$110K in 2007, to \$120K in 2016). The average payment, even though distorted by a few atypical payouts, grew on average 3% annually (from \$298K to \$360K). While that outpaced the consumer price index, it fell below medical inflation, a fair proxy for medical expenses which, along with policy limits, heavily influence payments. ... Certainly, extraordinary jury awards draw media attention, pique the interest of reinsurers, and can skew the focus of patient safety improvements, but they remain rare. Per 1,000 cases closed, only one or two cases closed with more than \$5 million indemnity. Outlier payments (those exceeding \$11M) had a minimal impact on overall indemnity trends.”

Finally, insurers internally admit there are some major structural health care industry changes that most in the medical profession are now experiencing, which actually impact verdicts and claim size but not actual payouts. During a 2019 A.M. Best Webinar on the “State of the Medical Professional Malpractice Liability Insurance Market,” panelists discussed the migration of doctors from solo practices into hospitals. If more doctors are now hospital employees, then in the event of a malpractice claim fewer smaller payouts would be expected in exchange for one combined payout. In other words, the combination of doctors and hospitals into a larger single claim gives the appearance of higher costs and severity, yet overall costs are not impacted at all.<sup>114</sup>

## CONCLUSION

For five decades, businesses and consumers have been victims of periodic eruptions in insurance premiums caused by the property/casualty insurance industry’s economic cycle, the industry’s unique accounting methods, and laws that allow anti-competitive pricing by this industry. While insurers try to convince the public that lawsuits and juries, or “social inflation,” are to blame for this, historical data are clear that this has never been true – and it is not true today. The only way to stop volcanic eruptions in insurance premiums is through better oversight and regulation of the industry’s mismanaged accounting and the cyclical nature of the insurance business.

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<sup>114</sup> See also, Gloria Gonzalez, “Medical malpractice insurers under pressure: Best,” *Business Insurance*, May 07, 2019, <https://www.businessinsurance.com/article/20190507/NEWS06/912328310/Medical-malpractice-insurers-under-pressure-AM-Best-report> (“In recent years, growing numbers of doctors have moved from working as solo practitioners or in small practices to being employed by hospitals or other large medical organizations. ‘As industry consolidation and physician migration trends continue, insurers undoubtedly will be pressured to either accept these changes or find innovative ways to adapt,’ the [A.M. Best] report stated. ‘Fortunately for insurers, time is on their side as the pace of this change has been incremental. MPL insurers also have benefited from their ability to retain existing business, as well as from loss frequency that remains benign.’”)

## AUTHORS

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His awards include the Award for Excellent Service from the Secretary of the Department of Housing and Urban Development (HUD) for work performed from 1971 to 1977, the Esther Peterson Award for lifetime service to consumers in 2002 and twice, the Schraeder-Nelson Publications Award for article of the year: in 2002 for “Enron’s Impact on State Insurance Regulation” and in 2007 for “How Regulators Can Return P/C Profits to Reasonable Levels,” *Regulator Magazine*, Insurance Regulatory Examiner’s Society. He is the author of numerous publications on insurance and related topics and has served as an Executive Committee member and advisor to the National Association of Insurance Commissioners (NAIC). Over the past decades, Mr. Hunter has testified many times in Congress as well as in every state in the union on the insurance cycle and related premium spikes.

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Ms. Doroshow has worked on civil justice and insurance issues since 1986, when she first directed a project for Ralph Nader on liability and the insurance industry. With Nader, she was author of several reports and numerous materials on civil justice and insurance issues. At CJ&D, Ms. Doroshow has written and co-authored major CJ&D studies, frequently testifies before Congress and state legislatures, and was a member of the New York State Governor’s task force on medical malpractice in 2007 and 2008.

Ms. Doroshow is the recipient of the AAJ Partnership Award, 2016; the Distinguished Service Award, Kansas Association for Justice, 2012; Consumer Advocate of the Year,

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Since 2013, Mr. Heller has been an appointee of California's Insurance Commissioner, serving as a Consumer Representative on the California Automobile Assigned Risk Plan (CAARP) Advisory Board, which oversees that state's residual auto insurance market and innovative Low-Cost Auto Insurance Program for low-income drivers. During more than two decades of work on public policy and regulatory matters related to property-casualty insurance, Mr. Heller has authored reports, articles, and op-eds on issues related to insurance laws and markets in the United States; overseen regulatory challenges to insurance company rates and practices; served as a consulting expert in insurance-related litigation; and testified before dozens of state and federal legislative committees in support of consumer rights and protections. His peer-reviewed article – "An Auto Insurance Lifeline for Safe Driving, Lower-Income Marylanders" – was published by the Abell Foundation in November 2019. For nine years (2004-2012), Mr. Heller served as the Executive Director of the national consumer advocacy organization, Consumer Watchdog. His work has saved policyholders hundreds of millions of dollars on insurance premiums, helped curb unfair auto insurance pricing practices, and increased access to insurance markets for lower-income consumers.

Between 1994 and 1996, Mr. Heller was a classroom teacher in St. John Parish, Louisiana through the Teach for America program. He holds a B.A. in Political Science from the University of California, Berkeley and a Master of Public Administration degree from the University of Southern California.

## APPENDIX

### HOW THE INSURANCE INDUSTRY CREATES CRISES THAT HARM AMERICAN BUSINESSES AND THEN LIES ABOUT IT

#### CRISIS #1: 1974 TO 1977

The first liability insurance crisis in this country occurred in the mid-1970s. One article described some of what was happening in the nation:

In 1974, the Argonaut Insurance Company had announced to northern California doctors that it would increase its premiums by 380% and ultimately would withdraw from the California malpractice insurance market. Physicians reacted to this and similar statements by other insurance carriers by demanding tort reforms. In late 1975, Travelers announced to California physicians that it would increase its rates by 327%. Physicians who wished to continue their malpractice coverage had to pay the higher rate and enroll by January 28, 1976. On January 1, 1976 southern California physicians went on strike, causing public hospitals to overflow with patients. The physicians also sought a legislative solution to their insurance availability crisis.<sup>115</sup>

California was not alone. As *Facts on File World News Digest* wrote in 1975, “The nationwide doctor’s protest over rising costs of malpractice insurance (up as much as 300% in recent months), which had led to a four-week strike across California, has since led to a number of ‘job actions’ in other states.”<sup>116</sup> The insurance industry blamed lawsuits and these arguments made it into legislation, like the following 1975 Wisconsin law:<sup>117</sup>

- (1) The legislature finds that: (a) The number of suits and claims for damages arising from professional patient care has increased tremendously in the past several years and the size of judgments and settlements in connection therewith has increased even more substantially....

During this period, co-author J. Robert Hunter was the nation’s Federal Insurance Administrator. In fact, Hunter became part of the inter-agency working group formed by President Ford<sup>118</sup> to examine whether the insurance industry’s alleged “explosion” of medical malpractice claims was causing the huge and sudden jump in premiums that doctors were experiencing. Hunter’s research immediately found that data were not

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<sup>115</sup> Jona Goldschmidt, “Where Have All the Panels Gone? A History of the Arizona Medical Liability Review Panel,” 23 *Ariz. St. L.J.* 1013, 1023-4 (Winter 1991).

<sup>116</sup> “Malpractice ‘job actions’ spread,” *Facts on File World News Digest*, July 5, 1975.

<sup>117</sup> Wis. Stats. Ch. 37, Laws of 1975, <https://docs.legis.wisconsin.gov/1975/related/acts/37>

<sup>118</sup> Proving that there was a time when Presidents studied things before acting.

available to explain why premiums were skyrocketing. Therefore, working with the National Association of Insurance Commissioners (NAIC), the inter-agency group undertook a closed-claim study. The study revealed that there was no “explosion” of claims and no justification for insurers to drastically raise rates. The group concluded that insurers had panicked from lack of data. They reported back to the White House that the problem seemed attributable to insurer economics and negotiated with the NAIC to create a new medical malpractice line of data in the Annual Statement to enable them to monitor the situation over time. President Ford (and later President Carter) resisted efforts to consider a national tort reform bill based on this research.

However, big insurance companies were telling the states something else. Even though they had no information other than what proved to be falsely padded reserves to support their argument, they said that a tremendous increase in lawsuits and jury awards was to blame for skyrocketing rates, and that state tort liability laws needed to change in order for the crisis to end. Unfortunately, many state lawmakers obliged. Perhaps most famously, in 1975, California enacted the Medical Injury Compensation Reform Act, or MICRA, which, among other things, placed a \$250,000 cap on non-economic damages for malpractice victims.<sup>119</sup> But California was not alone. Many other states enacted “tort reform” laws during this time, believing they would work to bring down insurance rates for doctors and stabilize the market. The following are examples of typical legislative findings in states that enacted tort limits at that time:

**Alaska (1976).** The Governor’s October 1, 1975 *Medical Malpractice Insurance Commission Report* “stressed three factors that contributed to the need for the new legislation. First, the country was embroiled in a malpractice crisis, and the Commission predicted that Alaska would soon be faced with the same crisis.”<sup>120</sup>

**Arizona (1976).** The Governor’s 1976 proclamation calling for a special legislative session noted, “WHEREAS, problems have arisen involving medical malpractice liability insurance coverage in Arizona, which if not given immediate legislative attention and correction will adversely affect the health and welfare of many people....”<sup>121</sup>

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<sup>119</sup> See Cal. Civil Code §3333.2

<sup>120</sup> Jonathan Scott Aronie, “Alaska’s Medical Malpractice Expert Advisory Panel: Assessing the Prognosis,” 9 *Alaska L. Rev.* 401, 402-3 n. 9 (1992), <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1294&context=alr>. See also, Ronen Avraham, “Database of State Tort Law Reforms (5th),” University of Texas Law School Law and Economics Research Paper No. e555 (2014); *Reid v. Williams*, 964 P.2d 453, 456 (Alaska 1998), <http://caselaw.findlaw.com/ak-supreme-court/1447600.html>, discussing AS 09.55.548. Awards, Collateral Source, <http://www.touchngo.com/lglcntr/akstats/Statutes/Title09/Chapter55/Section548.htm>; Jonathan Scott Aronie, “Alaska’s Medical Malpractice Expert Advisory Panel: Assessing the Prognosis,” 9 *Alaska L. Rev.* 401 (1992), <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1294&context=alr>; Jane K. Ricci, “Legislative Responses to the Medical Malpractice Crisis,” 39 *Ohio St L. J.* 855, 857-8 (1978), [http://kb.osu.edu/dspace/bitstream/handle/1811/65078/OSLJ\\_V39N4\\_0855.pdf](http://kb.osu.edu/dspace/bitstream/handle/1811/65078/OSLJ_V39N4_0855.pdf)

<sup>121</sup> Jona Goldschmidt, “Where Have All the Panels Gone? A History of the Arizona Medical Liability Review Panel,” 23 *Ariz. St. L.J.* 1013, 1024 (Winter 1991). See also, *James v. Phoenix General Hosp., Inc.*,

**Delaware (1976).** From the preamble of the 1976 “tort reform” law: “WHEREAS, there has been a tremendous increase in the cost of liability insurance coverage for health care providers in Delaware, and in some instances the withdrawal of liability insurance companies from the business of insuring health care providers in Delaware.”<sup>122</sup>

**Florida (1976).** From the preamble of the 1976 “tort reform” law: “WHEREAS, this insurance crisis threatens the quality of health care services in Florida as physicians become increasingly wary of high-risk procedures and are forced to downgrade their specialties to obtain relief from oppressive insurance rates....”<sup>123</sup>

**Louisiana (1975).** “[T]he legislature enacted the Medical Malpractice Act in 1975 in response to a ‘perceived medical malpractice insurance ‘crisis.’ ... The legislature intended the Act to reduce or stabilize medical malpractice insurance rates and to assure the availability of affordable medical services to the public.”<sup>124</sup>

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154 Ariz. 594 (1987), <http://law.justia.com/cases/arizona/supreme-court/1987/86-0535-2.html>; *Eastin v. Broomfield*, 116 Ariz. 576 (1977), <http://law.justia.com/cases/arizona/supreme-court/1977/13114-0.html>

<sup>122</sup> Delaware Health Care Malpractice Insurance and Litigation Act, <http://delcode.delaware.gov/sessionlaws/ga128/chp373.shtml>. See also, Ronen Avraham, “Database of State Tort Law Reforms (5th),” University of Texas Law School Law and Economics Research Paper No. e555 (2014).

<sup>123</sup> Jessica Fonseca-Nader, “Florida’s Comprehensive Medical Malpractice Reform Act: Is It Time for a Change?” 8 *St. Thomas L. Rev.* 551, 553 n.13 (Spring 1996). See also, Thomas Horenkamp, “The New Florida Medical Malpractice Legislation and Its Likely Constitutional Challenges,” 58 *U. Miami L. Rev.* 1285, 1287-8 (2004), <http://repository.law.miami.edu/umlr/vol58/iss4/17>; Laurie G. Steiner, “1988 Periodic Payment Awards: The Prescription for the Medical Malpractice Crisis in Ohio,” 3 *J. Law and Health* 47, 59-60, n.106 (1988-89),

<http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1374&context=jlh>; U.S. General Accounting Office, *Medical Malpractice: Case Study on Florida* (December 1986),

<http://www.gao.gov/assets/210/209000.pdf>; U.S. General Accounting Office, *Medical Malpractice: Six State Case Studies Show Claims and Insurance Costs Still Rise Despite Reforms* (December 1986) at 28,

<http://www.gao.gov/assets/150/144921.pdf>; Florida Division of Library Services, *1976 Summary of General Legislation: Florida Legislature, Regular Session April 6 – June 4* (August 1976) at 121-3,

<https://fall.law.fsu.edu/collection/FlSumGenLeg/FlSumGenLeg1976.pdf>; 1976 Supplement to Florida Statutes of 1975, Ch. 768 at 518-532,

[https://fall.fsulawrc.com/collection/FlaStat/FlaStat1976/vsupp/FlaStat1976vSupp\\_OCR\\_Part11.pdf](https://fall.fsulawrc.com/collection/FlaStat/FlaStat1976/vsupp/FlaStat1976vSupp_OCR_Part11.pdf); Florida Statutes of 1975, Ch. 768.133-134 at 2034-6,

<https://fall.law.fsu.edu/FlStatutes/docs/1975/1975TXLIIC768.pdf>; Florida Legislature, “Insurance,” *1975 Summary of General Legislation* at 103-111,

<https://fsulawrc.com/fall/collection/FlSumGenLeg/FlSumGenLeg1975.pdf>

<sup>124</sup> *Williamson v. Hospital Service of Jefferson*, 888 So. 2d 782, 785 (2004),

<https://www.courtlistener.com/opinion/1731556/williamson-v-hospital-service-of-jefferson/>. See also,

Leonard J. Nelson, III, Michael A. Morrissey and Meredith L. Kilgore, “Medical Malpractice Reform in Three Southern States,” 4 *J. Health & Biomedical Law* 69, 98-108 (2008),

[https://www.researchgate.net/profile/Leonard\\_Nelson2/publication/228141496\\_Medical\\_Malpractice\\_Reform\\_in\\_Three\\_Southern\\_States/links/00b49522f4a6557c11000000/Medical-Malpractice-Reform-in-Three-Southern-States](https://www.researchgate.net/profile/Leonard_Nelson2/publication/228141496_Medical_Malpractice_Reform_in_Three_Southern_States/links/00b49522f4a6557c11000000/Medical-Malpractice-Reform-in-Three-Southern-States); Emily Townsend Black Grey, “The Medical Malpractice Damages Cap: What is

Included?” 60 *La. L. Rev.* 547, 548 (2000),

**New Hampshire (1977).** “RSA ch. 507-C (Supp. 1979) was intended to codify and stabilize the law governing medical malpractice actions and to improve the availability of adequate liability insurance for health care providers at reasonable cost.”<sup>125</sup>

**New Mexico (1976).** “The purpose of the Medical Malpractice Act is to promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico.”<sup>126</sup>

**Ohio (1975).** “The Ohio Medical Malpractice Act (‘Act’) was passed as a result of the turmoil that swept the nation in the early 1970s with the medical fraternity predicting dislocation of medical care as the result of soaring malpractice rates.”<sup>127</sup>

**Pennsylvania (1975).** Quotation from the 1975 Act: “It is the purpose of this act to make available professional liability insurance at a reasonable cost....”<sup>128</sup>

**Tennessee (1975).** “The Medical Malpractice Review Board and Claims Act was enacted in 1975 by the Legislature to contain the cost of medical malpractice litigation because of the perceived medical malpractice insurance crisis that existed at that time.”<sup>129</sup>

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<http://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=5817&context=lalrev>; Kandy G. Webb, “Recent Medical Malpractice Legislation – A First Checkup,” 50 *Tul. L. Rev.* 655 (March 1976).

<sup>125</sup> *Carson v. Maurer*, 120 NH 925, 930 (1980),

[https://scholar.google.com/scholar\\_case?case=11872789357968934676](https://scholar.google.com/scholar_case?case=11872789357968934676). See also, NH Rev Stat §507-C:7, <http://law.justia.com/codes/new-hampshire/2010/titlelii/chapter507-c/section507-c-7/>; NH Rev Stat §507-C:8, <http://law.justia.com/codes/new-hampshire/2010/titlelii/chapter507-c/section507-c-8/>

<sup>126</sup> NM Stat § 41-5-2, <http://law.justia.com/codes/new-mexico/2015/chapter-41/article-5/section-41-5-2/>. See also, Ronen Avraham, “Database of State Tort Law Reforms (5th),” University of Texas Law School Law and Economics Research Paper No. e555 (2014); *Otero v. Zouhar*, 697 P.2d 493, 499 (1984), <https://www.courtlistener.com/opinion/1128290/otero-v-zouhar/>; Ruth L. Kovnat, “Medical Malpractice Legislation in New Mexico,” 7 *N. Mex. L. Rev.* 5, 7, 17, 19 (Winter 1976-7),

<https://digitalrepository.unm.edu/nmlr/vol7/iss1/3/>

<sup>127</sup> *Morris v. Savoy*, 61 Ohio St. 3d 684, 686 (1991),

[https://scholar.google.com/scholar\\_case?case=730122836700512440](https://scholar.google.com/scholar_case?case=730122836700512440). See also, “Ohio High Court Upholds Law Limiting Tort Damages,” *Washington Legal Foundation*, February 22, 2008,

<http://www.wlf.org/upload/2-22-08tunnell.pdf>, David P. Miraldi, “Ohio’s Statute of Limitations for Medical Malpractice,” 38 *Ohio St. L. Rev.* 125 (1977),

[https://kb.osu.edu/dspace/bitstream/handle/1811/64125/OSLJ\\_V38N1\\_0125.pdf](https://kb.osu.edu/dspace/bitstream/handle/1811/64125/OSLJ_V38N1_0125.pdf)

<sup>128</sup> “Health Care Services Malpractice Act” (signed into law October 15, 1975),

<http://www.palrb.us/pamphletlaws/19001999/1975/0/act/0111.pdf>

<sup>129</sup> *Newton v. Cox*, 878 S.W.2d 105, 107-8 (Tenn. 1994),

<https://www.courtlistener.com/opinion/2410380/newton-v-cox/>. See also, Tenn. Code §29-26-119, <http://law.justia.com/codes/tennessee/2010/title-29/chapter-26/part-1/29-26-119/>; Tenn. Code §29-26-120, <http://law.justia.com/codes/tennessee/2010/title-29/chapter-26/part-1/29-26-120/>; Robert L. Lockaby, Jr., “Constitutional Challenges to Medical Malpractice Review Boards,” 46 *Tenn. L. Rev.* 607 (Spring 1979); Joseph H. King, Jr. “The Standard of Care and Informed Consent Under the Tennessee Medical Malpractice Act,” 44 *Tenn. L. Rev.* 225 (1977).

**Texas (1977).** “The Legislature enacted article 4590i with the express recognition that Texas faced ‘a serious public problem in availability of and affordability of adequate medical professional liability insurance,’ which in turn had ‘a material adverse effect on the delivery of medical and health care in Texas.’”<sup>130</sup>

**Virginia (1976).** “The General Assembly concluded, therefore, that escalating costs of medical malpractice insurance and the availability of such insurance were substantial problems adversely affecting the health, safety, and welfare of Virginia’s citizens. . . . Thus, the General Assembly made a judgment that passage of the Act, including Code § 8.01-581.15, was an appropriate means of addressing the problem.”<sup>131</sup>

**Washington (1976).** From the 1976 final legislative report on “tort reform” law: “The purpose of the legislation was to address rising health care costs resulting from the high cost of malpractice liability.”<sup>132</sup>

As *U.S. News & World Report* wrote during the period:

Growing concern over the crisis in malpractice insurance – pointed up by a doctors’ “strike” in California in early January – is touching off a flurry of moves to cope with the problem. In State after State, actions are being taken to deal with the situation before it seriously affects the quality of health care in the U.S. Some of the moves...[n]early half of all States have reformed malpractice laws. Ceilings have been put on the amount of the awards.

...In addition to the problems of insurance, some States have focused on legal aspects of malpractice to try to cut the expense of litigation – a key factor in raising insurance costs. . . . The most controversial change in malpractice law proposed in some States is to limit the amount a patient can recover. Indiana limited the liability of an individual doctor to \$100,000, with no award to exceed \$500,000. Other States, such as Illinois, Florida, Idaho, Louisiana, Ohio,

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<sup>130</sup> *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 893 (Tex. 2000), <https://casetext.com/case/horizoncms-healthcare-corporation-v-auld>. See also, Texas Senate Research Center, “The Medical Malpractice Liability Crisis,” *In Brief* (February 2003), [https://senate.texas.gov/assets/src/pub/InBrief\\_feb03b.pdf](https://senate.texas.gov/assets/src/pub/InBrief_feb03b.pdf); Glen M. Wilkerson et al., “Analysis of Recent Attempts to Assert Medical Negligence Claims ‘Outside’ Texas’s Article 4590i,” *Review of Litigation* (Summer 2001), <https://www.questia.com/library/journal/1P3-73958312/analysis-of-recent-attempts-to-assert-medical-negligence>

<sup>131</sup> *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525, 527-8 (Va. 1989), <https://www.courtlistener.com/opinion/1255151/etheridge-v-medical-center-hospitals/>. See also, Medical Society of Virginia, “Medical Malpractice Law in Virginia,” November 29, 2010, [https://www.msv.org/sites/default/files/medical\\_liability\\_white\\_paper\\_updated\\_20101129.pdf](https://www.msv.org/sites/default/files/medical_liability_white_paper_updated_20101129.pdf); “Virginia’s Medical Malpractice Act: A Constitutional Analysis,” 37 *Wash. & Lee L. Rev.* 1192 (1980), <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=2541&context=wlu>

<sup>132</sup> *Diaz v. State University Washington*, No. 64363–1–I (Wash. Ct. App. 2011) at ¶6, <http://caselaw.findlaw.com/wa-court-of-appeals/1606785.html>

Pennsylvania and Wisconsin, have set bounds on recovery and liability. California has put a limit of \$250,000 for recovery for emotional suffering connected with a physical injury.<sup>133</sup>

As *Facts on File World News Digest* wrote in 1975,

At least 27 states, according to a New York Times report July 27, had passed stopgap or more permanent measures on medical malpractice insurance. The measures were aimed at answering protests by physicians, which in some states involved curtailment of services in hospitals, over what they considered unreasonable high insurance rates.<sup>134</sup>

In 1985, a regression analysis conducted by Vanderbilt University Economics Professor Frank Sloan found that caps on damages and other “tort reforms” enacted after the mid-1970s insurance crisis had no effect on insurance premiums.<sup>135</sup> But this was not the lesson learned by the insurance industry. Instead, big insurance learned that state regulators would give away the store in rate increases without any data to justify them, and state lawmakers would respond by restricting the legal rights of injured victims. These political lessons have carried them through for four decades.

## **CRISIS #2: 1985 TO 1988**

Between 1978 and 1985, insurers began a new phase. No longer were they raising rates on doctors or businesses. They did the opposite. Taking advantage of the ultra-high interest rates of the early 1980s, they began lowering prices “to the point of absurdity”<sup>136</sup> and insuring poor risks just to get the premium dollars to invest. This period was characterized by such risky underwriting as retroactively insuring the MGM Grand Hotel for fire risk *months after it had burned down in a fire*.<sup>137</sup>

Eventually these astonishing price cuts became unbearable. Combined with dropping interest rates and investment income, insurance insiders signaled to the industry that the soft market period – *i.e.*, rate cutting – had to end. In May 1985, the ISO, in conjunction with the National Association of Independent Insurers, released a report called, *1985: A Critical Year*, which proclaimed that “the brutal price war of the last six years is over”

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<sup>133</sup> “Speedup in Action to Deal with Medical Malpractice Crisis,” *U.S. News & World Report*, January 19, 1976.

<sup>134</sup> “Medical malpractice actions,” *Facts on File World News Digest*, October 4, 1975.

<sup>135</sup> Frank Sloan, “State Responses to Malpractice Insurance Crisis of the 1970s: An Empirical Assessment,” *9 J. Health Pol. Pol’y & L.* 629 (1985).

<sup>136</sup> Judy Greenwald, “Insurers Must Share Blame: AIG Head,” *Business Insurance*, March 31, 1986.

<sup>137</sup> *The Liability Insurance Crisis*, Hearings Before the Subcomm. On Economic Stabilization of the House Comm. On Banking, Finance and Urban Affairs, 99th Cong., 2nd Sess. 83 (1986)(Testimony of J. Robert Hunter).

and that “significant premium increases are needed especially for the current commercial lines products.”<sup>138</sup>

So once again, the industry decided to raise rates quickly and sharply and also to raise reserves to justify the price hikes. Companies also reduced or canceled coverage for many policyholders. The country was suddenly in the midst of a new industry-created phony liability insurance “crisis.” This time, doctors, manufacturers, municipalities, day-care centers, non-profit groups, and many other commercial customers of liability insurance saw their rates skyrocket, again irrespective of whether states may have enacted “tort reforms” during the last crisis. Many could not find coverage at any price. Once more, policyholders, especially doctors, revolted:

- “Doctors are threatening to quit practicing some specialties or move out of the state while South Florida hospitals and trauma centers have threatened to shut down or have curtailed services.”<sup>139</sup>
- “Doctors and hospitals in [West Virginia] have been saying for weeks that they would have to close their doors at the end of this month when three major insurance companies planned to cancel malpractice insurance coverage for most of the state’s medical providers.”<sup>140</sup>
- “Hundreds of doctors, especially those in high-risk specialties like obstetrics and orthopedics, refused to accept new patients last February when a state Insurance Division decision opened them up to massive retroactive premium increases.”<sup>141</sup>

The insurance industry once more started pressing for major limits on the legal rights of Americans. The following 1985 quotes are instructive:<sup>142</sup>

- Aetna President William O. Bailey told the National Association of Insurance Brokers (NAIB) that “clearly another round of price increases is absolutely necessary for the business” and “the time is right to start engaging in some serious efforts for tort reform,” according to *Business Insurance*.<sup>143</sup>
- GEICO Chairman John J. Byrne told the Casualty Actuaries of New York that “it is right for the industry to withdraw and let the pressures for reform build in the

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<sup>138</sup> See Jay Angoff, “Insurance Against Competition: How the McCarran-Ferguson Act Raises Prices and Profits in the Property-Casualty Insurance Industry,” 5 *Yale J. Reg.* 397 (1988),

<http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1081&context=yjreg>

<sup>139</sup> *St. Petersburg Times*, May 7, 1987.

<sup>140</sup> Michael Abramowitz, “W. Va.’s Malpractice Insurance Crisis Ends; Legislature Reverses Course, Eases New Curbs to Keep Firms From Ending Coverage,” *Washington Post*, May 24, 1986.

<sup>141</sup> *The Record (New Jersey)*, July 24, 1986.

<sup>142</sup> Quotes can be found at National Insurance Consumer Organization, “Crisis Creation Chronology” (1986).

<sup>143</sup> *Business Insurance*, June 10, 1985.

courts and in the state legislatures,” the *Journal of Commerce* reported. Mr. Byrne argued that the insurance industry should quit covering doctors, chemical manufacturers and corporate officers and directors “to free itself from its bondage to a court system which has run amok.”<sup>144</sup>

- Only six months after the National Association of Insurance Commissioners (NAIC) annual meeting at which no mention was made of a “civil justice crisis,” the *National Underwriter* (NU) reported that talk of “civil justice system abuses” dominated the NAIC mid-year meeting.<sup>145</sup>

In fact, the industry had other information pointing to the cause of this situation. In 1986, Maurice R. Greenberg, then President and Chief Executive Officer of American International Group, Inc., told an insurance audience in Boston that the industry’s problems were due to price cuts taken “to the point of absurdity” in the early 1980s. Had it not been for these cuts, Greenberg said, “there would not be ‘all this hullabaloo’ about the tort system.”<sup>146</sup> But big insurance took no public responsibility. Instead, insurers decided – and freely discussed internally – that the industry would use this crisis, which it had manufactured, to start pressing again for “tort reform.”

On March 19, 1986, the *Journal of Commerce* reported that the Insurance Information Institute (III) was beginning a \$6.5 million nationwide advertising campaign designed to, in III’s words, “change the widely held perception that there is an insurance crisis to a perception of a lawsuit crisis.” Insurance industry print ads started running in media outlets, with such misleading headlines as “The Lawsuit Crisis is Bad for Babies,” “The Lawsuit Crisis is Penalizing School Sports,” and “Even Clergy Can’t Escape the Lawsuit Crisis,” appearing in *Readers’ Digest*, *Time*, and *Newsweek*, as well as in Sunday magazine supplements.<sup>147</sup> In 1986, Congressman John J. LaFalce (D-NY) asked the III to submit information to Congress to back up the “clergy” ads, for example. During 1986 congressional hearings, LaFalce announced:

The information they gave us would lead us to conclude that there are only about a dozen of these religious malpractice cases pending throughout the country, and that the only one that has gone to trial was dismissed in favor of the defendant. In other words...at the time these ads were run, the insurance industry had not yet paid out one cent pursuant to any court judgment in any of these cases. Yet, they form an integral part of its national advertising campaign.<sup>148</sup>

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<sup>144</sup> Phil Zunkewicz, “Cycle Causes Confusion As Reinsurance Dies And Tort Woes Persist,” *Journal of Commerce*, October 7, 1985.

<sup>145</sup> *National Underwriter*, June 28, 1985.

<sup>146</sup> Judy Greenwald, “Insurers Must Share Blame: AIG Head,” *Business Insurance*, March 31, 1986.

<sup>147</sup> Alan Herbert, “\$6.5 Million In Ads Targets Lawsuit Crisis,” *Journal of Commerce*, March 19, 1986.

<sup>148</sup> *The Liability Insurance Crisis*, Hearings before the Subcomm. on Economic Stabilization of the Comm. on Banking, Finance and Urban Affairs, House of Representatives, 99th Cong., 2d. Sess., Part 1, July 23, 1986 at 2.

Insurance companies and other insurance trade associations complemented the III campaign with their own ads. For example:

- Johnson & Higgins ran several ads in 1985 and 1986. One that appeared in the *Wall Street Journal* on November 19, 1985 stated that “the mounting wave of losses, which last year cost insurers more than \$116 for every \$100 of premium taken in, has forced insurers to act defensively.... Nothing has done more to create this ominous situation than the field day plaintiffs are having in court.”<sup>149</sup>
- Aetna ran a series of ads in 1987. One contained a pull-quote that read, “Somehow we’ve managed to create a [civil justice] system that makes good people behave badly.” The ad blamed the civil justice system for the fact that “insurers, whose reasons for being in business is to pool risks so that they are affordable, start looking for reasons not to take risks.”<sup>150</sup>

It is no coincidence that the American Tort Reform Association (ATRA) was founded during this period, representing hundreds of U.S. and foreign corporations, as well as trade associations like the American Medical Association, in their bid to overhaul civil liability laws at the state and national levels. In his 1995 report for the Washington-based group Essential Information, John Gannon found nearly 40 ATRA members were insurance companies or insurance-related organizations and six ATRA directors worked for insurance companies or law firms that frequently represented insurers.<sup>151</sup> *Legal Times* also reported that “most of [ATRA’s] funding comes from large corporate donors. Insurance firms...are each good for \$50,000 or \$75,000, one unnamed lobbyist familiar with the Association told the publication.”<sup>152</sup>

As in the mid-1970s, business, medical, and insurance lobbyists began convincing state legislatures, regulators, and voters in ballot initiative states that the only way to bring down insurance rates was to make it more difficult for injured consumers to sue in court. For example,

- At a 1986 meeting of the National Association of Insurance Commissioners, Iowa’s commissioner, William D. Hager, remarked, “The insurance industry has argued for some time that insurance rates and availability are predicated upon the high costs associated with the expanding tort system. It should clearly follow, therefore, that insurance rates will decrease and the availability improve with the advent of legislative reforms of the tort system.”<sup>153</sup>

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<sup>149</sup> Stephen Daniels, “The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building,” *52 Law & Contemp. Prob.* 261 (1989).

<sup>150</sup> *Ibid.*

<sup>151</sup> John Gannon, *Tort Deform - Lethal Bedfellows*, Essential Information (1995) at 23-25.

<sup>152</sup> “Proponents of Reform,” *Legal Times*, April 17, 1995, cited in Ken Silverstein, *Smoke & Mirrors*, Public Citizen Congress Watch (1996) at 11.

<sup>153</sup> Kenneth Reich, “Insurers told rate cuts must precede more legal reform” *Los Angeles Times*, December 14, 1986.

- Iowa’s Attorney General Tom Miller asserted in 1986 that “reforms are needed to reduce tort liability in the state and consequently cut spiraling insurance rates.”<sup>154</sup>
- A spokesman for the Texas Medical Association promised in 1986 that “[i]f significant tort reform is passed next year, there will be an immediate stabilization of premiums.”<sup>155</sup>
- In its March 1987 newsletter, the Association for California Tort Reform announced, “[D]oes significant reform mean lower insurance premiums? Yes!”
- Ralph Gaines, Jr., a spokesman for the Alabama Civil Justice Reform Committee, said in 1987 that “rigorous and meaningful tort reform will go a long way to reduce rates in insurance premiums.”<sup>156</sup>
- In New York in 1986, just months after state lawmakers responded once to the insurance crisis by enacting major “tort reforms,” Minority Leader Clarence D. Rappleyea (R-Norwich) called for even more changes – complete elimination of joint and several liability and a \$250,000 cap on non-economic damages – saying these measures were still needed “to ease the liability insurance crisis.”<sup>157</sup>
- To garner support for Florida’s Amendment 10, the unsuccessful 1988 ballot initiative that would have capped noneconomic damages at \$100,000, the Florida Medical Association argued that “the cap was a necessary tradeoff to stop spiraling insurance rates.”<sup>158</sup>
- Doctors in Montana and their insurers believed in 1988 that “if tort reform is enacted to make the system more predictable, insurance rates will stabilize or drop.”<sup>159</sup>
- In a November 7, 1988 editorial entitled “Prepare for the backlash,” the *National Underwriter*, an insurance trade publication, bluntly conceded, “Let’s face it. The only reason tort reform was granted in many states is because people accepted our argument that it was needed to control soaring insurance rates.”

Notably at this time, there was a “virtual absence of empirical evidence that tort reform [would] indeed lower liability insurance rates or expand the insurance’s availability,” as one business trade publication put it.<sup>160</sup> What’s more, when they were pushed hard by

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<sup>154</sup> Scott Sonner, “Miller calls for liability reform,” *UPI*, February 21, 1986.

<sup>155</sup> *UPI*, October 24, 1986.

<sup>156</sup> Dana Beyerle, “Civil liability law reform urged,” *UPI*, April 7, 1987.

<sup>157</sup> “Tort Reform, Banks on NY Insurance Agenda,” *Journal of Commerce*, January 22, 1987.

<sup>158</sup> Stephen Koff, “Voters deal hard blow to limits on liability,” *St. Petersburg Times*, November 9, 1988.

<sup>159</sup> Mike Dennison, “In rural areas, doctors are delivering sad message to mothers-to-be,” *Associated Press*, May 1, 1988.

<sup>160</sup> Editorial, *Crain’s Chicago Business*, June 9, 1986.

legislators to provide guarantees that rates would drop, they could not. And their subsequent rate filings with insurance departments confirmed this:

- In 1986, lobbyist Peter G. Strauss of the Alliance of American Insurers testified that “liability insurance rates would go down” if the New Jersey legislature enacted a cap on damages, repealed the collateral source rule, and eliminated joint and several liability. However, “he said he could not say how much rates would drop.” And under questioning from New Jersey Senate President John F. Russo (D-Ocean County), “he said that he knew of no state where rates had declined as a result of such ‘caps’ or other revisions in the civil justice system.”<sup>161</sup>
- In 1986, Washington State enacted what was considered at the time “one of the most comprehensive [tort] reform bills yet.” Before it passed, Ted E. Linham, president of the Washington State Physicians Insurance Association, “testified in the state legislature that the new law would reduce premiums charged by the association, which is a mutual company, by 25% to 30% within 18 months after the legislation takes effect Aug. 1.” However, after the law passed, the company asked for a rate *hike*, and state regulators began “looking for an explanation of why the insurer wants a premium hike after the industry was successful in getting tort reform.”<sup>162</sup>
- After Florida enacted what Aetna Casualty and Surety Co. characterized as “full-fledged tort reform,” including a \$450,000 cap on non-economic damages, Aetna did a study of cases it had recently closed and concluded that Florida’s tort reforms would not impact Aetna’s rates. Aetna explained that “the review of the actual data submitted on these cases indicated no reduction of cost.”<sup>163</sup> Filings made in 1986 by 104 insurers licensed in Florida revealed that, out of 277 filings, 175 (or 63 percent) showed no savings from “tort reform,” while none showed savings of more than 10 percent.<sup>164</sup>
- In 1986, Connecticut enacted major “tort reforms” to “bring insurance premiums down by setting ceilings and other restrictions on liability.” But by 1987, one state lawmaker was noting that “the insurance industry now says those measures will have no effect on insurance rates. We have been disappointed by the response of the insurance industry. The reforms we passed should have led to rate reductions

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<sup>161</sup> Carolyn Acker, “Russo: Pending legislation won’t ease insurance rates,” *Philadelphia Inquirer*, September 5, 1986; Vincent R. Zarate, “\$500,000 liability lid proposed by Russo,” *Star-Ledger*, September 5, 1986.

<sup>162</sup> “State hires outside firm to look at liability rate request,” *UPI*, December 4, 1986. *See also*, “Tort reform legislation: Did state get ‘suckered,’” *Seattle Times*, July 1, 1986.

<sup>163</sup> Aetna Casualty & Sur. Co., Commercial Ins. Div., “Bodily Injury Claim Cost Impact of Florida Tort Law Change,” August 8, 1986.

<sup>164</sup> National Insurance Consumer Organization, “‘Tort Reform’ a Fraud, Insurers Admit” and “Tort Reform Will Not Reduce Insurance Rates, Say 100+ Florida Insurers” (1986).

because we made it more difficult to recover, or set limits on recovery. But this hasn't happened.”<sup>165</sup>

- In Kansas, State Farm said in 1986, “[W]e believe the effect of tort reform on our book of business would be small. ...[T]he loss savings resulting from the non-economic cap will not exceed 1% of our total indemnity losses....”<sup>166</sup>
- The industry refused to support “tort reform” legislation any time it was coupled with a required insurance price cut, even a small decrease.

What is perhaps even more disturbing is that state officials who may have questioned the insurance industry or resisted pressure to strip people of their rights received direct threats from insurance representatives. For example, in 1985, attorney Jeff Johnson of the former U.S. law firm LeBoeuf, Lamb, Leiby and MacCrae – at the time Lloyd’s of London U.S. counsel<sup>167</sup> – told Alaska state legislators:

If you change your tort laws in Alaska, you will have a market here when the rest of the United States will not. Lloyd’s is pulling out of the United States as a reinsurer – they have already pulled out of Connecticut, New York and New Jersey – and they’re continuing to pull out of more states.<sup>168</sup>

As a result, Alaska’s Director of Insurance, John George, proceeded to tell Alaska’s Defense Council, “Lloyd’s is threatening to pull out of the United States, in fact they are pulling out of the States one by one, but they will stay in Alaska if we enact tort reform. If we all work together we might be able to steam roller this legislation.”<sup>169</sup> (Alaska responded by enacting a broad “tort reform” bill.)

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<sup>165</sup> “Insurers Warn,” *UPI*, March 9, 1987.

<sup>166</sup> Letter from Robert J. Nagel, Assistant Vice President, State Filings Division, to Ray Rather, Kansas Insurance Department, October 21, 1986 at 1-2.

<sup>167</sup> Lloyd’s provides reinsurance, which primary insurance companies carry to spread their risk. Not only is there no federal regulation of reinsurance, but state insurance departments also do not regulate rates and terms of coverage in reinsurance contracts and do not require foreign reinsurers to be licensed to do business in the United States. State reinsurance regulation is focused only on assuring the solvency of the reinsurer, requiring only that the foreign reinsurer maintain some security in the United States to back up its obligations, such as a U.S. trust fund or a letter of credit. And states have no data collection requirements for foreign reinsurers. *See, e.g., The Liability Insurance Crisis*, Hearings Before the Subcomm. On Economic Stabilization of the House Comm. On Banking, Finance and Urban Affairs, 99th Cong., 2nd Sess. 83 (1986)(Statement of Mindy Pollack, Assistant General Counsel, Reinsurance Association of America). *See also*, Joanne Doroshov and Adrian J. Wilkes, *Goliath: Lloyd’s of London in the United States*, Center for Study of Responsive Law (1988) at 27-30.

<sup>168</sup> *The Liability Insurance Crisis*, Hearings Before the Subcomm. On Economic Stabilization of the House Comm. On Banking, Finance and Urban Affairs, 99th Cong., 2nd Sess. 83 (1986)(Testimony of J. Robert Hunter)(Exh. I, sheet 3)(Excerpt from Report of Casualty Insurance Colloquium held for Alaska State Legislators by the Insurance Industry, September 17, 1985)(Statement by Jeff Johnson).

<sup>169</sup> Summary of Casualty Insurance Colloquium held for Alaska State Legislators by the Insurance Industry (September 17, 1985)(Statement from summary of presentation of John George, Director of Insurance, State of Alaska).

Meanwhile, Lloyd's was also telling the U.S. Congress that America's tort system was to blame for the company's underwriting losses. U.S. Representative John LaFalce (D-NY) noted:

Both American reinsurance companies and the foreign reinsurers, or alien reinsurers, in particular the Lloyd's of London market, argue that they were more severely hit in terms of declining profitability in 1984 and 1985, than the primary insurers. The major reason given by these reinsurance groups for their declining profitability, is the so-called explosion in tort litigation.<sup>170</sup>

Yet when a U.S. senator sought statistics on Lloyd's payouts on U.S. claims, Lloyd's would not supply this information.<sup>171</sup> And despite its threats, Lloyd's never pulled out of the United States. In fact, within two years, desperately in need of U.S. business, Lloyd's representatives began attempting to smooth over any evidence of withdrawal and minimize their earlier intimidation of U.S. companies and public officials.<sup>172</sup>

Unfortunately, the damage was already done to injury victims. During this period, lawmakers in some 46 states passed "tort reforms" that restricted victims' legal rights after being told by insurance companies and others that this was the only way to reduce skyrocketing insurance rates. For the most part, the new "tort limits" they enacted have remained on the books.

## **WHAT WAS LEARNED – THE INDUSTRY HAD INVENTED A PHONY CRISIS**

Many studies examined the causes of the mid-1980s insurance crisis. Some were even released in the middle of it, such as one produced by the Ad Hoc Insurance Committee of the National Association of Attorneys General in 1986. That study concluded:

The facts do not bear out the allegations of an "explosion" in litigation or in claim size, nor do they bear out the allegations of a financial disaster suffered by property/casualty insurers today. They finally do not support any correlation between the current crisis in availability and affordability of insurance and such a litigation "explosion." Instead, the available data indicate that the causes of, and therefore solutions to, the current crisis lie with the insurance industry itself.<sup>173</sup>

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<sup>170</sup> *The Liability Insurance Crisis*, Hearings Before the Subcomm. On Economic Stabilization of the House Comm. On Banking, Finance and Urban Affairs, 99th Cong., 2nd Sess. 83 (1986)(Statement of Hon. John J. LaFalce, Chairman of Subcomm.).

<sup>171</sup> Letter from R. Hazell to Sen. John Danforth, Chairman of the Senate Comm. On Commerce, Science and Transportation, April 2, 1986.

<sup>172</sup> See, e.g., "Lloyd's Forecast is Bullish," *Journal of Commerce*, September 8, 1987.

<sup>173</sup> Francis X. Bellotti, Attorney General of Massachusetts, et al., *Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance*. Boston, MA: Ad Hoc Insurance Committee of the National Association of Attorneys General (May 1986).

State commissions in New Mexico, Michigan, and Pennsylvania reached similar conclusions.<sup>174</sup> This led *Business Week* to write in 1987:

Even while the industry was blaming its troubles on the tort system, many experts pointed out that its problems were largely self-made. In previous years the industry had slashed prices competitively to the point that it incurred enormous losses. That, rather than excessive jury awards, explained most of the industry's financial difficulties.<sup>175</sup>

Once the crisis subsided and rates began stabilizing or dropping, we learned even more. In 1989, as this new "soft market phase" was beginning, Michael Hatch, then Commerce Commissioner of Minnesota, released an investigation of two malpractice insurers including the country's then largest, St. Paul. Hatch found that during the prior six years, these companies had increased doctors' malpractice premiums some 300 percent. Yet neither the number of claims against doctors nor the amount paid out by insurance companies had increased. In response to a question by ABC's *Nightline* as to how this could happen, Hatch responded, "Because they had the opportunity to do it. There was a limited market. People need coverage. The companies knew they had a corner on it, and they raised their rates accordingly."

What's more, evidence gathered by over a dozen state attorneys general for an anti-trust<sup>176</sup> class action filed in 1988, and settled in 1995, showed that a number of insurance and reinsurance companies had restricted coverage to commercial customers and increased rates for the purpose of creating an atmosphere intended to coax states into enacting "tort reform."<sup>177</sup> According to the anti-trust complaint, Lloyd's of London became the locus of meetings and discussions for a coordinated industry effort to raise commercial insurance rates, abandon certain lines of coverage, change the standard terms of coverage used by the majority of the industry, and enact limits on victims' rights.<sup>178</sup> In 1991, the National Association of Insurance Commissioners undertook a major study of what happened during the mid-1980s crisis, publishing its findings in a book called

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<sup>174</sup> See, e.g., New Mexico State Legislature, *Report of the Interim Legislative Workmen's Compensation Comm. on Liability Insurance and Tort Reform*, November 12, 1986; Michigan House of Representatives, *Study of the Profitability of Commercial Liability Insurance*, November 10, 1986; Insurance Comm., Pennsylvania House of Representatives, *Liability Insurance Crisis in Pennsylvania*, September 29, 1986.

<sup>175</sup> "What Insurance Crisis?" *Business Week*, January 12, 1987.

<sup>176</sup> While the McCarran-Ferguson Act exempts the insurance industry from most anti-trust laws, insurance companies may not boycott their insureds by agreeing to deny them coverage entirely. *St. Paul Fire & Marine Inc. Co. v. Barry*, 438 U.S. 531 (1978).

<sup>177</sup> *In re Insurance Antitrust Litigation*, MDL No. 767, No. C-88-1688 [CAL] (N.D. Cal.); *The State of Texas v. Insurance Services Office, Inc.*, No. 439089 (Tex. Dist. Ct., Travis Co., 53rd Jud. Dist., filed March 22, 1998). See also, "Final Approval Given To Insurance Antitrust Settlement," *Mealey's Litigation Reports*, April 18, 1995; Joanne Doroshow and Adrian Wilkes, *Goliath: Lloyd's of London in the United States*, Center for Study of Responsive Law (1988), text accompanying n. 74-77 at 69-95; "Ten States Announce They Will Join Antitrust Suits," *Insurance Antitrust & Tort Reform Report*, June 15, 1986.

<sup>178</sup> *In re Insurance Antitrust Litigation*, MDL No. 767, No. C-88-1688 [CAL] (N.D. Cal.); *The State of Texas v. Insurance Services Office, Inc.*, No. 439089 (Tex. Dist. Ct., Travis Co., 53rd Jud. Dist., filed March 22, 1998).

*Cycles and Crises in Property/Casualty Insurance: Causes and Implications for Public Policy*.<sup>179</sup> The NAIC concluded that insurance cycles were real and caused by some or all of three contributing factors:

1. Adverse shock losses that move insurers away from their target leverage ratios leading to supracompetitive (excessive) prices;
2. Changes in interest rates; and
3. Under-pricing in soft markets.

The report stated that regulators saw “considerable price cutting in soft markets which depletes surplus and increases the severity of the reversal when the market tightens.”

In 1999, two authors of this report<sup>180</sup> decided to examine the impact of tort law limits enacted during the 1985-1988 insurance crisis in a study called *Premium Deceit – the Failure of “Tort Reform” to Cut Insurance Prices*.<sup>181</sup> We found that enactment of “tort reform” laws during the nation’s second insurance crisis had no impact on rates. States with few or no tort law restrictions experienced approximately the same changes in insurance rates as those states that enacted severe restrictions on victims’ rights. These findings were consistent with other studies, such as the 1991 report from Washington’s insurance commissioner Dick Marquardt, who found that it was “impossible to attribute stable insurance rates to tort-law changes or the damages cap,” since rates also improved in states that did not pass tort reform.<sup>182</sup>

When asked to comment on the *Premium Deceit* findings, Sherman Joyce, president of the American Tort Reform Association (ATRA), told *Liability Week* on July 19, 1999, “We wouldn’t tell you or anyone that the reason to pass tort reform would be to reduce insurance rates.” ATRA General Counsel Victor Schwartz told the same publication, “[M]any tort reform advocates do not contend that restricting litigation will lower insurance rates, and I’ve never said that in 30 years.” And when *Premium Deceit* was reissued in 2002, Debra Ballen, American Insurance Association executive vice president, responded in a March 13, 2002 news release, “Insurers never promised that tort reform would achieve specific savings.”

### **CRISIS #3: 2002 TO 2006**

For approximately 13 years following the mid-1980s insurance crisis, rates stabilized and, in some lines in some states, declined and availability improved everywhere. No matter how much insurers cut their rates, the insurers wound up with a great profit year

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<sup>179</sup> National Association of Insurance Commissioners, *Cycles and Crises in Property/Casualty Insurance: Causes and Implications for Public Policy* (1991), [http://www.naic.org/documents/prod\\_serv\\_special\\_cyc\\_pb.pdf](http://www.naic.org/documents/prod_serv_special_cyc_pb.pdf)

<sup>180</sup> Ms. Doroshov and Mr. Hunter.

<sup>181</sup> See Center for Justice & Democracy, *Premium Deceit: The Failure of “Tort Reform” to Cut Insurance Prices* (1999), <http://centerjd.org/system/files/PremiumDeceit.pdf>

<sup>182</sup> “Health Care Reform – Bush’s Insurance Cap Plan A Proven Failure,” *Seattle Times*, May 16, 1991.

when investing the float on the premium in this amazing stock and bond market. Further, interest rates were relatively high as the Fed focused on inflation.

But in 2000, the market started to turn once more as the Fed cut interest rates again and again. Unfortunately for policyholders, the prolonged soft market was finally about to end. Indeed, by 2002, a new “hard market” and insurance crisis were underway, this time impacting property as well as liability coverages, with medical malpractice lines of insurance once again severely affected. As one insurance industry insider put it in 2001: “The [medical malpractice insurance] market is in chaos.... Throughout the 1990s...insurers were...driven by a desire to accumulate large amounts of capital with which to turn into investment income. Regardless of the level of...tort reform, the fact remains that if insurance policies are consistently underpriced, the insurer will lose money.”<sup>183</sup>

Federal and state lawmakers and regulators (and the general public) again turned to medical and insurance lobbyists and public relations consultants for an explanation as to why doctors’ insurance rates, in particular, were jumping so dramatically. Lawsuits and jury awards were exploding, they alleged, and medical malpractice insurers were being forced to raise insurance rates because of this. Trade and business associations conveyed that message to lawmakers and to the public everywhere in campaigning for more tort limits. For example:

- The American Medical Association (AMA) announced in March 2002 that it planned to lobby lawmakers and courts in at least 25 states and mount an ad campaign that raised public support for “tort reform.” In explaining the AMA’s position, President Richard Corlin claimed that limits on injured patients’ rights to sue were needed because “[m]any practitioners, both generalists and specialists, just can’t afford the liability premiums, forcing them to retire early, limit their practice or relocate.”<sup>184</sup>
- The American Tort Reform Association (ATRA) announced in December 2001 that “[s]ome physicians in parts of eastern Pennsylvania have already abandoned their practices because of skyrocketing insurance premiums, opting to retire early or move to states where premiums cost much less. Pennsylvania, like other states where malpractice insurance rates have soared in the absence of meaningful civil justice reforms, is facing a physician shortage crisis. Legislators in Pennsylvania’s General Assembly have promised to address liability reform in January to help keep their doctors from leaving the state.”<sup>185</sup>

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<sup>183</sup> Charles Kolodkin, “Medical Malpractice Insurance Trends? Chaos!” International Risk Mgmt. Institute (September 2001).

<sup>184</sup> Simon Avery, “Doctors vow tort reform to reduce insurance costs,” *Associated Press*, March 11, 2002. *See also*, “AMA: To Campaign For Malpractice Tort Reform,” *American Health Line*, March 13, 2002.

<sup>185</sup> American Tort Reform Association, “Insurance Rate Hikes Force Pennsylvania Doctors To Close Doors,” December 19, 2001.

- Dave Golden, director of commercial lines at the National Association of Independent Insurers, argued: “If insurance companies can spend less defending themselves and the doctors they insure in court, the cost of doing business and practicing medicine in West Virginia can return to normal levels. Otherwise, doctors will continue to flee and turn to states where the litigation climate and insurance rates are more palatable.”<sup>186</sup>
- In a March 2003 policy paper called “Doctors on Strike,” Bruce Bartlett wrote, “Recently, there have been numerous press stories about doctors striking to protest high medical malpractice premiums. This is just the most obvious evidence that something is fundamentally wrong with the nation’s tort liability system. A number of reports suggest that the cost is growing out of control....”<sup>187</sup>

Once again, data showed that the industry was not being honest about why rate hikes were happening. The study *Stable Losses/Unstable Rates 2016*, written by two authors of this report,<sup>188</sup> found that at no time were increases in premiums connected to actual payouts by insurers.<sup>189</sup> In addition, during this period, medical malpractice insurers vastly (and unnecessarily) increased reserves (used for future claims) despite no increase in payouts or any trend suggesting large future payouts.<sup>190</sup>

Yet once again, nearly half (at least) of the states responded to severe premium hikes by enacting “tort reform” laws. Fourteen states enacted or lowered caps on non-economic damages. For example:

**Maryland.** Because premiums for doctors were so high in the mid-2000s, Maryland was labeled an American Medical Association (AMA) “problem state”<sup>191</sup> and a “crisis state” according to the American College of Obstetricians and Gynecologists.<sup>192</sup> Yet Maryland had had a cap on non-economic damages since 1986, which included inflationary increases. Despite the cap, the state experienced premiums that “rose by more than 70 percent in the last two years.”<sup>193</sup> Lawmakers’ solution “to combat the high cost of malpractice insurance” was not to repeal the cap as not working, but to freeze and lower it.<sup>194</sup>

<sup>186</sup> “Tort Reform Necessary To Quell WV Medical Malpractice Crisis,” *PropertyandCasualty.com News*, December 14, 2001.

<sup>187</sup> Bruce Bartlett, “Doctors on Strike,” *National Center for Policy Analysis*, March 3, 2003.

<sup>188</sup> Ms. Doroshov and Mr. Hunter.

<sup>189</sup> Americans for Insurance Reform, *Stable Losses/Unstable Rates 2016* (November 2016), Exhibits A and B; Appendix A and B, <http://centerjd.org/content/stable-losses-unstable-rates-2016>. See also, Americans for Insurance Reform, *True Risk: Medical Liability, Malpractice Insurance And Health Care* (July 2009), <https://www.centerjd.org/system/files/TrueRiskF.pdf>

<sup>190</sup> See Americans for Insurance Reform, *True Risk: Medical Liability, Malpractice Insurance And Health Care* (July 2009), <https://www.centerjd.org/system/files/TrueRiskF.pdf>

<sup>191</sup> American Medical Association, *American’s Medical Liability Crisis: A National View* (June 2004).

<sup>192</sup> Mary Ellen Schneider, “Maryland: A State in ‘Crisis’ for Ob.Gyns,” *OB/GYN NEWS*, October 15, 2004.

<sup>193</sup> James Dao, “A Push in States to Curb Malpractice Costs,” *New York Times*, January 14, 2005.

<sup>194</sup> See Maryland Patients’ Access to Quality Health Care Act of 2004, <http://mlis.state.md.us/2004s1/bills/hb/hb0002e.pdf>

**Missouri.** This state was also identified by the AMA as a so-called “crisis state,”<sup>195</sup> yet had had a cap on non-economic damages since 1986.<sup>196</sup> According to the state insurance department, “New medical malpractice claims dropped 14 percent in 2003 to what the department said was a record low, and total payouts to medical malpractice plaintiffs fell to \$93.5 million in 2003, a drop of about 21 percent from the previous year.” And “the National Practitioner Data Bank, a federally mandated database of malpractice claims against physicians, found that the number of paid claims in Missouri fell by about 30 percent since 1991. The insurance department’s database found that paid claims against physicians fell 42.3 percent during the same time period.” Yet doctors’ malpractice insurance premiums *rose by 121 percent between 2000 and 2003.*<sup>197</sup> Again, lawmakers’ solution was not to repeal the cap but to make it worse.<sup>198</sup>

In Texas, voters were coaxed into voting to change their state constitution to allow their own rights to be stripped away. The insurance industry and Texas regulators made loud promises at the time that if this happened and “caps” on damages were passed, insurance companies would lower insurance rates for doctors. Caps were indeed enacted. Yet immediately thereafter, major insurers requested rate *hikes* as high as 35 percent for doctors and 65 percent for hospitals.<sup>199</sup> As reported in the *Houston Chronicle*:

House lawmakers sent a stern message to insurance companies Thursday: Medical malpractice lawsuit reforms passed last year were meant to help doctors – not boost profits. Republicans and Democrats who supported the legislation suggested that lawmakers might consider mandatory rate rollbacks if doctors don’t get significant rate relief. . . . Texas Medical Liability Trust is the only major carrier to agree to reduce rates. Others have tried to raise rates. About 60 percent of Texas doctors have not seen a rate decrease, the commissioner said.<sup>200</sup>

Moreover, in April 2004, after one Texas insurer’s rate hike request was denied, it announced it was using a legal loophole to avoid state regulation and increase premiums 10 percent without approval.<sup>201</sup> In a 2004 filing to the Texas Department of Insurance,

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<sup>195</sup> American Medical Association, *American’s Medical Liability Crisis: A National View* (June 2004).

<sup>196</sup> Missouri Department of Insurance, *Medical Malpractice Insurance in Missouri; The Current Difficulties in Perspective 7* (2003).

<sup>197</sup> “State report says malpractice claims fell,” *Associated Press*, November 5, 2004.

<sup>198</sup> The cap was struck down as unconstitutional in 2012. *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (2012).

<sup>199</sup> See, e.g., Darrin Schlegel, “Malpractice Insurer Fails in Bid for Rate Hike,” *Houston Chronicle*, November 21, 2003; Darrin Schlegel, “Some Malpractice Rates to Rise Despite Prop. 12,” *Houston Chronicle*, November 19, 2003; October 2003 rate filing from Texas Medical Liability Insurance Association (JUA) to Texas Department of Insurance.

<sup>200</sup> Jim Vertuno, “House takes insurance firms to task over malpractice rates,” *Houston Chronicle*, April 23, 2004.

<sup>201</sup> Darrin Schlegel, “Insurer switching its tactics/Going unregulated to raise premiums,” *Houston Chronicle*, April 10, 2004.

GE Medical Protective revealed that the state's non-economic damage cap would be responsible for no more than a 1 percent drop in losses.<sup>202</sup>

Texas, of course, was not alone in seeing rates immediately rise after passing tort limits:

**Florida:** "When Gov. Jeb Bush and House Speaker Johnnie Byrd pushed through a sweeping medical malpractice overhaul bill...the two Republican leaders vowed in a joint statement that the bill would 'reduce ever-increasing insurance premiums for Florida's physicians...and increase physicians' access to affordable insurance coverage.'" But insurers soon followed up with requests to increase premiums by as much as 45 percent.<sup>203</sup>

**Ohio:** Almost immediately after "tort reform" passed, all five major medical malpractice insurance companies in Ohio announced they would not reduce their rates. One insurance executive predicted his company would seek a 20 percent rate increase.<sup>204</sup>

**Oklahoma:** After caps passed in 2003, the third-largest medical malpractice insurer in the state raised its premiums 20 percent, followed by an outrageous 105 percent rate hike in 2004.<sup>205</sup> The largest insurance company, which was owned by the state medical association, requested an astounding 83 percent rate hike just after "tort reform" passed.<sup>206</sup>

**Mississippi:** Four months after "caps" passed, investigative news articles reported that surgeons still could not find affordable insurance and that many Mississippi doctors were still limiting their practice or walking off the job in protest.<sup>207</sup>

**Nevada:** Within weeks of enactment of "caps" in the summer of 2002, two major insurance companies proclaimed that they would not reduce insurance rates for at least another year to two, if ever. The Doctor's Company, a nationwide medical

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<sup>202</sup> Consumer Watchdog, "Smoking Gun Document Exposes Insurance Industry Lies" (2004), <https://www.consumerwatchdog.org/newsrelease/nations-largest-medical-malpractice-insurer-declares-caps-damages-dont-work-raises-docs->

<sup>203</sup> Julie Kay, "Medical Malpractice; Despite Legislation that Promised to Rein in Physicians' Insurance Premiums, Three Firms File for Big Rate Increases," *Palm Beach Daily Business Review*, November 20, 2003.

<sup>204</sup> See, e.g., "Despite New Law, Insurance Companies Won't Lower Rates Right Away," *Associated Press*, January 9, 2003.

<sup>205</sup> "Hike Approved for Premiums," *Daily Oklahoman*, April 8, 2004.

<sup>206</sup> See, e.g., "Oklahoma's Largest Medical-Liability Company Gets 83% Rate Increase Over Three Years," *BestWire*, December 2, 2003.

<sup>207</sup> See, e.g., "Miss. Tort Reform Effort Falls Short," *Commercial Appeal*, February 18, 2003; Reed Branson, "Doctors In Oxford Shut, Cite Insurance," *Commercial Appeal*, February 14, 2003; Ben Bryant, "Tort Reform Has Done Little to Ease Malpractice Crisis," *Biloxi Sun-Herald*, February 2, 2003.

malpractice insurer, then filed for a 16.9 percent rate increase. Two other companies filed for 25 percent and 93 percent rate increases.<sup>208</sup>

We know that rates failed to drop because the country was still in the midst of a severe “hard market.” But like clockwork, rates eventually did stabilize, and they did so in every state irrespective of whether lawmakers enacted “tort reform” laws.<sup>209</sup> All of this is also reflected in Figures 7 through 18 above. “Losses paid” – the actual payouts by insurers – barely increased during this crisis period yet premiums jumped significantly without any basis. Following that period, claims have been essentially flat for 15 years. And after price-gouging doctors during the crisis period, premiums have steadily dropped since then.

The growth of insurance pure premiums (also known as “loss costs”), as compiled by the Insurance Services Office (ISO), showed the same trend.<sup>210</sup> According to the ISO, the same cyclical pattern was at work in the medical malpractice line, with the biggest increases between 2002 and 2005, and dropping steadily since then with 2008 seeing an astonishing 11 percent decrease.<sup>211</sup> Moreover, this decrease might have been even greater had 17 states not limited the decrease to 20 percent, probably because ISO wanted to control this drop. Most likely, this result was due to the recognition that, with profits as high as they were, medical malpractice insurance for doctors had been greatly overpriced in prior years.<sup>212</sup>

When the Supreme Court of Florida had an opportunity to look back on this period in a 2014 decision striking down one of the state’s caps on damages, the Court wrote, “Our consideration of the factors and circumstances involved demonstrates that the conclusions reached by the Florida Legislature as to the existence of a medical malpractice crisis are not fully supported by available data.”<sup>213</sup>

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<sup>208</sup> See, e.g., Joelle Babula, “Medical Liability Company Requests Premium Increase,” *Las Vegas Review-Journal*, February 11, 2003; Joelle Babula, “State Insurance Program Holds Off on Lowering Rates,” *Las Vegas Review-Journal*, August 14, 2002.

<sup>209</sup> See, Americans for Insurance Reform, *Premium Deceit: The Failure of “Tort Reform” to Cut Insurance Prices* (November 2016), <http://centerjd.org/content/premium-deceit-2016-failure-tort-reform-cut-insurance-prices>; Americans for Insurance Reform, *True Risk: Medical Liability, Malpractice Insurance And Health Care* (July 2009), <https://www.centerjd.org/system/files/TrueRiskF.pdf>

<sup>210</sup> “Pure premium” is a term used interchangeably with “loss costs.” This is the portion of each premium dollar taken in that insurance companies use to pay for claims. It includes the cost of adjusting and settling claims, including adjuster and legal expenses. Insurers use other parts of the premium dollar to pay for: their profit, commissions, other acquisition expenses, general expenses, and taxes. Loss costs include both paid and outstanding claims (reserves are included through an actuarial process known as “loss development”) as well as trends into the future since rates based on ISO loss costs are for a future period. Thus, loss costs include ISO’s adjustments to make sure that everything is included in the price, even such factors as future inflation.

<sup>211</sup> See Americans for Insurance Reform, *Premium Deceit: The Failure of “Tort Reform” to Cut Insurance Prices* (November 2016), <http://centerjd.org/content/premium-deceit-2016-failure-tort-reform-cut-insurance-prices>

<sup>212</sup> Ibid.

<sup>213</sup> *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014).

## SOFT MARKET – 2006 TO 2020

As *Medical Liability Monitor* wrote just four years ago, doctors have “seen direct written premium fall by roughly 20 percent” since 2006. At the same time, “premium revenue is still outpacing claims expenses.”<sup>214</sup> Other industry publications reported additional confirmation of the soft market industry-wide, such as a 2010 *Business Insurance* white paper, noting that “premium levels...are approaching – and in some cases falling below – those reached in the late 2000, just before the last hard market.... The average general liability and workers compensation premiums were 3.6% and 0.9% below year-end 2000 levels, respectively, as of June 30, 2010.”<sup>215</sup>

But in 2011 following several worldwide weather events,<sup>216</sup> leading insurance executives started trying to push the country into a new hard market by hyping the notion that they were in bad shape financially even though this was untrue.<sup>217</sup> For example, the 2011 storm Hurricane Irene - greatly hyped by the Weather Channel but not nearly the catastrophe that was expected<sup>218</sup> - was also greatly hyped by the insurance industry. The industry hoped it would provide a catalyst for the industry to start pushing the idea – particularly with mainstream news media – that the industry needed a market turn. In the media, insurance executives began hyping the notion: 1) the industry was in financial trouble (untrue); and 2) hurricanes and other catastrophes were going to force them to raise rates (also untrue, as the events were well within the industry’s model projections and thus already priced in).<sup>219</sup>

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<sup>214</sup> “Annual Rate Survey Issue,” *Medical Liability Monitor* (October 2013),

<https://careers.milliman.com/uploadedFiles/insight/2013/MLM-Rate-Survey.pdf>

<sup>215</sup> “Hard Market Game Plan; Steps Risk Managers Need to Take Before Rates Rise,” *Business Insurance*, (2011) at 8.

<sup>216</sup> According to the Natural Resources Defense Council, “so far in 2011, America has experienced 14 disastrous weather events that created over a billion dollars in damages each – and all-time record.” Peter Lehner, “Billions of Dollars in Damages from Extreme Weather Shows the Cost of Climate Inaction,” National Resources Defense Council, December 8, 2011.

<sup>217</sup> At the end of 2010, the leverage ratio was 0.74 to 1, meaning that surplus was about twice that required.

<sup>218</sup> See, e.g., Matthew Sturdevant, “Insurance Industry Spared Major Costs From Hurricane Irene,” *Harford Courant*, August 30, 2011.

<sup>219</sup> Following Hurricane Andrew, the property/casualty industry, as a whole, completely changed the way it set rates for hurricanes. The purpose was to institute some stability in pricing and prevent huge price hikes after one storm. Models project, by segment of the coastline called “reaches,” the anticipated storm damage for different category hurricane storms. The projections are for at least 10,000 years of virtual “experience” based on the best hydrological, meteorological, actuarial, and other inputs available. One of the advantages of this approach is that the 10,000 years of projected experience includes periods of many and very large hurricanes (like multiple hurricanes hitting the state in one year and a category 5 storm making a direct hit on Miami and causing \$200 billion in insured loss) and also periods where no hurricanes make landfall on our nation’s coasts. This means that the absence of storms for a decade should not lower rates as this is anticipated in the results projected by the models. Also, the happenstance of multiple storms in a state in a year or one large hit should not raise rates as this is likewise anticipated in the modeled projections. See, e.g., Americans for Insurance Reform, *At The Tipping Point: The Homeowner Insurance Mess In Florida And How To Fix It* (2006), <https://www.insurance-reform.org/studies/TIPPINGPOINT.pdf>

For example, in October 2011, David Eslick, chairman and chief executive officer of Marsh & McLennan Agency, told an insurance audience that “insurers will not begin to ‘get rate’ unless they exhibit ‘stiffer backbone.’” Said Eslick “They need to take the initiative if they want more rate,” a clear signal for those with “weak backs” to get with the program and stop competing with lower rates.<sup>220</sup> William R. Berkley, chairman and chief executive officer of W.R. Berkley Corp., and ACE Ltd. Chief Executive Officer Evan Greenberg both clearly signaled to those not yet on the same page to begin both rate increases and reserve hikes. They even suggested that companies not joining in this must be “relying on bad data,”<sup>221</sup> or as Greenberg put it:

Some companies continue to write irresponsibly. “They don’t know any better,” he says. “I’m convinced many of them don’t know the difference between what’s an adequate or inadequate price.” Meanwhile, the best companies “are endeavoring to do what we do and show discipline. And they are trying to press the market to recognize a price that reflects the risk. ... “I see a number of companies that are trying – a few that are brand names – that are trying to do what we’re doing.”<sup>222</sup>

The industry started pushing out a false story to the mainstream news media, namely that the industry was in financial trouble and the soft market would have to end, even though the industry’s actual financial situation failed to support either of these notions. This can be plainly illustrated by an August 28, 2011 *New York Times* article entitled, “Irene Adds to a Bad Year for Insurance Industry.”<sup>223</sup> The *New York Times* was not alone, of course. All through 2011, the drumbeat of insurance firms and top executives calling for an end to the soft market continued. The following are a few examples, chronologically listed from August through December 2011:

- “A survey on four commercial lines suggests the soft market may be bottoming out, according to the Risk and Insurance Management Society Inc. (RIMS)... The survey indicates significant tightening in the price declines that have defined the soft market.”<sup>224</sup>
- “Al Tobin of Aon Corp.’s national property practice said the storm, coming after earthquakes in Japan and New Zealand and record tornadoes in the U.S., could provide a reason for insurers to raise their rates.”<sup>225</sup>

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<sup>220</sup> Mark E. Ruquent, “Carriers Not Getting What They Want Most: Rate Increases,” *National Underwriter Online*, October 5, 2011.

<sup>221</sup> “W.R. Berkley CEO: The Market Turn Has Finally Arrived,” *Best’s News Service*, October 27, 2011.

<sup>222</sup> Chad Hemenway, “ACE’s Greenberg, Fitch Ratings See Rates Improving,” *National Underwriter Online*, October 27, 2011.

<sup>223</sup> Mary Williams Walsh, “Irene Adds to a Bad Year for Insurance Industry,” *New York Times*, August 28, 2011.

<sup>224</sup> “Soft Market Reaching Bottom, RIMS Says,” *National Underwriter P&C*, August 22-29, 2011.

<sup>225</sup> Leslie Scism and Eric Holm, “Insurers: Storm Might Have Been Worse,” *Wall Street Journal*, August 29, 2011.

- “The \$7 billion in estimated losses from Hurricane Irene will compound the vast damage caused by weather in the United States this year. Yet despite billions they’ve paid out for floods, tornadoes and earthquakes, big insurance companies can expect another profitable year. And their customers can expect higher premiums.... Another reason insurers are expected to raise premiums is that reinsurance companies are set to boost their rates Jan 1.”<sup>226</sup>
- “Although Lloyd’s posted a 697 million pound (US\$1.22 billion) first-half loss on ‘unprecedented’ catastrophe claims, Chief Executive Richard Ward worries the market is still not seeing sufficient boosts in pricing outside the business lines directly hit by disaster.”<sup>227</sup>
- [T]he current situation is “corrosive” for the industry as it deals with a significant catastrophe year that is eating away at reserves. ... “We must not lose sight of our primary mission – to take care of our customers, but we must also take care of ourselves.”<sup>228</sup>
- “The long-awaited turn in the property/casualty market has arrived,” said William R. Berkley, chairman and chief executive officer of W.R. Berkley Corp. “There’s no question that the market turn is definitive. It is here,” Berkley said. ... What drives the market turn is ‘always the same: fear of total loss of profitability,’ Berkley said. Sometimes it’s individual events that bring about that fear, and sometimes it’s an examination of trends, he said. Today, some companies are relying on data that isn’t as accurate as they think it is, Berkley said. ‘What it is right now is the loss of redundancies in peoples’ reserves...one of the things that happens and is always a keystone of change in the cycle is [when] the data you relied on didn’t prove to be accurate,’ Berkley said.”<sup>229</sup>
- “The chief executive of insurance broker Arthur J. Gallagher is upbeat about the firm’s third-quarter performance and told analysts that rate increases are necessary for the industry’s health. ‘I’m very pleased with our third-quarter results,’ J. Patrick Gallagher Jr., chairman, president and chief operating officer of the Itasca, Ill.-based firm, said during a conference call with

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<sup>226</sup> Christopher S. Rugaber and Daniel Wagner, “Higher Insurance Premiums Likely After Irene,” *Associated Press*, August 31, 2011.

<sup>227</sup> David Pilla, “Lloyd’s CEO: Even After Record First-Half Losses, Industrywide Pricing Is Inadequate,” *Best’s News Service*, September 21, 2011.

<sup>228</sup> Mark E. Ruquent, “Carriers Understand Market Challenges; Discuss Strategies Beyond Pricing,” *National Underwriter Online*, October 6, 2011, quoting Paul Krump, president of commercial and specialty lines for Chubb Group of Insurance Companies, in an address during The Council of Insurance Agents & Brokers’ 98th annual Insurance Leadership Forum.

<sup>229</sup> “W.R. Berkley CEO: The Market Turn Has Finally Arrived,” *Best’s News Service*, October 27, 2011, <https://insurancenewsnet.com/oarticle/WR-Berkley-CEO-The-P-C-Market-Turn-Has-Finally-Arrived-a-292681#.XlhD6xdKhmA>

financial analysts. ‘This is the third quarter that we have been in positive organic territory, and I’m pleased with that.’<sup>230</sup>

- “ACE Ltd. Chief Executive Officer Evan Greenberg said September was the best month for pricing this year, and a statement by Fitch says it is seeing ‘positive’ rate increases, but as Greenberg says, whether the trend continues ‘remains to be seen.’ During a conference call to discuss third-quarter earnings, Greenberg says ‘pricing overall continues to firm’ as ‘more classes achieve positive rate while rate decreases were smaller.’<sup>231</sup>
- “The soft-market cycle is over, according to MarketScout. Richard Kerr, chief executive officer of the insurance distribution and underwriting company, says that ‘the soft-market cycle has finally broken’ after nearly seven years.”<sup>232</sup>

Then, on December 13, 2011, an article appeared in the *National Underwriter Online News Service* called “Towers Watson CLIPS Survey: Commercial Prices Up but Not Up Enough,”<sup>233</sup> which encapsulates nearly every major point in this study. It reports on a Towers Watson Commercial Lines Pricing Survey (CLIPS), which Towers Watson used as an opportunity to do essentially the following:

- Pressure the industry to do more, explaining that a “real hard market” requires more and greater rate increases. Simple increases are not enough. Rates must spike.
- Justify this by presenting “lost cost” figures, which, as explained earlier, do not represent actual payouts but rather “incurred” losses which are exaggerated during hard markets.

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<sup>230</sup> “In response to a question about the rate environment, Gallagher said ‘it feels like’ certain lines of business are hardening in parts of the country, and he equated the current situation to the rate environment after Hurricane Andrew in 1992 and other property catastrophes where property hardened, but other lines did not. ‘Property is very tough in Oklahoma, for instance,’ he said. ‘Workers’ comp is getting tough in Illinois and California. And workers’ comp as a line, across the country, I think is going to get tight. [Directors and officers] is still soft.’ He went on to say, ‘The CEOs of the insurance companies that I talk to today are different in their outlook and discussion than they were in 2000. They all know that they have to pay attention to underwriting,’ he added. ‘They know their accident years aren’t good. They know they are not getting any investment income and they recognize that they are going to have to get some rate or they will be in trouble.’” Mark E. Ruquet, “AJG Reports Growth; Says Rate Increases Necessary for Industry’s Health,” *National Underwriter Online*, October 27, 2011.

<sup>231</sup> Chad Hemenway, “ACE’s Greenberg, Fitch Ratings See Rates Improving,” *National Underwriter Online*, October 27, 2011.

<sup>232</sup> Chad Hemenway, “Commercial Soft Market Has Ended, Says MarketScout,” *National Underwriter Online*, December 6, 2011.

<sup>233</sup> Chad Hemenway, “Towers Watson CLIPS Survey: Commercial Prices Up but Not Up Enough,” *NU Online News Service*, December 13, 2011, <https://www.propertycasualty360.com/2011/12/13/towers-watson-clips-survey-commercial-prices-up-bu/?slreturn=20200127175500>

- Encourage insurers to use “predictive modeling” to get their rates up, an anti-competitive practice that is legal because the industry is exempt from anti-trust laws.

But the pressure campaign did not work. The soft market did not end in 2011.

The industry has decided to try again. According to the *Wall Street Journal*, they are making this move for two main reasons: “several years of large catastrophe losses and continued low interest rates, which have weighed on their investment returns.”<sup>234</sup>

But as described throughout this study, there is absolutely no data to support industry assertions that this soft market should not continue. Adjusted claims have stayed essentially flat for two decades. And it is clear that insurance companies have been storing away excess profits for decades. Industry surplus is now at record-breaking excessive levels. The industry is perfectly able to pay the claims it owes without raising rates on businesses.

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<sup>234</sup> Nicole Friedman and Leslie Scism, “Insurers Drive Up Prices for U.S. Businesses,” *Wall Street Journal*, February 11, 2020, <https://www.wsj.com/articles/insurers-drive-up-prices-for-u-s-businesses-11581417009>