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## SURVEY SAYS ...

# "TORT REFORM" NOT A PRIORITY FOR BUSINESSES

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## INTRODUCTION

On March 30, 1999, the Business Council of New York State held a conference for hundreds of small business owners at which some of New York's top political leaders spoke, including New York's Governor, Senate Majority Leader, Assembly Speaker and the principal sponsor of broad tort reform legislation then being considered by the New York State legislature. "Tort reform" was a hot issue in Albany, being touted by corporate lobbyists as critical for the small business community and crucial to improving New York's upstate economy. So one might expect some discussion about it from politicians trying assist the small business community. Yet not a single person even mentioned the issue.

In May 1999, following passage of radical tort reform legislation in Florida, Enterprise Florida, a private-public partnership that works to bring out-of-state companies to Florida, told the, *Miami Daily Business Review*, "tort reform was never a big priority for the group....The litigation environment isn't an issue that companies look at 'on a day-to-day basis' in deciding whether to relocate. If it were a frequent question, we would have been more active on this bill."

If you listen to corporate lobbyists, they will tell you that lawsuits by consumers are creating economic "crises" in states that are driving out businesses, doctors, and other professions. They tell

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lawmakers that “tort reform” legislation is needed for small businesses to survive and to attract new businesses to their state, and even more daunting, that unless "tort reform" is enacted, businesses and doctors will relocate to less "litigious" states. But as the two examples above illustrate, the notion that lawmakers must restrict the rights of injured consumers to sue in order for a state's business economy to grow or even survive is one of most sensationalized fictions driving the "tort reform" movement today.

The actions of those savvy New York politicians and the folks at Enterprise Florida reflected exactly what internal business surveys consistently show: when it comes to a state's business climate, liability issues rank far below other matters of far more importance, like workforce, healthcare and a range of tax and regulatory issues.

This White Paper addresses the disparity between what business owners believe and what lobbyists say about tort law's importance to small businesses and to a state's business environment. We examine several internal surveys by private business organizations, many of which are at the forefront of the "tort reform" movement. Whereas groups like the National Federation of Independent Businesses (NFIB), the U.S. Chamber of Commerce and the National Association of Manufacturers have all made "tort reform" one of their top legislative priorities at the federal and state level, survey after survey shows that their members believe other issues are far more pressing for their own survival and growth. Businesses virtually always put "lawsuits" or "liability" toward the bottom of their list of concerns, if they mention it at all.

We also debunk the common myth that liability laws are a significant factor that businesses consider when deciding where to locate. Based on extensive legal research, we rank states based on the number of major tort law limits enacted since 1985, and correlate those findings with the states that have built the most number of new facilities or plants. We find there to be absolutely no connection between a state's enactment of "tort reform" and the state's relative attraction for businesses.

And we conclude by showing that juries are actually are far more "pro-business" than conventional wisdom suggests, and that liability costs for businesses are extremely small and in steady and steep decline.

## A WORD ABOUT “TORT REFORM” SURVEYS

It is sometimes said that “tort reform” is a staff-driven issue – of far less a concern to the average business owner than it is to the lobbyists of major business organizations. That is why it is important to distinguish between unbiased polls that truly examine the views of business owners, and “push polls” that are conceived by business lobbyists seeking to demonstrate support for a pre-defined political or legislative agenda.

In 1995, a “poll” on the subject of “tort reform,” conducted by Newt Gingrich’s Contract with America pollster Frank Luntz, was roundly criticized for “push-poll” bias. Luntz admitted that he had “counted people as favoring ‘tort reform’ if they accepted the statement that ‘we should stop excessive legal claims, frivolous lawsuits and overzealous lawyers.’” Diane Colasanto, former President of the American Association for Public Opinion Research, said, “You can’t measure public opinion with leading questions like these.” Similarly, Donald Ferret of the University of Connecticut’s Roper Center said such leading questions “sharply overstate support for the measures in question.”<sup>1</sup>

In 1997, the New York State Bar Association, which represents both the defense and plaintiffs’ bar, criticized polls conducted by John Zogby for New York’s major business “tort reform” coalition, New Yorkers for Civil Justice Reform (NYCJR). Richard Behn, who heads Numbercrunchers, a national polling organization, said, “Although John Zogby is a respected pollster, the survey he prepared for New Yorkers for Civil Justice Reform is clearly designed to test voter response to a set of arguments designed to enhance the positions of New Yorkers for Civil Justice Reform. There are no counter arguments included in the poll to provide any balance to these statements.” Moreover, he called the polls “incendiary . . . filled with loaded language . . . [an effort to] move public opinion in a particular direction advantageous to the poll sponsor.”<sup>2</sup>

More recently, the American Tort Reform Association (ATRA) – a coalition of more than 300 corporations and associations representing tobacco, pharmaceutical, automotive and chemical industries that seek immunity from lawsuits – paid the Center for Survey Research and Analysis at the University of Connecticut to call registered voters and ask them certain questions about class action lawsuits, including whether they agreed or disagreed with broad damaging statements about such lawsuits. This “poll” was similarly condemned. The *Connecticut Law Tribune*, which serves that state’s entire legal community, put it this way: “By asking a handful of broad, disingenuous questions to a smattering of ill-prepared respondents, the tort reform crowd is trying to turn anecdotal, emotional responses into a quasi-official, scientifically measured poll that it can trot out before legislative bodies as ‘evidence’ that the public wants tort reform.”<sup>3</sup>

In other words, even respected pollsters and polling organizations have been criticized for bias in their handling of surveys commissioned by “tort reform” groups. So it should be no surprise that the U.S. Chamber of Commerce, which has made “tort reform” one of its priority political and legislative issues, has engaged in similarly skewed polling strategies.

In 1998, the Chamber created an offshoot called the Institute for Legal Reform to carry out the Chamber’s attacks on juries, judges, lawsuits and the attorneys who represent consumers. Said the Institute’s Chairman Lawrence B. Kraus, “The Chamber has been involved in this for years, but we’ve decided to make it a priority.”<sup>4</sup> This announcement came just months after a number of state and local chambers, some with lawyers and law firms as prominent members, expressed strong opposition to highly-publicized lawyer-

bashing remarks by Chamber CEO Tom Donahue, including statements like, “trial lawyers are sapping the vitality out of American enterprise.”<sup>5</sup>

In January 2001, the Chamber released a “survey” of its members, called the *2001 National Business Agenda Survey*, which the group said “will help shape the Chamber’s policy agenda for the new Congress and administration.”<sup>6</sup> Businesses were asked to respond to a series of statements containing “loaded” language like the other “push polls” described above. The survey yielded the following results:

Member companies cited three top legal reform issues for 2001: leveling the litigation playing field by making the same rules apply to all parties including the government, with 95 percent of respondents giving it a high priority; reforming product and service liability laws so parties are only responsible for harms they actually caused (94 percent); and ending excessive punitive damages (93 percent).<sup>7</sup>

This led the Chamber to announce that its members ranked “legal reform” as one of its top priorities for 2001. In fact, seemingly to provide special emphasis, in its press release the Chamber lists “legal reform” first among four issues that are highlighted, followed by workforce and employee benefits, regulatory reform and tax issues.<sup>8</sup> This emphasis is consistent with statements made in 1998 by the head of the Chamber’s “tort reform” lobby group, Lawrence B. Kraus, who said, “Perhaps no single issue generates as much intense emotion among businesses of all sizes as the excesses of America’s legal system.”<sup>9</sup>

The problem is, no other Chamber survey supports attaching this kind of political or legislative priority to “tort reform.” For example, a 1999 survey of 100 executives of the 100 largest state and metro Chambers of Commerce examining workforce issues showed that an overwhelming 82 percent of those executives considered workforce and education as their top concern, representing a 23 percent increase from the previous year.<sup>10</sup> In fact, the Chamber states in its own publication, *U.S. Chamber Small Business News* (August 19, 2000), that “acquisition and retention of qualified employees,” found by another organization to be the most critical issue for small businesses, “echoes the U.S. Chamber’s recent survey of state and local chamber executives that also pinpointed the short supply of labor as businesses number one concern.”<sup>11</sup>

Even in states where relatively few “tort reforms” have been enacted compared to other states, like Pennsylvania and Oklahoma,<sup>12</sup> Chamber surveys show that liability laws are irrelevant to businesses considering whether to stay or leave the state.<sup>13</sup> And when the Pennsylvania Chamber conducted its *Tenth Annual Pennsylvania Economic Survey* in 2000 in which respondents were asked to rank ten issues in order of importance, so-called “lawsuit abuse” was outpolled by business taxes, health care, workers compensation (workers compensation claims do not go through the tort system), education and workforce development and environmental law and regulation as more important issues.

These results are consistent with most every other business survey described in the next section.

## THE REAL CONCERNS OF BUSINESSES

### NATIONAL SURVEYS

**NATIONAL SMALL BUSINESS UNITED (NSBU) (CONDUCTED IN PARTNERSHIP WITH ARTHUR ANDERSEN ENTERPRISE GROUP) SURVEY OF SMALL AND MID-SIZED BUSINESSES, TRENDS FOR 2000.**<sup>14</sup> NSBU describes itself as “the nation’s oldest bipartisan small business advocate for small American businesses.”

**Survey:** Nationwide survey of small and mid-size businesses; 10,000 mailed, 557 responses.

#### **Findings:**

- When asked to name the “three most significant challenges to the future growth and survival of their business,” the top three factors were:
  1. finding and retaining qualified employees (61 percent of respondents named this as one of their top three challenges);
  2. state and federal regulations (35 percent);
  - and 3. economic uncertainty (29 percent).
- Other areas of concern cited were: keeping up with technology, access to adequate capital, taxes, labor costs, healthcare insurance benefits and conducting business on the Internet.
- Neither lawsuits nor liability laws made the list.
- Those results were consistent with earlier NSBU/Arthur Andersen surveys, which have never deemed lawsuits a top concern.<sup>15</sup>
- Even with regard to “legislative concerns” from which respondents could choose from a pre-defined list, healthcare reform, tax reform, capital gains tax incentives, social security reform, estate tax repeal and payroll tax reform all outpolled “product liability/tort reform.”
- Similarly, in 1999, 2000 and 2001, litigation was not mentioned in a list of top 10 concerns facing the small business community cited by the NSBU Small Business Congress. While tax reform, healthcare reform, pension reform and bankruptcy reform were placed on its legislative agenda, “lawsuit reform” was not.<sup>16</sup>

## **AMERICAN EXPRESS, VOICES FROM MAINSTREET SURVEY.<sup>17</sup>**

**Survey:** July 2000 poll of small business owners; sent to 1,000 small businesses, nearly 800 responded.

### **Findings:**

- The survey results list the top 10 issues that are “very important” to small businesses. Neither lawsuits nor liability laws made the list.
- Employee health care insurance ranked number one.
- Other concerns that made this list were: tax cuts/reform, improving the quality of the workforce, reducing government regulations, availability of capital, crime, social security reform, reducing the budget deficit, Internet security, reducing estate taxes and minimum wage guidelines.
- These results are consistent with an earlier American Express survey, where small businesses listed “improving schools/training young people for work” and “healthcare” as the most important priorities, but never mentioned litigation.<sup>18</sup>

## **NATIONAL FEDERATION OF INDEPENDENT BUSINESSES (NFIB) EDUCATION FOUNDATION. 2000 SMALL BUSINESS PROBLEMS AND PRIORITIES.<sup>19</sup>** NFIB is one of the most active “tort reform” lobbying groups at both the federal and state levels.

**Survey:** 75 potential problem areas were listed, and NFIB members were asked to assess how much each actually affected their operations.

### **Findings:**

- Interestingly, NFIB chose not to even list “lawsuits” or “liability laws” as problem areas from which members could choose.
- The only category remotely connected to general liability was called “cost and availability of liability insurance,” a problem for which insurance industry practices are far more responsible than lawsuits. This issue ranked #13.
- Nearly half of all respondents rated the cost of health care insurance a critical concern. Federal taxes on business income and finding qualified workers ranked second and third, respectively. Three of the six most important concerns involved taxes.

- Such findings were consistent with the issues discussed in the 2000 Congressional Small Business Summit, which focused on short-term tax relief, health care, social security, government regulations, worker shortages and the tax code.<sup>20</sup>

**NATIONAL ASSOCIATION OF MANUFACTURERS (NAM). 2000 NAM SMALL MANUFACTURERS OPERATING SURVEY.**<sup>21</sup> NAM is a principal lobbyist for product liability legislation in Congress.

**Survey:** Mailed to over 10,000 small and medium-sized manufacturers nationwide. More than 2,000 returned. Respondents were asked, “[W]hich of these is the most serious problem for your company (choose only one): cost of employee health insurance, government regulations, tax payments, finding and keeping qualified employees, difficulty in obtaining financing, litigation, cost of compliance with taxes, and ‘no response.’”

**Findings:**

- 85 percent listed one of the following three issues as their most serious problem: finding and keeping qualified employees (31.6 percent), cost of employee health insurance (29 percent) and government regulations (24.2 percent).
- Only 2.6 percent listed litigation as their companies’ most serious problem.
- This finding is consistent with 1999 survey results, in which only 2.5 percent of respondents mentioned litigation as their companies’ most serious problem.<sup>22</sup>

## STATE SURVEYS

### NEW YORK

#### **BUSINESS COUNCIL OF NEW YORK STATE. 2000 SURVEY OF BUSINESS COUNCIL MEMBERS.**<sup>23</sup>

**Survey:** Business Council members surveyed in August and September 2000 on wide range of issues affecting New York business conditions. 483 businesses responded.

**Findings:**

- Respondents cited lower tax burden, improvements to regulatory climate and concern about academic standards and high school graduates' preparedness for work as key issues for improving New York's business climate (which respondents also believe has improved in the last five years).
- Neither liability laws nor lawsuits were mentioned in any materials accompanying release of survey.

#### **NATIONAL FEDERATION OF INDEPENDENT BUSINESSES (NFIB). 2000 SURVEY (RELEASED FEBRUARY 6, 2001).**<sup>24</sup>

**Survey:** Survey of small business members of New York NFIB.

**Findings:**

- 63 percent of respondents selected rising health care costs as one of the top three most serious problems they face, followed by high taxes and an uncertain economy. Workers compensation insurance costs were also mentioned.
- Neither liability laws nor lawsuits were mentioned in any materials accompanying release of the survey.



**CENTER FOR GOVERNMENT RESEARCH (CGR) (RELEASED BY BUSINESS COUNCIL OF NEW YORK STATE). BARRIERS TO SMALL BUSINESS GROWTH IN NEW YORK STATE – A BAROMETER OF OPINIONS, NOVEMBER 1998.<sup>25</sup>**

**Survey:** Mailed to 3,600 small-to-medium sized businesses across state. About a 10 percent response rate.

**Findings:**

- Local property taxes were considered the most significant barrier to growth of their business. Health care costs came second, followed by the state personal income tax, energy costs and wage/salary costs, federal taxes, finding qualified workers, declining population and the state sales tax. All of these outpolled liability laws, which ranked 10th.
- Nearly half the respondents claimed state taxes affected growth.<sup>26</sup> Those firms who considered it harder to do business in New York than in any other state listed barriers to growth as follows: 1. health care costs, 2. local property taxes, 3. the state personal income tax, 4. energy costs and 5. federal taxes.<sup>27</sup>

**NEW JERSEY**

**NATIONAL FEDERATION OF INDEPENDENT BUSINESSES (NFIB). 1999 NFIB/NEW JERSEY SURVEY ON THE STATE BUSINESS CLIMATE.<sup>28</sup>**

**Survey:** Survey of small business members of New Jersey NFIB. Respondents were asked, “[W]hat is the number one problem facing your business today?” from the following list: over-regulation, access to capital/loans, health insurance costs, lack of qualified workers, property taxes, litigation/lawsuits, other insurance costs, business taxes, other.

**Findings:**

- Litigation/lawsuits tied with property taxes and “other insurance costs” for last place in this survey. More important concerns were: lack of qualified workers (24 percent), over-regulation (23 percent), health insurance costs (16 percent), business taxes (12 percent) and access to capital/loans (5 percent).

- In 1998, litigation/lawsuits again tied with “property taxes” for last place in the rankings.

## PENNSYLVANIA

### PENNSYLVANIA CHAMBER OF COMMERCE. TENTH ANNUAL PENNSYLVANIA ECONOMIC SURVEY.<sup>29</sup>

**Survey:** Mailed to 5,000 members, 905 responses. Respondents were asked to rank the following business issues according to the impact the issue would have on business over the next 12 months: Business taxes, health care, workers compensation, (workers compensation claims do not go through the tort system), education and workforce development, environmental law and regulation, “lawsuit abuse,” employment law and electronic commerce, land use, unemployment compensation and “other.”

#### Findings:

- So-called “lawsuit abuse” was outranked by business taxes, health care, workers compensation, education and workforce development and environmental law and regulation. The issue placed seventh, just as it had in 1999.
- In similar Pennsylvania Chamber surveys administered between 1993 and 2000, “lawsuit abuse” never ranked above sixth place.

## OTHER STATE NFIB SURVEYS

Quality workers and regulatory reform were the two biggest worries for **Washington**’s small business owners, according to a 1999 survey of the 17,000 state NFIB members.<sup>30</sup> A 2000 survey of **Oregon** NFIB members found that health care costs and taxes, including the personal income tax, capital gains tax, personal property tax and unemployment insurance tax, were the most pressing issues for Oregon small business owners.<sup>31</sup> In a 1999 NFIB **Pennsylvania** study, most business owners placed affordability of employee group health insurance and implementing state unemployment insurance on the top of their “worry” list.<sup>32</sup> That same year, the local director of NFIB’s **Hawaii** chapter reported that 77 percent of small business owners in Hawaii viewed taxes and fees as their greatest problems.<sup>33</sup> When asked to weigh in on issues of concern in 1997, **Illinois** NFIB members cited prevailing wages, educational funding and quality of graduates and health insurance.<sup>34</sup>

## LIABILITY LAWS DO NOT INFLUENCE BUSINESS LOCATION DECISIONS

Proponents of legislation to immunize corporations from suit make assertions such as: “states that enact laws restricting injured consumers’ legal rights have a higher level of productivity and employment growth.” During the recent 2000 elections, the Michigan Chamber of Commerce ran a three-week advertising campaign in Ohio, where in 1999 the state’s highest court had struck down a package of draconian “tort reform” laws. The three-week campaign, directed at Ohio businesses, touted Michigan as more business-friendly because its “tort reform” laws had been *upheld* by its state Supreme Court.<sup>35</sup>

Yet survey after survey has shown that, for years, businesses have not considered a state’s liability laws to be a significant factor in deciding where to locate. And Ohio certainly proves this point. For the second straight year, Ohio finished third in *Site Selection Magazine*’s national ranking of states with the most new and expanded facilities. According to the magazine, Ohio not only had 1,129 new and expanded facilities, including 206 new manufacturing plants (which earned it the number two spot among the top 10 states) in the year 2000 but it also “had the largest contingent – 22 cities – in *Site Selection*’s annual rankings of top small towns based upon corporate expansion activity over the preceding 12-month period.”<sup>36</sup> Moreover, from 1998 through 2000, Ohio’s three largest cities ranked among the top 11 large metro areas in the United States in total number of new and expanded facilities.<sup>37</sup>

Ohio is not the only state to prove this point. We decided to test the following hypothesis: if tort law limits make a state more attractive to businesses, that should be evident in trends showing which states are attracting the most new plants or facilities and are witnessing the most employment growth. As tort law limits get more severe, there should be an increase in new facilities and jobs. We segregated the states into three categories: states that enacted the fewest number of tort law changes since 1985 (category 1); states that passed a mid-range level of tort law limits (category 2); and states that enacted the most “tort reform” (category 3).<sup>38</sup> We placed a states tort severity ranking —1, 2 or 3—next to its listing in *Site Selection Magazine*’s survey of states with the most new or expanded facilities, capital investment or job growth.

Looking at the following tables, it is obvious that all enactment of “tort reform” has no correlation to businesses location decisions or employment.

**2000'S TOP TEN STATES:  
NEW/EXPANDED FACILITIES**

STATE	SEVERITY OF TORT LAW CHANGE
Michigan	3
California	2
Ohio	2
New York	3
Texas	3
Pennsylvania	1
North Carolina	1
Illinois	2
Louisiana	2
Virginia	1

**2000'S TOP TEN STATES:  
NEW MANUFACTURING PLANTS**

STATE	SEVERITY OF TORT LAW CHANGE
California	2
Ohio	2
Michigan	3
Pennsylvania	1
Illinois	2
New York	3
North Carolina	1
Louisiana	2
Alabama	2
Minnesota	3

**1998-2000 TOP TEN STATES:  
NEW/EXPANDED FACILITIES**

STATE	SEVERITY OF TORT LAW CHANGE
Michigan	3
California	2
Ohio	2
New York	3
Texas	3
North Carolina	1
Illinois	2
Pennsylvania	1
Virginia	1
Minnesota	3

**1998-2000 TOP TEN STATES:  
NEW MANUFACTURING PLANTS**

STATE	SEVERITY OF TORT LAW CHANGE
California	2
Michigan	3
Ohio	2
Illinois	2
New York	3
North Carolina	1
Texas	3
Pennsylvania	1
Minnesota	3
Virginia	1

**1998-2000 TOP TEN STATES:  
CAPITAL INVESTMENT PER  
ONE MILLION POPULATION**

STATE	SEVERITY OF TORT LAW CHANGE
Michigan	3
South Carolina	1
Louisiana	2
Mississippi	1
North Carolina	1
Alabama	2
Ohio	2
Arizona	2
Virginia	1
Kentucky	1

**1998-2000 TOP TEN STATES:  
NEW/ EXPANDED GLOBAL  
FACILITIES**

STATE	SEVERITY OF TORT LAW CHANGE
Michigan	3
Ohio	2
South Carolina	1
Virginia	1
California	2
Illinois	2
North Carolina	1
Texas	3
New Jersey	3
Indiana	2

**1998-2000 TOP TEN STATES:  
JOBS PER ONE MILLION  
POPULATION**

STATE	SEVERITY OF TORT LAW CHANGE
Virginia	1
Kentucky	1
Michigan	3
New York	3
South Carolina	1
West Virginia	1
North Carolina	1
Texas	3
Pennsylvania	1
North Dakota	3

**1998-2000 TOP TEN STATES:  
NEW/ EXPANDED FACILITIES  
PER ONE MILLION POP.**

STATE	SEVERITY OF TORT LAW CHANGE
Michigan	3
North Carolina	1
Ohio	2
Minnesota	3
Kentucky	1
South Carolina	1
Virginia	1
New York	3
California	2
Illinois	2

Despite what “tort reform” proponents may promise lawmakers, tort law limits enacted since the mid-1980s have not had any impact on business location decisions. States with little or no tort law restrictions are just as attractive to businesses as those states that enacted severe restrictions on victims’ rights.

Other surveys also show that tort laws play no meaningful role in a business’ site selection decision.<sup>39</sup> According to a 1998 survey of Fortune 500 companies, U.S.-based firms ranked “logistics” (access to customers and markets) as their highest priority when selecting sites.<sup>40</sup> Another recent *Site Selection* magazine survey found that “access to a skilled work force” remained the number one priority of corporate site seekers, which has “been the case for years.”<sup>41</sup>

A 2000 Oklahoma Chamber of Commerce survey confirmed these findings. Oklahoma is a state that has enacted relatively few “tort reforms” compared to other states.<sup>42</sup> When asked to explain the reason(s) why companies in the community had left or were planning to leave, several labor and workers’ compensation issues tied for first.<sup>43</sup> Other explanations included no direct air service to Oklahoma City or Tulsa, the state’s personal income tax, financial business incentive packages and the perception that Oklahoma was “business unfriendly” relative to the regulatory burden.<sup>44</sup> As Richard Rush, President & CEO of the state chamber, said in response to the survey results, “None of these answers are particularly surprising. For many years our members have expressed frustration over these important issues.”<sup>45</sup>

Pennsylvania is another state that has enacted few tort restrictions relative to other states.<sup>46</sup> According to the Pennsylvania Chamber of Business and Industry’s *10th Annual Economic Survey*, last year was a “record year for those [Chamber member] respondents who would not move their businesses out of Pennsylvania,” with 80.8 percent saying they would not leave the state if they could, a 30 percent increase from 1996.<sup>47</sup> In addition, almost 60 percent of respondents rated the business climate in Pennsylvania as “good,” with only 3.1 percent rating the climate as “poor,” down from 22.4 percent in 1996.<sup>48</sup> Moreover, among those companies who would leave the state, the top reasons given were: business taxes, better labor force and environmental issues.<sup>49</sup> As in earlier Pennsylvania Chamber surveys, lawsuits or the state’s tort laws were not mentioned.<sup>50</sup>

Moreover, other data show that Pennsylvania’s economy continues to thrive. In the March 2001 edition of *Site Selection Magazine*, the state claimed sixth place for most new and expanded corporate facilities and ninth among the top 10 states in jobs per million in the year 2000.<sup>51</sup> In addition, Pennsylvania placed fourth in generating a high number of new manufacturing plants in 2000, while ranking eighth from 1998 through 2000.<sup>52</sup> Commenting on his state’s accomplishment, Governor Tom Ridge said, “There are many reasons for our success over the past several years, but there is one in particular that has made Pennsylvania such an attractive location for site consultants: We get out of

the way,” meaning “slashing taxes at record rates, reducing burdensome regulations and reconnecting with our business customers.”

## MEDICAL MALPRACTICE LAWS AND PHYSICIAN LOCATION

One of the most contentious issues today concerns the impact of a state’s medical malpractice laws on where physicians decide to practice. This is separate from the equally important question of the correlation between a state’s liability law and insurance rates – a myth that is addressed below.

Over the last 25 years, the insurance industry has created medical malpractice insurance “crises,” making malpractice insurance unaffordable for physicians and other health care workers. Like clockwork, this leads to frenetic calls for legislative limits on victims’ rights. Doctors and their insurers say that physicians will leave the state and not return unless consumers’ legal rights are taken away.

West Virginia is one state where such a malpractice insurance “crisis” is happening. The West Virginia Medical Association says that “meritless” malpractice claims are driving up insurance rates and causing a mass exodus of doctors from the state. However, *Charleston Gazette* reporters Lawrence Messina and Martha Leonard uncovered data proving just the opposite. In a landmark series, “The Price of Practice,” Messina and Leonard found that the number of doctors in West Virginia has increased yearly, with the state seeing a 14.3 percent increase in its number of doctors between 1990 and 2000. This increase is at a rate about 20 times greater than the population.<sup>53</sup> The paper said in a March 1 editorial:

The Medical Association has made much of the fact that Wheeling has lost all three of its neurosurgeons in the past year. But two of those neurosurgeons are near the top of the list for the number of malpractice suits brought against them. In all but one of the 19 lawsuits brought against those two doctors, the insurance company representing them settled out of court, apparently paying damages. The third neurosurgeon left town shortly after being sued for malpractice. That neurosurgeon admitted drilling into the wrong side of his patient’s head during an operation, possibly leaving her permanently scarred. The same neurosurgeon lost a jury trial for \$1.8 million for botching a surgery that caused multiple cerebral aneurysms and cardiac arrest. Is Wheeling really worse off for losing these doctors?

Other studies have found there to be no correlation between where physicians decide to practice and state liability laws. One recent study found that, “[D]espite anecdotal reports that favorable state tort environments with strict ... tort and insurance reforms

attract and retain physicians, no evidence suggests that states with strong ... reforms have done so.”<sup>54</sup> A 1995 study of the impact of Indiana’s medical malpractice “tort reforms,” which were enacted with the promise that the number of physicians would increase, found that “data indicate that Indiana’s population continues to have considerably lower per capita access to physicians than the national average.”<sup>55</sup>

While it is beyond the scope of this study to determine what is responsible for decisions by physicians to locate in a particular state, it is clear that factors other than a state's tort laws are the cause.

## LIABILITY LAWS AND INSURANCE RATES

In the 1999 study, *Premium Deceit; The Failure of “Tort Reform” to Cut Insurance Prices*, J. Robert Hunter, former Texas insurance commissioner and Federal Insurance Administrator under Presidents Carter and Ford, and co-author Joanne Doroshov conducted the first-ever exhaustive look at the impact of tort restrictions on state-by-state insurance costs over the last 14 years. The study found that laws restricting injured consumers’ rights to go to court do not reduce insurance prices for insurance consumers. These laws, while having terrible consequences for many innocent people, do nothing to improve the affordability or availability of liability insurance for businesses or professionals.

According to Hunter, “Despite years of claims by insurance companies that rates would go down following enactment of tort reform, we found that tort law limits enacted since the mid-1980s have not lowered insurance rates in the ensuing years. States with little or no tort law restrictions have experienced approximately the same changes in insurance rates as those states that have enacted severe restrictions on victims’ rights.”

Following the release of *Premium Deceit*, spokespeople for the American Tort Reform Association (ATRA) agreed. Both ATRA’s president and general counsel said in published statements that lawmakers who enact restrictions on consumers’ legal rights should not expect insurance rates to drop<sup>56</sup> These remarks were a surprisingly honest admission by some of the nation’s most vocal proponents of tort restrictions. Laws that restrict the rights of injured consumers to go to court do not produce lower insurance costs or rates, and insurance companies that claim they do are severely misleading this country’s lawmakers.



## THE EXPLANATION: JURIES AND THE COSTS OF LIABILITY FOR BUSINESSES

Despite what the lobbyists and heads of trade associations like the U.S. Chamber, NFIB and NAM say, there are reasons why lawsuits or liability issues barely rank as important for most businesses. The explanation has to do with the actual behavior of juries and the real cost of liability for businesses.

“Tort reform” proponents argue that juries are anti-business, often allowing emotions and sentimentality for the victim to enter improperly into their decision-making process. While there is no question that jurors have always introduced a sense of equity and fairness into the deliberative process – that is their historic purpose – there is no evidence at all that they are arbitrary, emotional or anti-business.

In fact, contrary to popular belief, Professor Valerie P. Hans found in her recent book, *Business on Trial: The Civil Jury & Corporate Responsibility*, that jurors are often quite “pro-business.” Hans discovered that jurors “expressed concern about the effect of an award on the business defendant, wondering whether it might lead to a loss of jobs or otherwise harm the company.” Hans found that “jurors often show doubts about, and sometimes even hostility toward, injured plaintiffs.”<sup>57</sup> She explained, “This is not to say that jurors are *never* sympathetic. Rather, they have a highly differentiated reaction to the civil plaintiff that flies in the face of the conventional wisdom that jurors are nothing more than bleeding hearts.”<sup>58</sup> Also, jurors are “often suspicious and ambivalent toward people who bring lawsuits against business corporations.”<sup>59</sup> According to Hans,

...Most business litigants in the cases that were part of this study were described in a neutral or positive light. In a minority of cases, jurors levied some harsh comments against particular business defendants, but to the extent that I could determine through interviews, their criticism seemed to be linked largely to trial evidence of business wrongdoing rather than to jurors’ preexisting anti-business hostility. In fact, general attitudes toward business were only modestly related, at best, to judgments of business wrongdoing.<sup>60</sup>

Indeed, according to the most current data available from the Bureau of Justice Statistics of the U.S. Justice Department, the overall median jury award for all tort cases in 1996 was relatively low, totaling only \$30,000.<sup>61</sup> In 1992, it was 90 percent higher, at \$57,000 (in 1996 dollars).<sup>62</sup>

This reality is certainly reflected in the Ernst & Young and the Risk & Insurance Management Society’s annual survey of business liability costs, which recently found such costs to be the lowest in a decade. The study, which calculates annual insurance and claims costs for U.S. businesses including property damage, workers compensation and

all other liability costs, found liability costs to be in steep decline – only \$5.20 for every \$1000 in revenue in 1999, down 37 percent from 1992 levels.<sup>63</sup>

Similarly, according to a June 1998 report by the Consumer Federation of America (CFA) based on data collected by the National Association of Insurance Commissioners, products liability insurance costs only 16 cents per \$100 of a retail product – a tiny fraction equaling less than 2/10 of 1 percent. Adjusted for inflation, products liability insurance costs have fallen about 75 percent over the last decade.

With liability costs so low, it is no wonder that business concerns lie elsewhere.

## CONCLUSION

From the mid-1980s until today, the nation's largest businesses have been advancing a legislative agenda to limit their liability for causing injuries. One of the principal arguments on which they rely is that laws that make it more difficult for injured people to go to court (*i.e.*, "tort reform") are economically necessary for small businesses and for a state's economy. Using this argument, great pressure has been brought to bear on legislatures around the country to restrict the rights of innocent victims to recover for their injuries and to hold wrongdoers accountable in court.

However, surveys show that issues such as workforce development, healthcare and taxes are the issues businesses believe challenge their growth and viability, not civil lawsuits. By examining the inconsistency between public statements and private responses, we see that allegations that "tort reform" is critical for the small business community and crucial to improving a state's economy are merely spin designed to enlist public support for statutory limits that benefit companies at the expense of injured consumers.

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## NOTES

<sup>1</sup> See, "The GOP Contract: Luntz Admits Initial Polling was 'Flawed,'" *The Hotline*, November 14, 1995 (citing November 10, 1995 Knight-Ridder story by Frank Greve); <http://www.aapor.org/press/release.html>.

<sup>2</sup> Letter from Richard J. Behn, President, Numbercrunchers, Inc., to Joshua Pruzansky, President, New York State Bar Association, June 23, 1997.

<sup>3</sup> "Vox Populi Justice," *Connecticut Law Tribune*, February 5, 2001.

<sup>4</sup> Berkman, Harvey, "Sides Set to Fight on Tort Reform," *National Law Journal*, April 20, 1998.

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<sup>5</sup> Carter, Terry, "A Lesson Learned; How a U.S. Chamber of Commerce plan to boost membership by attacking lawyers backfired before it was even launched," *ABA Journal* (May 1998).

<sup>6</sup> "U.S. Chamber Members Rank 2001 Issues in New Survey," January 9, 2001, found at <http://www.uschamber.com/Press+Room/2001+Releases/January+2001/01-04.htm>.

<sup>7</sup> "U.S. Chamber Members Rank 2001 Issues in New Survey," January 9, 2001, found at <http://www.uschamber.com/Press+Room/2001+Releases/January+2001/01-04.htm>.

<sup>8</sup> "U.S. Chamber Members Rank 2001 Issues in New Survey," January 9, 2001, found at <http://www.uschamber.com/Press+Room/2001+Releases/January+2001/01-04.htm>.

<sup>9</sup> Lash, Steve, "Business group seeks to breathe new life into tort reform," *Chicago Daily Law Bulletin*, April 25, 1998.

<sup>10</sup> "Workforce Issues: A Top Priority for Chamber Members," found at <http://www.uschamber.com/CWP/default.htm>.

<sup>11</sup> "The Spirit of Enterprise," *U.S. Chamber Small Business News*, Vol. 1, Issue 1, August 18, 2000, found at <http://www.uschamber.com/Small+Business/Small+Business+News/Small+Business+News+Archive/Aug+ust+18.htm> (Arthur Andersen and National Small Business United has released the findings from the eighth annual Survey of Small and Mid-Sized Businesses. ... The greatest challenge facing the growth and survival of their business, according to the respondents of the survey, is the acquisition and retention of qualified employees ... This echoes the U.S. Chamber's recent survey of state and local chamber executives that also pinpointed the short supply of labor as businesses number one concern"); "Workforce Issues: A Top Priority for Chamber Members," found at <http://www.uschamber.com/CWP/default.htm> ("Chamber members see workforce development as a top priority today and expect to for at least the next three years").

<sup>12</sup> See, e.g., Hunter, J. Robert and Joanne Doroshov, *Premium Deceit; The Failure of "Tort Reform" to Cut Insurance Prices*, Appendix A (ranking of states), Citizens for Corporate Accountability & Individual Rights, Center for Justice & Democracy, 1999.

<sup>13</sup> Richard Rush, President & CEO Oklahoma's Association of Business and Industry, "How do we keep and grow Oklahoma businesses?" September 1, 2000, found at <http://www.Okstatechamber.com/media/survey9-1-00.asp>; Pennsylvania Chamber of Business and Industry, "Tenth Annual Pennsylvania Economic Survey" (January 2001), found at [www.pachamber.org](http://www.pachamber.org).

<sup>14</sup> "Survey of small and mid-sized businesses: Trends for 2000." Conducted by Arthur Andersen and National Small Business United.

<sup>15</sup> See, e.g., "Survey of Small and Mid-Size Businesses: Trends for 1998," found at <http://www.nsbu.org/survey/7th/index.html>; "Highlights of the 1997 NSBU/Arthur Andersen Survey of Small and Mid-Sized Businesses," found at <http://www.nsbu.org/survey.htm>; "1996 NSBU/AA Survey Highlights," NSBU News Release, June 27, 1996, found at <http://www.nsbu.org/survey96.htm>.

<sup>16</sup> "The Voice of Small Business Is Shaped: Final Results from Small Business Congress 2001," February 14, 2001, found at [http://www.nsbu.org/media\\_center/pr021401.htm](http://www.nsbu.org/media_center/pr021401.htm); "Final Results From Small Business Congress 2000," February 7, 2000, found at <http://www.nsbu.org/pr/pr020700.htm>; "Final Results From The 1999 Small Business Congress," February 9, 1999, found at <http://www.nsbu.org/pr/pr020999.htm>.

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- <sup>17</sup> “Small Business Says Affordable Healthcare Is Their Highest Priority on the National Agenda; High Costs Prevent One Out of Two Small Firms from Offering Employees Healthcare Insurance,” *Business Wire*, July 10, 2000.
- <sup>18</sup> “Small Business Owners Want Improvements In Education And Affordable Healthcare – Top Concerns Ahead Of Tax Cuts And Reductions In Regulatory Burdens,” March 16, 2000, found at <http://www.nsbu.org/pr/pr031600amex.htm>.
- <sup>19</sup> NFIB Education Foundation, “2000 Small Business Problems & Priorities,” found at [http://www.google.com/search?q=cache:www.nfib.com/media/releases/sbet\\_prob.htm+NFIB+Education+Foundation&hl=en](http://www.google.com/search?q=cache:www.nfib.com/media/releases/sbet_prob.htm+NFIB+Education+Foundation&hl=en).
- <sup>20</sup> “2000 Congressional Small Business Summit Referendum Summary,” found at <http://www.google.com/search?q=cache:www.nfib.com/2000summit/referendum.html+NFIB+Small+Business+Problems+Priorities&hl=en>.
- <sup>21</sup> “2000 NAM Small Manufacturers Operating Survey Results,” found at [http://www.nam.org/tertiary\\_print.asp?TrackID=&CategoryID=251&DocumentID=1926](http://www.nam.org/tertiary_print.asp?TrackID=&CategoryID=251&DocumentID=1926).
- <sup>22</sup> “1999 NAM Small Manufacturers Operating Survey Results,” found at [http://www.nam.org/tertiary\\_print.asp?TrackID=&CategoryID=251&DocumentID=1928](http://www.nam.org/tertiary_print.asp?TrackID=&CategoryID=251&DocumentID=1928).
- <sup>23</sup> See, Business Council of New York State, “Survey: Business Council Members See Improvement – and Room for More – In New York’s Business Climate, Taxes,” October 17, 2000. <http://www.bcnys.org/whatsnew/2000/1017srvy.htm>.
- <sup>24</sup> “Health care mandates threaten New York small businesses, new NFIB survey finds,” February 6, 2001. On file with CJ&D.
- <sup>25</sup> “Barriers to Small Business Growth in New York State,” Center for Governmental Research Inc. (November 1998).
- <sup>26</sup> “Study: Property taxes, health-care costs hurt small businesses” (March 1999), on file with CJ&D. A 2000 survey of New York Business Council members echoes such concerns over taxes. See, “Survey: Business Council Members See Improvement—And Room For More—In New York’s Business Climate, Taxes,” October 17, 2000 found at <http://www.bcnys.org/whatsnew/2000/1017srvy.htm>.
- <sup>27</sup> “Study: Property taxes, health-care costs hurt small businesses” (March 1999), on file with CJ&D.
- <sup>28</sup> “Results of the 1999 NFIB/New Jersey Survey on the State Business Climate,” on file with CJ&D.
- <sup>29</sup> Pennsylvania Chamber of Business and Industry, “Tenth Annual Pennsylvania Economic Survey” (January 2001), found at [www.pachamber.org](http://www.pachamber.org).
- <sup>30</sup> Sleeth, Amy, “Quality workers, regulatory reform top NFIB survey,” *Puget Sound Business Journal*, February 5, 1999.
- <sup>31</sup> Brown, Craig, “Insurance, Taxes Top Issues For Small Businesses, Report Says,” *The Oregonian*, February 9, 2001.

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<sup>32</sup> Miller, Michael, "Benefit costs are a top concern for Pennsylvania small business," *Pittsburgh Business Times*, April 9, 1999.

<sup>33</sup> "NFIB calls for tax/fee reductions," *Pacific Business News*, February 5, 1999.

<sup>34</sup> Janecke, Ron, "Illinois small-business owners weigh in on issues," *St. Louis Business Journal*, February 3, 1997.

<sup>35</sup> See, e.g., "Michigan's Stable Legal Climate Credited With Giving State Strong Competitive Advantage," June 12, 2000, found at <http://www.michamber.com/chamnews/june00.htm>; Michael Bender, "Michigan Ads Seek Ohio's Fortunes," *Dayton Daily News*, June 6, 2000; "Michigan Chamber Launches Campaign to Bring Ohio Jobs to Michigan," June 5, 2000, found at <http://www.michamber.com/chamnews/june00.htm>.

<sup>36</sup> Starner, Ron and Tracy Heath, "It's MICH-AGAIN!" *Site Selection Magazine* (March 2001), found at <http://www.siteselection.com/issues/2001/mar/p152>.

<sup>37</sup> Starner, Ron and Tracy Heath, "It's MICH-AGAIN!" *Site Selection Magazine* (March 2001), found at <http://www.siteselection.com/issues/2001/mar/p152>.

<sup>38</sup> The methodology for determining the category designations can be found in Hunter, J. Robert and Joanne Doroshow, *Premium Deceit; The Failure of "Tort Reform" to Cut Insurance Prices*, Citizens for Corporate Accountability & Individual Rights, Center for Justice & Democracy, 1999. Only Ohio's designation has since been changed from "3" to "2" following the Ohio Supreme Court finding Ohio's 1996 "tort reform" law unconstitutional. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451 (1999).

<sup>39</sup> See, e.g., Lisa Love, "The Role of Quality of Life in Business (Re)Location Decisions," *Journal of Business Research*, March 1999; "Barriers to Small Business Growth in New York State," Center for Governmental Research Inc. (November 1998).

<sup>40</sup> "Firms pick sites based on logistics," *Logistics Management & Distribution Report*, September 30, 1998.

<sup>41</sup> Arend, Mark, "Survey Reveals New Factors Behind Site Location Decisions," *Site Selection* (May 1999).

<sup>42</sup> See, e.g., Hunter, J. Robert and Joanne Doroshow, *Premium Deceit; The Failure of "Tort Reform" to Cut Insurance Prices*, Appendix A (ranking of states), Citizens for Corporate Accountability & Individual Rights, Center for Justice & Democracy, 1999.

<sup>43</sup> Richard Rush, President & CEO Oklahoma's Association of Business and Industry, "How do we keep and grow Oklahoma businesses?" September 1, 2000, found at <http://www.Okstatechamber.com/media/survey9-1-00.asp>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See, e.g., Hunter, J. Robert and Joanne Doroshow, *Premium Deceit; The Failure of "Tort Reform" to Cut Insurance Prices*, Appendix A (ranking of states), Citizens for Corporate Accountability & Individual Rights, Center for Justice & Democracy, 1999.

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<sup>47</sup> Pennsylvania Chamber of Business and Industry, “Tenth Annual Pennsylvania Economic Survey” (January 2001), found at [www.pachamber.org](http://www.pachamber.org).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Starner, Ron and Tracy Heath, “It’s MICH-AGAIN!” *Site Selection Magazine* (March 2001), found at <http://www.siteselection.com/issues/2001/mar/p152>.

<sup>52</sup> Starner, Ron and Tracy Heath, “It’s MICH-AGAIN!” *Site Selection Magazine* (March 2001), found at <http://www.siteselection.com/issues/2001/mar/p152>.

<sup>53</sup> Leonard, Martha, “State has seen sharp increase in number of doctors,” *Sunday Gazette Mail*, February 25, 2001.

<sup>54</sup> Kinney, “Malpractice Reform in the 1990s, Past Disappointment, Future Success?” 20 *J. Health Pol. Pol’y & L.* 99, 120 (1996), cited in Galanter, Marc, “Real World Torts,” 55 *Maryland L. Rev.* 1093, 1152 (1996).

<sup>55</sup> Kinney and Gronfein, “Indiana’s Malpractice System: No-Fault by Accident,” 54 *Law & Contemp. Probs.* 169, 188 (1991), cited in Galanter, Marc, “Real World Torts,” 55 *Maryland L. Rev.* 1093, 1152-1153 (1996).

<sup>56</sup> *Liability Week* (July 19, 1999); *Business Insurance* (July 19).

<sup>57</sup> *Business on Trial: The Civil Jury & Corporate Responsibility*, New Haven and London: Yale University Press (2000), p. 23.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 216.

<sup>60</sup> *Id.* at 217.

<sup>61</sup> “Tort Trials and Verdicts in Large Counties, 1996,” U.S. Department of Justice, Bureau of Justice Statistics, NCJ- 179769 (August 2000), p. 6.

<sup>62</sup> *Id.* at 9.

<sup>63</sup> 2000 *RIMS Benchmark Survey*, Produced jointly by Ernst & Young LLP and RIMS, 2001.