Insurance Liability and Civil Justice Reform

Did a liability crisis really exist, and if it did, who is responsible? Should it result in civil justice reform?

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The insurance liability "crisis" is "the greatest hoax that I have ever observed in the United States, both in terms of its size—tens of billions of dollars—and in terms of its manufactured figures and phony anecdotes. Any industry that wants to say there is a crisis has got to provide evidence backing it up. And for ten months now I have challenged the insurance industry to tell us how much they are paying out in verdicts and settlements...And they haven't done it." -*Ralph Nader* (Sherrill 688)

Few would dispute that ours is a litigious society, and that the right of redress is exercised by thousands each day in our court system. What many will argue, however, is that in 1986 a litigation explosion occurred in the area of tort law, resulting in a crisis of insurance liability.

Though most kinds of litigation increased little more than the population ("Special Litigation Report" 17), and only a fraction of the millions of lawsuits filed involved a tort (Jordan), the *price* of liability insurance increased sharply between 1985-1986. The cost of coverage for medical malpractice increased by more than 40 percent, while the cost of general liability policies rose by more than 70 percent. Rates increased by 100 to 200 percent for some municipalities, 200 to 300 percent for day-care centers, and 200 to 400 percent for chemical manufacturers (Huber 31). Insurance companies placed the blame for such skyrocketing premiums on the tort system, citing an explosive growth in damage awards.

However, as Robert Hunter of the National Insurance Consumer Organization states:

> The only data that's ever been done on jury verdicts—studies in Cook County and San Francisco—shows that the number of cases filed has stayed constant and the median verdict has stayed flat in 1979 dollars, at under $20,000, for the past twenty-five years. That's the data we have. Now, if the insurance companies have data that shows contrary, if they have

> data that shows juries are running wild with their awards, why don't the companies come forward with it?...The insurance companies simply refuse to put forth the data to let us analyze it (Sherrill 688).

Certainly, many Americans felt that a liability crisis existed, with or without empirical data as proof of a litigation explosion. According to a survey conducted by Cambridge Reports, Inc. in 1986, 64 percent of the American people thought too many lawsuits were filed, and 56 percent thought that the civil justice system awarded too much money to successful plaintiffs. In addition, 67 percent believed that lawyers filed too many frivolous lawsuits ("Tort Reform Gains Support" 22).

Lacking the necessary data to support a litigation explosion does not preclude the existence of a liability crisis. Numerous examples of skyrocketing insurance premiums exist. Specialty Systems, Inc. of Richmond, Virginia experienced more than a 4,900% increase on its policy in one year (from $9,361 to more than $460,000). Also, the seaside village of Point Arena, California had its insurance liability policy costs doubled, while Detroit's Armada Corporation found themselves tackling a rate increase from $45,000 a year to $720,000 (Stern 19). The horror stories continue. Five Molokai, Hawaii doctors who once delivered babies stopped doing so because malpractice insurance would have cost them more than they would have made, and Will County, Illinois found it necessary to close its forest preserves until it could get a new liability policy that the county could afford (Stern 16). The extreme circumstances exemplified by these stories were common occurances in 1986—evidence enough of the existence of an insurance liability crisis.

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The Factor of Responsibility: The Insurance Industry v. The Legal Profession

In recognizing the existence of an insurance liability crisis, one must ask with whom the responsibility for such a catastrophe lies. The insurance industry and the legal profession have very different but clear-cut viewpoints on the subject; they each blame the other, and are unwilling to admit any involvement or accept any responsibility for the quagmire. "Insurers and some of their customers blame aggressive lawyers, inventive judges and soft-hearted juries for twisting legal concepts of negligence into novel shapes to justify excessive damage awards to people. Avaricious lawyers, they argue, seek outrageously high damages for clients who have flimsy cases, so that the lawyers can reap huge contingency fees" (Stern 19). The inference being made: the higher the awards, the higher the insurance premiums. That is what the insurance industry tells us as it screams for tort reform.

Support for this argument is made by Peter Huber in his article, "Injury Litigation and Liability Insurance Dynamics." He asserts that the crisis in insurance liability is caused by an increase in liability law, causing an "avalanche of suits" that result in "unexpectedly large payouts by insurance companies, thus causing insurance companies to sharply increase their rates." He portrays the court system as being flawed and in need of reform, via tort law. As he states, "For better or for worse, much has in fact changed in US tort law in the past three decades. The changes have, beyond serious doubt, transformed liability insurance costs and therefore liability insurance rates." This is a view shared by many in the insurance industry, as well as by the United States Department of Justice. In their report, "The Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability," they state directly that "in sum, tort law appears to be a major cause of the insurance availability/affordability crisis which the federal government can and should address in a variety of sensible and appropriate ways."

Historically, tort reform is one of those campaigns which the insurance industry "wages each time it starts making big losses on all or some classes of liability business" ("A Survey of Insurance" 4). The industry lobbied to have worker's compensation cases removed from the courts in 1910, and in the 1960s mounted a campaign to have no-fault motor liability laws passed in various states. During 1985-1986, it once again aimed at having tort-reform measures passed in state legislatures as a direct result of the liability crisis at hand.

In an attempt to "educate the public on the problem of lawsuit abuse" ("The Insurance Industry" 46), the insurance industry launched a $6.5 million public relations campaign that virtually attacked the civil justice system. One ad showed an auto with a bumper sticker that said, "Go Ahead, Hit Me," and others portrayed playgrounds and parks threatened by crippling lawsuits ("The Insurance Industry" 46). The theme of the ad campaign was designed to reach those who see every accident as a chance for financial gain, and curtail abuse of the right of redress.

Not everyone saw the ad campaign in that same light. Robert Hayden, in his paper "The Cultural Logic of a Political Crisis: Common Sense, Hegemony and the Great American Liability Famine of 1986," as well as in a letter to the editor of SCIENCE entitled "Liability Insurance and Litigation," states that the liability crisis is really a "political creation aimed at deflecting public attention from a recurring situation by blaming it on supposedly unique circumstances outside of the control of the party otherwise likely to be blamed (and who is, of course, trying to establish the existence of the crisis)." In this way, the insurance industry's ad campaign served to deflect the attention and responsibility for the insurance liability crisis from the insurance industry to the court system.

As for the legal profession, on those rare occasions when it does acknowledge the existence of a liability crisis (and not a litigation explosion), it is with the charges that the insurance industry is guilty of price-gouging and refusing to disclose relevant information for verification of financial hardships claims. Lawyers say that the industry uses "excessive rates in order to minimize their risk and increase profits" (Green 79). What they most often assert is that "there never was a liability crisis. What happened was there was a crisis of insurance that was foisted on the country by the insurance industry to make up for their own misjudgments in business" (Reske 47).

That may very well be true. The insurance industry makes money from selling policies and from investments. Inadequate pricing in the early 1980s (underwriting underpriced insurance products), as well as the cyclical nature of the insurance industry, could very well have contributed to the suddenness of the price hikes. The *Wall Street Journal*, quoting the General Accounting Office, said that in 1983 industry profits on general-liability insurance dropped to $118 million from $847 million in 1979. To make up for the low profits, insurance rates began to rise (Reske 50).

It would seem that at least 19 states also support this belief, as well as the federal court of California. A re-

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examination of the liability crisis is being forced as a result of lawsuits where the states charge that the insurance industry aided and abetted the liability crisis. They contend that at least four major insurance companies and 28 other defendants illegally conspired to limit the availability of commercial general insurance and to cut their share of other costs, such as legal expenses to defend against claims. The suits charge that the changes cutting liability coverage made in the Insurance Services Office's commercial general liability (CGL) forms were the result of "boycotts, threats, intimidation and other coercive conduct by defendants," and would limit or exclude certain types of liability coverage in an effort to cut competition and increase prices, and to make those who purchase policies pay more for less" (Reske 49). The Insurance Services Office, Inc. (ISO) is a non-profit trade association that represents about 1,400 insurance companies (both property and casualty) and develops standard policy forms for use by insurance companies. Approximately 95 percent of all casualty insurance written in the United States is done so by member companies of ISO.

The Insurance Industry and Research Statistics

An interesting relationship exists between those who produce statistical research reports and the insurance industry, as discovered by a reporter for *The Charleston* (West Virginia) *Gazette*. In researching background material and reading numerous reports on the need for civil justice reform, it was discovered that many ties exist between the Rand Corporation (that has published numerous reports portraying the court system as being

burdened to the breaking point by "greedy lawyers and crazy juries" [Sherrill 689], and further, in dire need of reform) and those that stood to gain by weakening the existing tort system—insurance companies. Some of the evidence that links the two:

- Corporate grants to the Rand Corporation come from Travelers Insurance, Aetna Life and Casualty, CIGNA, Allstate Insurance, and the Alliance of American Insurers. Travelers is Johns-Manville's primary insurer. Aetna and CIGNA have insured other asbestos manufacturers.
- Rand's board of trustees includes William T. Coleman, a CIGNA director, and Newton N. Minow, Aetna's general counsel.
- Charles J. Zwick, a Johns-Manville director, is also a Rand trustee.
- John A. Love, another Johns-Manville director, is an honorary member of the Rand Institute for Civil Justice's board of overseers (Sherrill 689).

By acknowledging that such a strong relationship exists between those that publish "supposed facts" and those that utilize those facts, how are we to know the realities of the insurance liability crisis and the need for civil justice reform, specifically in the area of tort law? The answer is quite simple—we are not to know the true realities, but only what the insurance industry would have us believe are realities.

Is There a Need for Civil Justice Reform?

> *The first step is to structure a civil justice system that does what the American people want it to do, not what the plaintiffs' lawyers or the insurance companies want... Underlying all our problems with the civil justice system is the inability of this country to decide whether it wants to have a fault-based liability system. We are experiencing the disadvantages of trying to operate both systems in tandem, the worst of both worlds.*
> -*Gustave Shubert, Director, Institute for Civil Justice* (Green 79)

The insurance industry readily supports, and strongly advocates, the need for civil justice reform. In particular, it has encouraged legislative action that would result in an overhaul of our tort system. Senator Mitch McConnell (R-KY) introduced a congressional bill to encourage states to cap pain-and-suffering awards at $100,000 and to require that punitive damages be paid to a court as an outright fine, rather than to a plaintiff and his/her attorney. Senator John Danforth (R-MO) sponsored a bill that would set uniform federal standards in product-liability cases to replace present conflicting state laws. The plaintiff would be required to prove negligence or fault by the manufacturer. Other reforms include the abolishment of the doctrine of joint and several liability, or something similar to a reform put to vote in California, to make a defendant's share of any pain-and-suffering award proportionate to the defendant's degree of blame; to limit contingency fees, so that lawyers would have less incentive to seek outsize damages for their clients; and finally, to institute some sort of punishment for attorneys who file frivolous suits (Stern 25-26).

The proposed legislative actions are in philosophic accord with a list of eight reforms constructed by the US Department of Justice's Tort Policy Working Group. They think that the following reforms would "bring a greater degree of rationality and predictability to tort law, and thereby significantly assist in resolving the availability/affordability crisis" (Justice Dept., *Policy Implications* 60). The reforms include the following:

1. Retain fault as the basis for liability, as fault is the only mechanism in tort law for distinguishing desirable from undesirable conduct, and is an indispensable predicate to many other aspects of the tort liability system without which the system would generate arbitrary and unfair results.

2. Base causation findings on credible scientific and medical evidence and opinions, so that juries are not asked to make difficult decisions about highly complicated issues of science and medicine.

3. Eliminate joint and several liability, so that each plaintiff is liable for its own fault.

4. Limit non-economic damages to a fair and reasonable amount, so that open-ended damages such as pain and suffering, mental anguish, and punitive damages are held to a minimum.

5. Provide for periodic payments of future economic damages, so that a losing defendant does not have to pay in one burdensome lump sum.

6. Reduce awards by collateral sources of compensation for the same injury, in order to prohibit double recovery.

7. Schedule contingency fees, in order to reduce abuse of awards based on lawyers' fee-greed.

8. Develop alternate dispute resolution, in order to encourage early settlement of lawsuits (Justice Dept., *Policy Implications* 60-75).

The Tort Policy Working Group recognized that any significant, long-term reform could not and should not come solely from the federal government, but ultimately rests in the hands of state governments and the courts.

In response, the American Bar Association's Action Committee to Improve the Tort Liability System recommended that the ABA establish a commission to study and recommend ways to improve the liability insurance system as it affects the tort system. Further examination and modifications were also recommended in the areas of damages for pain and suffering, punitive damages, joint and several liability, attorney's fees, injury prevention/reduction, and finally, the litigious process itself (frivolous claims and unnecessary delay).

According to Assistant Attorney General Richard Willard, even greater measures are necessary to handle what he refers to as a "litigation crisis": "Legislatures could instantly eliminate a huge portion of the litigation crisis by simply overruling the judiciary and again trying liability to true fault" (Green 79). The American Tort Reform Association agrees: "Once tort law is returned to a fault-based system, some real opportunities for reform open up—reforms that both lawyers and insurance companies can agree on because both sides will benefit from them" (Green 79).

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However, the legal profession believes that regulation of the insurance industry is in order, and this is best exemplified by the push for the repeal of the insurance industry's exemption from federal anti-trust laws. Presently, under the McCarran-Ferguson Act, the insurance industry is controlled by individual states, allowing insurers to share information, collect claims data, and develop actuarial tables and standardized forms (the very same collusive activities which those 19 states assert caused the insurance liability crisis). Insurance companies maintain that this exemption is necessary in order to conduct business, and further, that it "benefits consumers who can shop around for the best price based on the standardized forms" (Reske 49).

The US Department of Justice's Tort Policy Working Group does not share the same sentiments of the legal profession.

> To the extent that other factors—such as the recent large underwriting losses of the insurance industry—underlie this crisis, there is little the federal government can or should do to remedy these problems. While the contribution of these economic factors seems clear, it is likely that these problems will work themselves out in the short-term as the insurance industry restores its desired level of profitability, and as other insurance industry developments are implemented (Justice Dept., *Policy Implications* 80).

(The insurance industry developments to which the report refers include new claims-made policies, laser endorsements, pollution exclusion, defense cost inclusion, and alternative insurance mechanisms, such as self-insurance.) The report further says:

> State legislators and insurance regulators have recognized the severity of the liability insurance crisis, and have responded in a variety of ways. One state has barred cancellation or non-renewal policies and prohibited any increases in the cost of policies in effect. Several other states are considering similar actions (59).

State regulatory developments are obviously another tool by which the insurance industry is amending its behavior, though once again, many would rather that regulation exist on the federal level as a matter of anti-trust.

Conclusion

Though for reasons not empirically proven to be the result of a litigation explosion or high damage awards, the existence of an insurance liability crisis surely cannot be denied. Anytime price-hikes amounting to some 4,900% occur, a disaster of great proportion must be recognized.

Examining the economic climate in 1986, the effects of profit-loss were most definitely reflected in the skyrocketing premiums of the insurance industry. To say otherwise would be to ignore what little information can be derived from insurance companies—that they suffered a multi-million dollar loss in profit due to underwriting underpriced insurance products, and that the loss had to be made up. The cyclical nature of the insurance industry and natural ups-and-downs of the market may also have contributed to such magnificent price-hiking as was experienced by consumers during 1985-1986. But since the insurance industry will make very little data available, the realities and truths of the situation will remain a distortion of insurance industry propaganda, while the blame for the insurance liability crisis is attributed to a civil justice system gone awry.

This is not to say that an examination of tort reform is unwarranted; some of the recommendations made by the US Department of Justice's Working Group on Tort Policy have immense merit, such as a greater use of alternative dispute resolution. All of the recommendations deserve further analysis in order for their true value (in the realm of tort reform) to be fully recognized and then applied as a civil justice reform.

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