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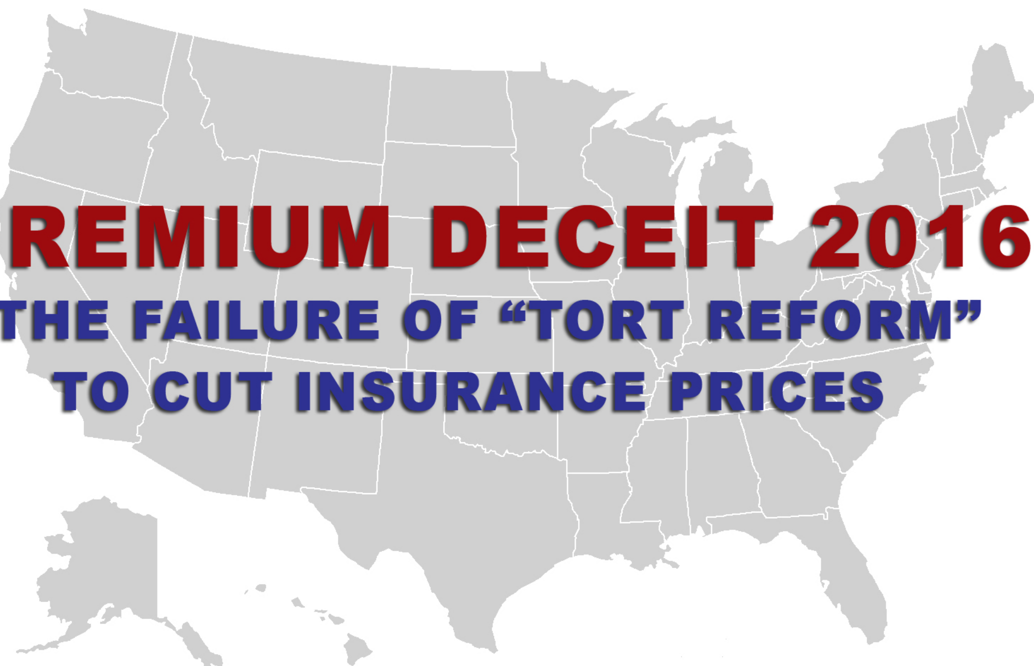

PREMIUM DECEIT 2016

THE FAILURE OF "TORT REFORM" TO CUT INSURANCE PRICES

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November 2016

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INTRODUCTION

For about the last decade, liability insurance premiums – for auto insurance, medical malpractice policies for doctors, liability coverage for businesses – have been generally stable. When small businesses were recently surveyed, liability costs ranked dead last in a list of "cost" problems affecting businesses.[1] As far as medical malpractice insurance for doctors, the data show that per physician, inflation-adjusted premiums are now at their lowest level since these data were first collected four decades ago.[2]

It was quite a different story one decade ago, however. Those with good memories may recall that between the years 2002 and 2006, trauma centers were closing[3] and doctors were picketing state capitols about what seemed like inexplicable medical malpractice insurance rate increases.[4] Doctors threatened to leave the profession. Access to health care was at stake, claimed the

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[1] National Federation of Independent Business, *Small Business Problems and Priorities* (August 2016), http://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf

[2] *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, MD, 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." https://www.ismie.com/News-and-Publications/News-and-Announcements/ISMIE-Mutual-Announces-No-Change-for-Base-Premium/

[3] Ken Ritter, "Vegas trauma center closes as doctors balk at malpractice costs," *Associated Press*, July 5, 2002.

[4] *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

American Medical Association.[5] Some small businesses experienced abrupt rate increases in their liability insurance premiums as well. Policyholders in most every state in the nation faced some kind of rate hike. But doctors, in particular, were truly suffering through a liability insurance crisis. Their premiums were suddenly rising 100 percent or more. Then in 2006, the dramatic rate hikes just stopped. The "crisis" was over.

Those with really *really* good memories may recall that between the years 1985 and 1988, the nation experienced virtually the same thing. Insurance rates suddenly skyrocketed for not only 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, Your Policy is Canceled,"[6] began to appear. Congress held hearings.[7] But within three years, the crisis simply ended.

Incredibly, this had happened once before. In the years 1974 through 1978, the same familiar phenomenon gripped the nation as liability insurance premiums suddenly jumped. Medical malpractice and product liability lines of insurance saw the biggest premium increases. 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."[8] On June 9, 1975, *Newsweek* ran a cover story entitled, "Malpractice: Doctors in Revolt." And then, as with the later two crises, it just ended.

During the three or four years while each of these crises was most severe, panicked state lawmakers looked for quick solutions to bring down rates for their constituents. Each time, business, medical and insurance lobbyists told them that establishing legal roadblocks in the way of injured victims, and allowing big 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, with medical malpractice insurance seeing some of the most dramatic premium increases, 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* Exhibit C.)

With rare exceptions, lawmakers never consider policy solutions focused on insurance industry practices.[9] Instead, policymakers have treated these periodic insurance crises as if insurance

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[5] *See*, *e.g*., U.S. General Accounting Office, *Analysis of Medical Malpractice: Implications of Rising Premiums on Access to Health Care*, GAO-03-836, August 29, 2003, http://www.gao.gov/new.items/d03836.pdf

[6] George J. Church, "Sorry, Your Policy Is Canceled," *Time Magazine,* March 24, 1986.

[7] *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).

[8] 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)(citations omitted); "Malpractice 'job actions' spread," *Facts on File World News Digest*, July 5, 1975.

[9] Only California and Illinois enacted meaningful insurance regulation. In 1988, California voters passed a stringent insurance regulatory law, Proposition 103 (Prop. 103), which ordered a 20% rate rollback, forced companies to open their books and get approval for any rate change before it takes effect and allowed the public to intervene and challenge excessive rate increases. California Department of Insurance, "Information Sheet: Proposition 103

companies were the victims of them instead of what they really were – the creators of them. Of the hundreds of laws passed around the country in response to these crises, virtually all of them are designed to put more money in the pockets of insurers, making it more difficult for injured victims to go to court or obtain compensation from a jury. The medical profession, in particular, now has more legal protection for their negligence than any other profession in the country. (*See* Exhibit C, Part 3.) Undoubtedly, the legal rights of just about every reader of this study have been weakened and, in some cases, eliminated as a result of state legislative actions taken during these crisis periods.

Yet to buy the industry's explanation that lawsuits and jury awards were to blame for creating these insurance crises, one would have to accept the notion that juries engineered large jury awards in the mid-1970s, then stopped for about eight years, then started again in the mid-1980s, stopped for 13 years and then started again in 2002. And then they just stopped again. Of course, such an explanation is ludicrous. It is also demonstrably untrue. At no time did claims or payouts spike during any of these periods and it is certainly not happening now.[10]

What industry lobbyists never provide to lawmakers is the real explanation: that these crises are manufactured by the insurance industry itself. More specifically, the volcanic eruptions in insurance premiums that characterized the last three insurance crises were the result of the industry's own boom and bust economic cycle, anti-competitive (yet legal) underwriting practices,[11] and virtually unchecked power when it comes to setting reserves for future claims payouts and establishing rates.[12]

Intervenor Process," http://www.insurance.ca.gov/01-consumers/150-other-prog/01-intervenor/info.cfm. In addition to saving motorists over a $100 billion (*see* Consumer Federation of America, "What Works," November 2013, http://www.consumerfed.org/pdfs/whatworks-report_nov2013_hunter-feltner-heller.pdf), Prop. 103 has allowed the state Insurance Commissioner to take action and lower excessive insurance rates for doctors. California Department of Insurance, "Insurance Commissioner Dave Jones Announces Second Medical Malpractice Rate Reduction for NORCAL Mutual," October 2, 2012, http://insurancenewsnet.com/article.aspx?id=359412#.UG2TCRjBpJW. In 2005, Illinois enacted a very strong insurance regulatory law as well as a non-economic damages cap. In February 2010, the Illinois Supreme Court struck down this cap as unconstitutional. Because of a non-severability clause, the insurance regulatory law was struck down as well. *Lebron v. Gottlieb Memorial Hospital*, 930 N.E.2d 895 (Ill. 2010). But while it was in effect, according to the Illinois Division of Insurance, this regulatory law greatly improved the medical malpractice insurance environment with expanded coverage and lower premiums for doctors. Illinois Department of Insurance, "Illinois Department of Insurance Encourages Insurers to Comply with 2005 Medical Malpractice Reforms," February 20, 2010, http://www.insurance.illinois.gov/newsrls/2010/02202010_a.asp. *See also*, Adam Jadhav, "Minor insurer is cutting malpractice rates for doctors," *St. Louis Post-Dispatch,* October 13, 2006.

[10] *See* Americans for Insurance Reform, *Stable Losses/Unstable Rates 2016* (November 2016), http://centerjd.org/content/stable-losses-unstable-rates-2016.

[11] In 1944, Congress passed the McCarran-Ferguson Act, a law that exempts the insurance industry from anti-trust laws and allows the industry to collude on important components of insurance prices, an anti-competitive practice that is illegal for other industries. 15 U.S.C. 1012-1015. For example, at cycle bottoms immediately preceding liability insurance crises, insurance companies will pressure their own competitors to stop competing for premium dollars and raise rates as an entire industry.

[12] The McCarran-Ferguson Act prohibits any federal regulation of insurance or Federal Trade Commission scrutiny over the insurance industry. 15 U.S.C. 1012-1015. The job of regulating insurance companies has been left to the states. Most state insurance departments have weak or non-existent authority over insurance rates through prior approval or rejection of requests for rate increases. State insurance departments universally lack adequate investigators, actuaries, economists, auditors and other professionals, preventing them from recommending appropriate insurance rates and coverage. In other words, with few exceptions, state insurance departments have

Simply described, the "boom and bust" economic cycle occurs because insurers make most of their money 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.[13] This results in competitive *underpricing* of policies, when rates rise less than inflation. This is called the "soft market," the duration of which is typically around six to ten years. We are now into the 10th year of the most recent "soft market" period, which is why severe rate hikes are not problems for businesses and health care providers today. However, when investment income decreases because the stock market plummets (or as in past cycles, interest rates drop) and/or cumulative price cuts make profits unbearably low, the industry responds by sharply increasing premiums and reducing coverage, creating a "hard market." For policyholders, a "liability insurance crisis" is the result.[14]

The existence of this cycle is certainly not a secret within the industry. As W.R. Berkley CEO William R. Berkley put it in a 2011 interview, "Basically we've been in the business now for 38 years. It's a cyclical business; we've been through three complete cycles going on to the fourth…."[15] Similarly, *Business Insurance* magazine published a white paper in 2010 entitled "Hard Market Game Plan: Steps Risk Managers Need to Take Before Rates Rise."[16] The purpose of the white paper was to show that any business could prepare for the predictable periodic hard market. In fact, this document is essentially a flat out admission that hard markets are not caused by jumps in claims, lawsuits or the tort system, which are not even mentioned in the paper, but rather by insurer economics, for which businesses can plan. "'It's not a question of if the market is going to harden, but when it's going to harden,' Mr. [Jim] Rubel [of Lockton Cos., LLC] said. 'When it does, I think it will harden with a vicious whip.'"[17]

This cycle is national in scope and occurs irrespective of a state's particular "tort" law. Yet each time a crisis hits, individual state tort laws are routinely blamed for political effect. So-called "tort reform" becomes the only solution that most lawmakers will consider. But the questions

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neither the authority nor the funding to exercise proper control over insurance industry pricing.

[13] 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.

[14] Today's extended soft market is also the result of excessive pricing and over-reserving that took place during the prior hard market, *i.e.*, insurance crisis. "Reserves" are funds insurers set aside for payment of future claims. Reserves include estimates of some claims they have received but also insurers' "estimates" of claims that they do not even know about yet (called "Incurred but Not Reported" or "IBNR"). As was true during the last hard market, insurers may vastly (and unnecessarily) increase reserves despite no increase in payouts or any trend suggesting large future payouts. This phenomenon often seems to be politically inspired, used by insurers as a way to justify imposition of large premiums increases. (We noted in AIR's 2009 report, *True Risk*, "The reserve increases in the years 2001 to 2004 could have accounted for 60 percent of the price increases witnessed by doctors during the period." Americans for Insurance Reform, *True Risk: Medical Liability, Malpractice Insurance And Health Care* (July 2009), https://www.centerjd.org/system/files/TrueRiskF.pdf.) During subsequent soft markets, these reserves often are released through income statements as profits, as they are actually not needed to pay future claims. Also, during the soft phase of the cycle, insurers are trying to gain market share, and insurers must show profits to keep rates down. *See also*, Tom Baker, *The Medical Malpractice Myth*, University of Chicago Press, 2005, at 45 et seq.

[15] Phil Gusman, "Berkley: Market Is Hardening; Good Companies Can Seize Opportunities," *National Underwriter*, December 7, 2011.

[16] "Hard Market Game Plan; Steps Risk Managers Need to Take Before Rates Rise," *Business Insurance*, 2010.

[17] *Id*. at 12.

remain: do insurance rates drop as a result of a state's enactment of "tort reform?" Conversely, do insurance rates rise in states that resist stripping away victims' rights? Are lawmakers ever held to account if their "tort reform" solutions fail?

The Center for Justice & Democracy and its project, Americans for Insurance Reform (CJD/AIR) have been exploring these questions since 1999 when CJD/AIR produced its first study, Premium D*eceit —the Failure of "Tort Reform" to Cut Insurance Prices*.[18] That study, which examined insurance rates about a decade after the mid-1980s insurance crisis, tested the impact of "tort reforms" passed by state legislators (or voters by ballot initiative) during those years after being told by insurers that this was only way to bring rates under control. *Premium Deceit* found that enactment of "tort reform" laws had no impact on rates. More specifically, despite what "tort reform" proponents convinced lawmakers to believe, tort law limits enacted in response to the severe liability insurance crisis of the mid-1980s did not lower insurance rates in the ensuing years. States with little or no tort law restrictions experienced approximately the same changes in insurance rates as those states that enacted severe restrictions on victims' rights. Simply put, there was no correlation between "tort reform" and insurance rates.

In 2009, CJD/AIR produced another study, *True Risk: Medical Liability, Malpractice Insurance and Health Care*,[19] providing an initial look at the insurance crisis that occurred from 2002 to 2006, which hit the medical malpractice insurance line most severely. Once again, the study found that despite what the insurance industry and medical lobbies promised lawmakers, legal limits on injured patients had not lowered insurance rates for doctors in the ensuing years (at least as of 2009 when that study was published). Many states with little or no restrictions on patients' legal rights experienced the same level of insurance rate changes as those states that enacted severe limits on patients' rights.

Now, a full decade since the end of that third liability insurance crisis, CJD/AIR have taken another look at the "tort reforms" and ballot initiatives passed in response to that crisis. This new study drills down to determine if "tort reforms" enacted in nearly half the states during those years delivered their intended effect – lowering rates for doctors – compared to the states that did not restrict tort laws and protected the legal rights of patients. In addition, we specifically examine the impact of "caps" on non-economic damages,[20] which is the "tort reform" proposal for which lobbyists campaign most intensely. Notably, 14 states either enacted new caps during the 2002 to 2006 crisis period or lowered already existing caps. (Those already-existing caps apparently – and not surprisingly – failed to stop rates from dramatically increasing in the mid-2000s. Rather than repealing those caps as the wrong solution to control rates, these states did the opposite and made them more severe.)

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[18] *See* Center for Justice & Democracy, *Premium Deceit: The Failure of "Tort Reform" to Cut Insurance Prices* (1999), http://centerjd.org/system/files/PremiumDeceit.pdf
[19] Americans for Insurance Reform, *True Risk: Medical Liability, Malpractice Insurance and Health Care* (2009), http://www.insurance-reform.org/TrueRiskF.pdf
[20] Non-economic damages compensate the consumer for injuries like blindness, disfigurement, loss of fertility, trauma, suffering, severe pain or other physical impairments that affect day-to-day life.

We specifically examined insurance pure premiums, also known as "loss costs."[21] This is the largest part of the premium dollar and is the one component of an insurance rate that should be affected by verdicts, settlements, payouts or so-called "tort reform." Pure premium data are compiled by a private company called the Insurance Services Office (ISO), which has the largest database of audited, unit transaction insurance data of any entity in the United States.[22] ISO provides these data for states to use in setting rates.

Our findings once again show that the "tort reform" remedies pushed by the insurance industry have been colossal failures. There is no correlation between enactment of tort limits and insurance rates. States that enacted new limits on patients' legal rights in medical malpractice cases (caps on damages plus other traditional tort reforms) saw an average 22.7 percent decrease in pure premiums from 2002 to the present – but states that did nothing saw a larger average drop of 29.5 percent. What's more, states that enacted only caps saw an average 21.8 percent decrease in pure premiums over the period – but the states that did not enact or lower caps saw an even greater average drop of 28.9 percent.

In sum, the "tort reform" remedy pushed by industry lobbyists in the mid-2000s failed to accomplish its purpose. Meanwhile, negligent health care providers were made less accountable and patients lost critical legal rights.

HISTORY OF INSURANCE CRISES AND LAWMAKING FAILURES

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,

[21] "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.

[22] ISO data are not available for Hawaii, New York or Texas.

> causing public hospitals to overflow with patients. The physicians also sought a legislative solution to their insurance availability crisis.[23]

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."[24] The insurance industry blamed lawsuits and these arguments made it into legislation, like the following 1975 Wisconsin law:

> (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….[25]

During this period, *Premium Deceit 2016* co-author J. Robert Hunter was the nation's Federal Insurance Administrator. In fact, Hunter became part of the inter-agency working group formed 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 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.

However, big insurance companies told states something else. Even though they had no information 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.[26] 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. (*See* Exhibit C for full list.) The following examples illustrate their thinking:

> **Alaska (1976)**.[27] The Governor's October 1, 1975 Medical Malpractice Insurance Commission Report "stressed three factors that contributed to the need for the new

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[23] 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)(citations omitted).

[24] "Malpractice 'job actions' spread," *Facts on File World News Digest*, July 5, 1975.

[25] Wis. Stats. Ch. 37, Laws of 1975, https://docs.legis.wisconsin.gov/1975/related/acts/37

[26] *See* Cal. Civil Code §3333.2

[27] Ronen Avraham, "Database of State Tort Law Reforms (5th)," University of Texas Law School Law and Economics Research Paper No. e555 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902711; Jonathan Scott Aronie, "Alaska's Medical Malpractice Expert Advisory Panel: Assessing the Prognosis," 9 *Alaska L. Rev.*

legislation. First, the country was embroiled in a malpractice crisis, and the Commission predicted that Alaska would soon be faced with the same crisis."[28]

Arizona (1976).[29] 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…."[30]

Delaware (1976).[31] 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."[32]

Florida (1976).[33] From the preamble of the 1976 "tort reform" law: "WHEREAS, this insurance crisis threatens the quality of health care services in Florida as physicians

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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. *See also*, *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

[28] 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 (citations omitted).

[29] Jona Goldschmidt, "Where Have All the Panels Gone? A History of the Arizona Medical Liability Review Panel," 23 *Ariz. St. L.J.* 1013 (Winter 1991); *James v. Phoenix General Hosp., Inc.*, 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

[30] 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).

[31] 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), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902711

[32] Delaware Health Care Malpractice Insurance and Litigation Act, http://delcode.delaware.gov/sessionlaws/ga128/chp373.shtml

[33] 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. *See also,* Florida Division of Library Services, *1976 Summary of General Legislation: Florida Legislature, Regular Session April 6 – June 4* (August 1976) at 121-3, http://archive.law.fsu.edu/library/collection/FlSumGenLeg/FlSumGenLeg1976.pdf; 1976 Supplement to Florida Statutes 1975 at 518-532, http://archive.law.fsu.edu/library/collection/flastat/FlaStat1976/vsupp/FlaStat1976vSupp_OCR_Part11.pdf; Ch. 768.133-134 at 2034-6, http://archive.law.fsu.edu/library/collection/flastat/FlaStat1975/vol2/FlaStat1975v2OCR_Part41.pdf; Florida Legislature, *1975 Summary of General Legislation* at 103-111, http://archive.law.fsu.edu/library/collection/FlSumGenLeg/FlSumGenLeg1975.pdf. *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; Jessica Fonseca-Nader, "Note and Comment: Florida's Comprehensive Medical Malpractice Reform Act: Is it Time for a Change?" 8 *St. Thomas L. Rev.* 551, 553-5 (Spring 1996); Laurie G Steiner, "1988 Periodic Payment Awards: The Prescription for the Medical

become increasingly wary of high-risk procedures and are forced to downgrade their specialties to obtain relief from oppressive insurance rates…."[34]

Louisiana (1975).[35] "[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."[36]

New Hampshire (1977).[37] "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."[38]

New Mexico (1976).[39] "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."[40]

Ohio (1975).[41] "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."[42]

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

[34] 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).

[35] Leonard J. Nelson, III, Michael A. Morrisey and Meredith L. Kilgore, "Medical Malpractice Reform in Three Southern States," 4 *J. Health & Biomedical Law* 69, 98-108 (2008), http://suffolk.edu/documents/Law%20Journal%20of%20H%20and%20B/Nelson-Morrissey-Kilgore-69-151.pdf; Emily Townsend Black Grey, "The Medical Malpractice Damages Cap: What is Included?" 60 *Louisiana L. Rev*. 547, 548 (2000), http://digitalcommons.law.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).

[36] *Williamson v. Hospital Service of Jefferson*, 888 So. 2d 782, 785 (2004), https://www.courtlistener.com/opinion/1731556/williamson-v-hospital-service-of-jefferson/

[37] 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/

[38] *Carson v. Maurer*, 120 NH 925, 930 (1980), https://scholar.google.com/scholar_case?case=11872789357968934676

[39] Ronen Avraham, "Database of State Tort Law Reforms (5th)," University of Texas Law School Law and Economics Research Paper No. e555 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902711; Ruth L. Kovnat, "Medical Malpractice Legislation in New Mexico," 7 *N. Mex. L. Rev*. 5, 7, 17, 19 (Winter 1976-7), http://lawschool.unm.edu/nmlr/volumes/07/1/03_kovnat_medical.pdf

[40] NM Stat § 41-5-2, http://law.justia.com/codes/new-mexico/2015/chapter-41/article-5/section-41-5-2/. *See also*, *Otero v. Zouhar*, 697 P.2d 493, 499 (1984), https://www.courtlistener.com/opinion/1128290/otero-v-zouhar/

[41] "Ohio High Court Upholds Law Limiting Tort Damages," *Washington Legal Foundation*, February 22, 2008, http://www.wlf.org/upload/2-22-08tunnell.pdf; *Morris v. Savoy*, 61 Ohio St. 3d 684, https://scholar.google.com/scholar_case?case=730122836700512440. *See also*, 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

[42] *Morris v. Savoy*, 61 Ohio St. 3d 684, 686 (1991), https://scholar.google.com/scholar_case?case=730122836700512440

Pennsylvania (1975).[43] Quotation from the1975 Act: "It is the purpose of this act to make available professional liability insurance at a reasonable cost…."[44]

Tennessee (1975).[45] "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."[46]

Texas (1977).[47] "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.'"[48]

Virginia (1976).[49] "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."[50]

Washington (1976).[51] 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."[52]

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

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[43] "Health Care Services Malpractice Act" (signed into law October 15, 1975), http://www.palrb.us/pamphletlaws/19001999/1975/0/act/0111.pdf

[44] *Ibid*.

[45] 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. *See also*, 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).

[46] *Newton v. Cox,* 878 S.W.2d 105, 107-8 (Tenn. 1994), https://www.courtlistener.com/opinion/2410380/newton-v-cox/ (citation omitted).

[47] Texas Senate Research Center, "The Medical Malpractice Liability Crisis," *in Brief* (February 2003), http://www.senate.state.tx.us/SRC/pdf/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

[48] *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 893 (Tex. 2000), https://casetext.com/case/horizoncms-healthcare-corporation-v-auld

[49] "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=wlulr. *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

[50] *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/

[51] *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 (citations omitted).

[52] *Ibid*.

> 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, 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.[53]

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.[54]

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.[55] 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"[56] and insuring poor risks just to get the premium dollars to invest. This period was characterized by such risky

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[53] "Speedup in Action to Deal with Medical Malpractice Crisis," *U.S. News & World Report*, January 19, 1976.
[54] "Medical malpractice actions," *Facts on File World News Digest*, October 4, 1975.
[55] Frank Sloan, "State Responses to Malpractice Insurance Crisis of the 1970's: An Empirical Assessment," 9 *Journal of Health Politics, Policy & Law* 629-46 (1985).
[56] Greenwald, "Insurers Must Share Blame: AIG Head," *Business Insurance,* March 31, 1986, p. 3.

underwriting as retroactively insuring the MGM Grand Hotel for fire risk *months after it had burned down in a fire*.[57]

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" and that "significant premium increases are needed especially for the current commercial lines products."[58]

So once again, the industry decided to raise rates quickly and sharply. Companies also reduced or canceled coverage for many policyholders. The country was suddenly in the midst of a new industry-created 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."[59]

- "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."[60]

- "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."[61]

The insurance industry once more started pressing for major limits on the legal rights of Americans. The following 1985 quotes are instructive:[62]

- 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

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[57] *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).
[58] *See* Jay Angoff, "Insurance Against Competition: How the McCarran-Ferguson Act Raises Prices and Profits in the Property-Casualty Insurance Industry," 5 *Yale Journal of Regulation* 397 (1988), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1081&context=yjreg
[59] *St. Petersburg Times,* May 7, 1987.
[60] *Washington Post,* May 24, 1986.
[61] *The Record (New Jersey),* July 24, 1986.
[62] Quotes can be found at National Insurance Consumer Organization, "Crisis Creation Chronology" (1986).

business" and "the time is right to start engaging in some serious efforts for tort reform," according to *Business Insurance*.[63]

- 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 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."[64]

- 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.[65]

In fact, the industry knew full well that it was to blame for 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."[66] 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.[67] 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

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[63] *Business Insurance*, June 10, 1985, p. 3.
[64] Phil Zunkewicz, "Cycle Causes Confusion As Reinsurance Dies And Tort Woes Persist," *Journal of Commerce*, October 7, 1985, p. 10A.
[65] *National Underwriter*, June 28, 1985, p. 1.
[66] Greenwald, "Insurers Must Share Blame: AIG Head," *Business Insurance,* March 31, 1986, p. 3.
[67] Herbert, "$6.5 Million In Ads Targets Lawsuit Crisis," *Journal of Commerce*, March 19, 1986, p. 1.

court judgment in any of these cases. Yet, they form an integral part of its national advertising campaign.[68]

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."[69]

- 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."[70]

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.[71] *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."[72]

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 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."[73]

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[68] *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, p. 2.
[69] 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).
[70] Ibid.
[71] John Gannon, *Tort Deform - Lethal Bedfellows,* Essential Information, 1995, pp. 23-25.
[72] "Proponents of Reform," *Legal Times*, April 17, 1995, cited in Ken Silverstein, *Smoke & Mirrors,* Public Citizen Congress Watch (1996), p. 11.
[73] 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."[74]

- 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."[75]

- 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."[76]

- 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."[77]

- 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."[78]

- 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."[79]

- 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."[80] What's more, when they were pushed hard by legislators to provide guarantees that rates would drop, they could not. And their subsequent rate filings with insurance departments confirmed this:

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[74] Scott Sonner, "Miller calls for liability reform," *UPI*, February 21, 1986.
[75] *UPI*, October 24, 1986.
[76] Dana Beyerle, "Civil liability law reform urged," *UPI*, April 7, 1987.
[77] "Tort Reform, Banks on NY Insurance Agenda," *Journal of Commerce,* January 22, 1987.
[78] Stephen Koff, "Voters deal hard blow to limits on liability," *St. Petersburg Times,* November 9, 1988.
[79] Mike Dennison, "In rural areas, doctors are delivering sad message to mothers-to-be," *Associated Press,* May 1, 1988.
[80] Editorial, *Crain's Chicago Business,* June 9, 1986.

- 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."[81]

- 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."[82]

- 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."[83] Filings made in 1986 by 104 insurers licensed in Florida showed that out of 277 filings, 175 (or 63 percent), showed no savings from "tort reform" while none showed savings of more than 10 percent.[84]

- 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 because we made it more difficult to recover, or set limits on recovery. But this hasn't happened."[85]

- 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…."[86]

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[81] 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.
[82] "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, p. 1.
[83] Aetna Casualty & Sur. Co., Commercial Ins. Div., "Bodily Injury Claim Cost Impact of Florida Tort Law Change," August 8, 1986, at 2.
[84] "'Tort Reform' a Fraud, Insurers Admit," and "Tort Reform Will Not Reduce Insurance Rates, Say 100+ Florida Insurers," National Insurance Consumer Organization (1986).
[85] "Insurers Warn," *UPI*, March 9, 1987.
[86] Letter from Robert J. Nagel, Assistant Vice President, State Filings Division, to Ray Rather, Kansas Insurance Department, October 21, 1986, at 1-2.

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[87] – 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.[88]

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."[89] (Alaska responded by enacting a broad "tort reform" bill. *See* Exhibit C.)

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.[90]

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[87] 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 Doroshow and Adrian J. Wilkes, *Goliath: Lloyd's of London in the United States,* Center for Study of Responsive Law (1988), pp. 27-30.

[88] *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).

[89] 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).

[90] *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.).

Yet when a U.S. senator sought statistics on Lloyd's payouts on U.S. claims, Lloyd's would not supply this information.[91] 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.[92]

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. (*See* Exhibit C for a list of "tort reforms" enacted in each state during this insurance crisis.)

CRISIS #2 – WHAT WAS LEARNED

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.[93]

State commissions in New Mexico, Michigan and Pennsylvania reached similar conclusions.[94] This led *Business Week* magazine 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.[95]

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

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[91] Letter from R. Hazell to Sen. John Danforth, Chairman of the Senate Comm. On Commerce, Science and Transportation, April 2, 1986.

[92] *See, e.g.,* "Lloyd's Forecast is Bullish," *Journal of Commerce,* September 8, 1987.

[93] 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).

[94] *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.

[95] "What Insurance Crisis?" *Business Week*, January 12, 1987.

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[96] 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."[97] 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.[98]

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 *Cycles and Crises in Property/Casualty Insurance: Causes and Implications for Public Policy*.[99] 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."

As noted earlier, in 1999, CJD/AIR decided to examine the impact of tort law limits enacted during this insurance crisis in a study called *Premium Deceit – the Failure of "Tort Reform" to Cut Insurance Prices*.[100] CJD/AIR found that enactment of "tort reform" laws during the

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[96] 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).

[97] *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., et al,* 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; "Ten States Announce They Will Join Antitrust Suits," *Insurance Antitrust & Tort Reform Report,* June 15, 1986; 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; pp. 69-95.

[98] *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., et al,* No. 439089 (Tex. Dist. Ct., Travis Co., 53rd Jud. Dist., filed March 22, 1998).

[99] 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

[100] *See* Center for Justice & Democracy, *Premium Deceit: The Failure of "Tort Reform" to Cut Insurance Prices* (1999), http://centerjd.org/system/files/PremiumDeceit.pdf

nation's second insurance crisis, in the years 1985 through 1988, 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.[101]

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 CJD/AIR reissued *Premium Deceit* 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 availability improved everywhere. The strong financial markets of the 1990s expanded the usual six- to 10-year soft market phase of the cycle. No matter how much insurers cut their rates, the insurers wound up with a great profit year 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."[102]

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 said again, so medical malpractice insurers were being forced to raise insurance rates. Trade and business associations conveyed that message to lawmakers and to the public everywhere in campaigning for more tort limits. For example:

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[101] "Health Care Reform – Bush's Insurance Cap Plan A Proven Failure," *Seattle Times,* May 16, 1991.
[102] Charles Kolodkin, "Medical Malpractice Insurance Trends? Chaos!" International Risk Mgmt. Institute (September 2001).

- 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."[103]

- 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."[104]

- 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."[105]

- 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…."[106]

However, as studies showed, this was false. In fact, *Stable Losses/Unstable Rates 2016* – AIR's companion study – found at the time when doctors' premiums skyrocketed, inflation-adjusted payouts per doctor failed to increase between 2004 and 2006, and at no time were increases in premiums connected to actual payouts by insurers.[107] In addition, during this period, medical

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[103] 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.
[104] American Tort Reform Association, "Insurance Rate Hikes Force Pennsylvania Doctors To Close Doors," December 19, 2001, http://www.atra.org/alert.fl.ml?aid=7265
[105] "Tort Reform Necessary To Quell WV Medical Malpractice Crisis," *PropertyandCasualty.com News*, December 14, 2001.
[106] Bruce Bartlett, "Doctors on Strike," *National Center for Policy Analysis,* March 3, 2003, http://www.ncpa.org/sub/dpd/index.php?Article_ID=5493
[107] 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 .

malpractice insurers vastly (and unnecessarily) increased reserves (used for future claims) despite no increase in payouts or any trend suggesting large future payouts.[108]

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"[109] and a "crisis state" according to the American College of Obstetricians and Gynecologists.[110] 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."[111] 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.[112]
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> **Missouri.** This state was also identified by the AMA as a so-called "crisis state,"[113] yet had had a cap on non-economic damages since 1986.[114] 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*.[115] Again, lawmakers' solution was not to repeal the cap but to lower it.[116]

In Texas, voters were coaxed into voting to change their own 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

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[108] *See*, Americans for Insurance Reform, *True Risk: Medical Liability, Malpractice Insurance And Health Care* (July 2009), https://www.centerjd.org/system/files/TrueRiskF.pdf .
[109] AMA, *American's Medical Liability Crisis: A National View* (June 2004).
[110] Mary Ellen Schneider, *Maryland: A State in 'Crisis' for Ob.Gyns*, OB/GYN NEWS, Oct. 15, 2004.
[111] James Dao, "A Push in States to Curb Malpractice Costs," *New York Times*, Jan. 14, 2005.
[112] *See*, Maryland Patients' Access to Quality Health Care Act of 2004, http://mlis.state.md.us/2004s1/bills/hb/hb0002e.pdf
[113] AMA, *American's Medical Liability Crisis: A National View* (June 2004).
[114] Missouri Dep't of Ins., *Medical Malpractice Insurance in Missouri; The Current Difficulties in Perspective* 7 (2003).
[115] "State report says malpractice claims fell," *Associated Press*, November 5, 2004.
[116] The cap was struck down as unconstitutional in 2012. *Watts v. Lester E. Cox Medical Centers,* 376 S.W.3d 633 (2012).

thereafter, major insurers requested rate *hikes* as high as 35 percent for doctors and 65 percent for hospitals.[117] 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.[118]

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.[119] In a 2004 filing to the Texas Department of Insurance, 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.[120]

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.[121]
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> **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.[122]
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> **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.[123] The largest insurance company, which was owned by the state medical

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[117] *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.
[118] Jim Vertuno, "House takes insurance firms to task over malpractice rates," *Houston Chronicle,* April 23, 2004.
[119] Darrin Schlegel, "Insurer switching its tactics/Going unregulated to raise premiums," *Houston Chronicle*, April 10, 2004.
[120] Consumer Watchdog, "Nation's Largest Medical Malpractice Insurer Declares Caps on Damages Don't Work, Raises Docs' Premiums," October 27, 2004, http://www.consumerwatchdog.org/newsrelease/nations-largestmedical-malpractice-insurer-declares-caps-damages-dont-work-raises-docs
[121] 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*, Nov. 20, 2003.
[122] *E.g.* "Despite New Law, Insurance Companies Won't Lower Rates Right Away," *Associated Press*, Jan. 9, 2003.
[123] "Hike Approved for Premiums," *Daily Oklahoman*, April 8, 2004.

association, requested an astounding 83 percent rate hike just after "tort reform" passed.[124]

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.[125]

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 malpractice insurer, then filed for a 16.9 percent rate increase. Two other companies filed for 25 percent and 93 percent rate increases.[126]

Of course, 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.[127] According to A.M. Best, after reaching a high of 14.2 percent in 2003, medical malpractice premium growth began dropping again, decreasing by 6.6 percent nationally in 2007, and an additional 5.3 percent in 2008.[128]

The growth of insurance pure premiums (also known as "loss costs") as compiled by the Insurance Services Office (ISO) showed the same trend.[129] 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.[130] 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.[131]

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[124] *E.g.* "Oklahoma's Largest Medical-Liability Company Gets 83% Rate Increase Over Three Years," *BestWire*, Dec. 2, 2003.

[125] *E.g.* "Miss. Tort Reform Effort Falls Short," *Commercial Appeal*, Feb. 18, 2003; Reed Branson, "Doctors In Oxford Shut, Cite Insurance," *Commercial Appeal*, Feb. 14, 2003; Ben Bryant, "Tort Reform Has Done Little to Ease Malpractice Crisis," *Biloxi Sun-Herald*, Feb. 2, 2003.

[126] *E.g.* Joelle Babula, "Medical Liability Company Requests Premium Increase," *Las Vegas Review-Journal*, Feb. 11, 2003; Babula, "State Insurance Program Holds Off on Lowering Rates," *Las Vegas Review-Journal*, Aug. 14, 2002.

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

[128] A.M. Best, "Solid Underwriting Undercut by MPLI's Investment Losses," *Best's Special Report*, April 27, 2009.

[129] "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.

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

[131] *Ibid*.

We are now a decade into this soft market period. As *Medical Liability Monitor* wrote in 2013,

> Since 2006, the U.S. [Medical Professional Liability] insurance sector has seen direct written premium fall by roughly 20 percent, suggesting a soft market. At the same time that this traditional soft market indicator has been in free-fall, however, the industry's premium revenue has continued to outpace its claims expenses, with annual combined ratios for the sector coming in at well below 100 percent every year since 2006.[132]

According to the 2016 *Medical Liability Monitor Annual Rate Survey*, published in October 2016, the soft market continues with 2016 average rates down 0.1 percent. Moreover, for "the vast majority (75 percent) of insurers in the survey, rates have remained flat between 2015 and 2016.[133] *MLM* notes, "Just under 80 percent of respondents said they believe the market is neither hardening or softening."

However, "in last year's 2015 Annual Rate Survey, insurers reported more rate increases than decreases for the first time since 2006. This trend continues in the 2016 survey. The differential is slightly wider with 15 percent reporting increases and 9 reporting decreases." And while, notes *MLM*, "In the near term, it looks like smooth sailing" and "there do not appear to be any rapidly developing storms on the horizon," there are:

> [S]ome head-winds as the aggregate medical professional liability line of business seems poised to produce stable but less profitable results. Slowly declining underwriting results that reflect rate erosion/moderate loss cost trends across the industry – with no apparent help from a volatile investment environment – suggests overall profitability will follow the lead of underwriting results.

Before the nation is thrust in the middle of a new hard market, with sudden and dramatic rate hikes and a possible new liability insurance crisis, CJD/AIR have decided to look at the impact of "tort reforms" enacted in response to the third insurance crisis, which hit doctors most severely and prompted the vast majority of legislative responses during those years.

METHODOLOGY

We purchased from ISO the Chief Executive Circular Letters detailing the state-by-state price or advisory loss cost level activity (pure premiums) for the years 2002 through 2015.[134] These

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[132] "Annual Rate Survey Issue," *Medical Liability Monitor* (October 2013), http://www.milliman.com/uploadedFiles/insight/2013/MLM-Rate-Survey.pdf

[133] Paul Greve and Alison Milford, "Do Still Waters Still Run Deep, Medical Professional Liability in 2016," *Medical Liability Monitor*, Annual Rate Survey, October 2016. *See also*, "Medical Malpractice Liability Premiums Remain Flat: Survey," *Insurance Journal*, October 10, 2016.

[134] As noted earlier, "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

letters show, for each line of insurance for which ISO performs statistical and actuarial analysis, the changes recommended by ISO to its insurance company members, subscribers and other customers, after filing and action by the state insurance regulators.[135]

ISO has the largest database of audited, unit transaction data of any entity in the United States. "Unit transaction" means that the data are generated each time a transaction occurs (such as a policy being bought or a claim filed or paid). This allows for a paper trail back to actual records if ISO audits determine that an insurer is filing "bad" data. ISO audits these data and requests corrections as necessary based upon that review. ISO data therefore represent the most reliable and largest database for determining trends in insurance costs as measured either by final rates being suggested by ISO in the 1980s or by the trends in loss costs in more recent years.

From these ISO Circular Letters, a database was constructed combining the Hospital Professional and Physicians, Surgeons' and Dentists' (PS&D) Professional Liability lines of insurance. The database shows the year-by-year change ISO filed with each state and got approved or otherwise went into effect, for each line of insurance. We recorded this change along with changes from each year for the years 2002 to 2015 into the database for each state. Ultimately we combined the changes to obtain the total change for the entire period 2002 to 2015.

In order to measure the impact of tort law limits enacted during the 2002 through 2006 medical malpractice insurance crisis, we placed the states into two categories based on the following criteria: states that responded to the liability crisis of the 2000s by enacting major medical malpractice tort limits, and states that did not. The hypothesis we tested was simple: if tort law limits succeed in reducing insurance costs for doctors, that fact should be evident in the trends of insurance costs in the states.

In defining a "major tort law limit" as listed in Exhibit C, we included: caps on damages (including lowering already existing caps), modifications to joint and several liability, modifications to the collateral source rule, structured settlements (except if optional for plaintiffs) and contingency fees limits or schedules (below the standard one-third) for plaintiff attorneys. Some laws are not included for a variety of reasons. For example, because this study is only evaluating the impact of legislative or voter responses, we did not include laws that are part of the common law or were court imposed. We also did not include laws that are limited to narrow causes of action, or varied so widely from state to state as to make them impossible to compare including statutes of limitations, immunity for specific groups, arbitration rules, or wrongful death statutes. We noted if substantial exceptions to application of a particular tort limit were enacted, or if a state Supreme Court struck down a limit as unconstitutional.

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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.

[135] In the early years of this review, ISO was recommending final rates to be charged by insurers. The Circular Letters were called "Price Activities" from 1985 until 1990 when it was changed to "Loss Cost/Rate Level Activity." In 1994 the name was changed again, to "Loss Cost Level Activity," a title the Circular Letters still use. These later names reflect the changing role of ISO as it increasingly stopped recommending full, final prices and, instead, recommended only the loss portion of the rate (*i.e.*, the expected claims costs, also known as "loss costs").

The categories of tort limits that we included have been favored by states seeking to bring down insurance rates since the first insurance crisis of the mid-1970s and through to the present day, allowing for consistency in analysis. In addition, they are the types of laws on which the American Tort Reform Association focused when it formed during the second insurance crisis in 1986,[136] and which the Congressional Budget Office analyzed in 2009 when it sought to evaluate the impact of broad federal medical malpractice "tort reform" on health care costs, including medical malpractice insurance rates.[137]

Sometimes, as with joint and several liability, the legislature decided to modify the law in some respect. Other times, it decided to abolish the doctrine altogether. Also, caps on damages vary in size. No subjective weight is attached to any of these decisions. The assumption is that whatever was enacted was whatever the legislature was convinced was necessary to bring down insurance rates, among other things, in that state at that time.

While this study examines the response to what was primarily a medical malpractice insurance crisis that took place from the years 2002 through 2006, for historical perspective Exhibit C lists a complete breakdown of major state law tort limits dating back to the 1970s. This list includes not only laws pertaining to medical malpractice cases but also general "tort reform" laws enacted for all personal injury cases, as well as laws pertaining to products liability cases only. Many of these laws were previously analyzed in our 1999 *Premium Deceit* study.[138]

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[136] *See*, *e.g*., ATRA Fact Sheet, "1986 TORT REFORM ENACTMENTS AND BALLOT INITIATIVES as of December 31, 1986," http://www.atra.org/sites/default/files/documents/ENACT86.pdf

[137] *See* Congressional Budget Office, "CBO's Analysis of the Effects of Proposals to Limit Costs Related to Medical Malpractice ('Tort Reform')," October 9, 2009, http://www.cbo.gov/publication/41334. CBO examined the impact of a $250,000 cap on non-economic damages, repeal of the collateral source rule, one-year date of discovery statute of limitations (3 years for children), and repeal of joint and several liability. CBO included changes in statute of limitations laws, which we did not. We included mandatory structured settlements and limits on contingency fees, which CBO did not.

[138] *See* Center for Justice & Democracy, *Premium Deceit: The Failure of "Tort Reform" to Cut Insurance Prices* (1999), http://centerjd.org/system/files/PremiumDeceit.pdf

FINDINGS

Our findings show that the "tort reform" remedies pushed by the insurance industry have been colossal failures. There is no correlation between "tort reform" and insurance rates. We found that states that enacted new limits on patients' legal rights in medical malpractice cases saw an average 22.7 percent decrease in pure premiums from 2002 to the present – but states that did nothing saw a larger average drop of 29.5 percent. (*See* Exhibit A.)

We also looked specifically at the impact of "caps" (or "one-size-fits-all" limits) on non-economic damages, which compensate patients for injuries like blindness, disfigurement, loss of fertility, trauma, suffering, severe pain or other physical impairments that affect day-to-day life. Caps, particularly those based on California's model, which were enacted in the mid-1970s, are considered "the gold standard for tort reform proponents."[139] It is clearly the "tort reform" proposal for which lobbyists campaign most intensely. Perhaps for that reason and others, the impact of caps is often studied by academics and economists.[140]

We found that states that enacted or lowered caps on non-economic damages saw an average 21.8 percent decrease in pure premiums over the period – but the states that did not saw an even greater average drop of 28.9 percent. (*See* Exhibit B)

In sum, the data do not support any conclusion that limiting patients' legal rights – including capping damages - results in lower premiums for doctors.

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[139] Lucinda M. Finley, "The 2004 Randolph W. Thrower Symposium: The Future Of Tort Reform: Reforming The Remedy, Re-Balancing The Scales: Article: The Hidden Victims Of Tort Reform: Women, Children, And The Elderly, Emory Law Journal," 53 *Emory L.J.* 1263 (Summer 2004).

[140] *See*, *e.g*., Myungho Paik, Bernard S. Black and David A. Hyman, "Damage Caps and Defensive Medicine, Revisited" (August 25, 2016), Northwestern Law & Econ Research Paper No. 13-20; Illinois Program in Law, Behavior and Social Science Paper No. LBSS14-21, http://ssrn.com/abstract=2110656. There, researchers examined the impact of the following "new cap" states: "Florida (2003); Georgia (2005), Illinois (2005), Mississippi (2003), Nevada (2002), Ohio (2003), Oklahoma (2003), South Carolina (2005), and Texas (2003). The Georgia and Illinois caps are invalidated by state supreme courts in early 2010; we treat them as in effect through 2009." Also included in our analysis is Wisconsin, which enacted a cap in 2006 after the state Supreme Court invalidated an older cap; and three states that reduced already existing caps in medical malpractice cases to address the insurance crisis – Alaska, Missouri and West Virginia. Missouri's cap was declared unconstitutional in 2012 and repassed in 2015. Texas is not included in our analysis because ISO data are not available for Texas.

CONCLUSION

Over the last 40 years, our nation has suffered through three liability insurance crises. When these periodic crises happen, insurers and medical lobbies propose one solution: limiting access to the courts and compensation to innocent consumers and patients injured by negligence. It would be one thing if these "tort reforms" did anything at all to help doctors and other policyholders who are being price-gouged. But they don't.

The findings of this report confirm that tort law limits enacted during the last liability insurance crisis – as during prior insurance crises – failed to lower insurance rates for doctors and health care providers despite what the insurance industry and medical lobbies 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.

AIR studies have consistently found that restricting the rights of injured consumers and patients to go to court will not produce lower insurance costs or rates, and insurance companies that claim they do are severely misleading this country's lawmakers. Lawmakers who resist industry pressure to limit victims' legal rights should be acknowledged as doing the right thing for their constituents and for their states.

About Americans For Insurance Reform and the Authors

AMERICANS FOR INSURANCE REFORM is a project of the Center for Justice & Democracy at New York Law School. AIR is a coalition of nearly 100 consumer groups from around the country working to strengthen oversight of property/casualty insurance industry practices.

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As a consultant on public policy and actuarial issues for various government agencies, his clients have included the U.S. Department of Housing and Urban Development, the General Accounting Office and the Environmental Protection Agency, as well as state governments including California, Florida, Georgia, Massachusetts, Maine, North Carolina, New Jersey, New York, Oklahoma, South Carolina and Texas. Other experience includes work in the private sector, including as Associate Actuary for the Mutual Insurance Advisory Association and Mutual Insurance Rating Bureau (now AIPSO), Actuarial Supervisor for the National Bureau of Casualty Underwriters (now ISO) and Underwriter, Atlantic Mutual and Centennial Insurance Companies.

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 in every state in the union on the insurance cycle and related premium spikes.

JOANNE DOROSHOW, an attorney, is co-founder of Americans for Insurance Reform and Executive Director of the Center for Justice & Democracy at New York Law School, where she is an Adjunct Professor of Law. CJ&D is the only consumer organization in the nation dedicated exclusively to fighting attacks on the civil justice system.

She 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, Joanne has written or 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.

Joanne is the recipient of the AAJ Partnership Award, 2016; the Distinguished Service Award, Kansas Association for Justice, 2012; Consumer Advocate of the Year, Consumer Attorneys of California, 2009; Esther Weissman Award, Worker Injury Law and Advocacy Group, 2008; Consumer Education Award, Consumer Attorneys Association of Los Angeles, 2005; Certificate of Recognition, California State Assembly, 2005; Consumer Advocacy Award, Massachusetts Academy of Trial Attorneys, 2003; Consumer Advocate of the Year, Trial Lawyers Association of Metropolitan Washington, DC, 2003; and the Hoosier Freedom Award, Indiana Trial Lawyers Association, 2000.

EXHIBIT A

Changes in medical malpractice pure premium/rates per state from 2002 through 2015. (Data not available for Hawaii, New York or Texas.) Chart on the left lists states that enacted major medical malpractice tort limits during the last insurance crisis (2002 through 2006). Chart on the right lists states that did not.

"TORT REFORM" STATES	**RATE CHANGE 2002 - 2015**
Alaska	0%
Arkansas	-13%
Florida	7%
Georgia	-22%
Idaho	-37%
Illinois	-9%
Maryland	16%
Minnesota	-37%
Mississippi	-18%
Missouri	-44%
Nevada	-35%
Ohio	-64%
Oklahoma	-12%
Pennsylvania	0%
South Carolina	-20%
Texas	N/A
West Virginia	-53%
Washington	-38%
Wisconsin	-29%
TOTAL AVERAGE	**-22.7%**

NO "TORT REFORM" STATES	**RATE CHANGE 2002 - 2015**
Alabama	-46%
Arizona	-51%
California	-68%
Colorado	-51%
Connecticut	-43%
District of Columbia	42%
Delaware	-8%
Hawaii	N/A
Indiana	-44%
Iowa	-49%
Kansas	-51%
Kentucky	-27%
Louisiana	-45%
Maine	-61%
Massachusetts	45%
Michigan	-55%
Montana	34%
North Carolina	-56%
North Dakota	-38%
New Hampshire	-13%
New Jersey	-33%
New Mexico	-44%
New York	N/A
Nebraska	-4%
Oregon	-26%
Rhode Island	0%
South Dakota	-40%
Tennessee	-54%
Utah	-14%
Virginia	-50%
Vermont	-20%
Wyoming	-14%
TOTAL AVERAGE	**-29.5%**

EXHIBIT B

Changes in medical malpractice pure premium/rates per state from 2002 through 2015. (Data not available for Hawaii, New York or Texas.) Chart on the left lists states that enacted or lowered existing caps on non-economic damages during the last insurance crisis (2002 through 2006). Chart on the right lists states that did not.

"CAP" STATES	RATE CHANGE 2002 - 2015
Alaska	0%
Florida	7%
Georgia	-22%
Illinois	-9%
Maryland	16%
Mississippi	-18%
Missouri	-44%
Nevada	-35%
Ohio	-64%
Oklahoma	-12%
South Carolina	-20%
Texas	N/A
West Virginia	-53%
Wisconsin	-29%
TOTAL AVERAGE	**-21.8%**

NO "CAP" STATES	RATE CHANGE 2002 - 2015
Alabama	-46%
Arizona	-51%
Arkansas	-13%
California	-68%
Colorado	-51%
Connecticut	-43%
D.C.	42%
Delaware	-8%
Hawaii	N/A
Idaho	-37%
Indiana	-44%
Iowa	-49%
Kansas	-51%
Kentucky	-27%
Louisiana	-45%
Maine	-61%
Massachusetts	45%
Michigan	-55%
Minnesota	-37%
Montana	34%
North Carolina	-56%
North Dakota	-38%
New Hampshire	-13%
New Jersey	-33%
New Mexico	-44%
New York	N/A
Nebraska	-4%
Oregon	-26%
Pennsylvania	0%
Rhode Island	0%
South Dakota	-40%
Tennessee	-54%
Utah	-14%
Virginia	-50%
Vermont	-20%
Washington	-38%
Wyoming	-14%
TOTAL AVERAGE	**-28.9%**

EXHIBIT C

PART 1: GENERAL TORT RESTRICTIONS AFFECTING PERSONAL INJURY CASES

Alabama
87: punitive cap (declared unconstitutional in 93)
87: collateral source rule (declared unconstitutional in part in 96 but overruled in 00)
87: structured settlements (declared unconstitutional in 91)
99: punitive cap

Alaska
86: cap, noneconomic
86: joint and several liability
86: collateral source rule
88: joint and several liability (ballot initiative)
97: punitive cap
97: cap, noneconomic
97: joint and several liability

Arizona
87: joint and several liability (with exceptions)
97: joint and several liability (exceptions removed)

Arkansas
03: punitive cap (declared unconstitutional in 11)
03: joint and several liability (with exceptions)

California
86: joint and several liability (ballot initiative)

Colorado
86: cap, noneconomic
86: joint and several liability
86: punitive cap
86: collateral source rule

Connecticut
86: collateral source rule
86: joint and several (i.e. proportional) liability
86: contingency fees (plaintiff waiver allowed 96)
86: structured settlements

Delaware
Pre-1985: collateral source rule

District of Columbia

Florida
Pre-1985: collateral source rule
86: joint and several liability (with exceptions)
86: collateral source rule
86: contingency fees
86: punitive cap
86: cap, noneconomic (declared unconstitutional in 87)
99: joint and several
99: punitive cap
07: collateral source rule

Georgia
87: punitive cap (product liability exempt)
87: joint and several liability
87: collateral source rule (declared unconstitutional in 91)
05: joint and several

Hawaii
86: cap, noneconomic damages (with exceptions)
86: joint and several liability (with exceptions)

Idaho
87: cap, noneconomic
87: joint and several liability (with exceptions)
87: structured settlements
90: collateral source rule
03: punitive cap
03: joint and several liability (repeals exceptions)
03: cap, noneconomic

Illinois
86: collateral source rule
86: joint and several liability
95: cap, noneconomic (declared unconstitutional in 97)
95: joint and several liability (declared unconstitutional in 97 reinstating 86 law)
95: punitive cap (declared unconstitutional in 97)

Indiana
Pre-1985: joint and several liability
86: collateral source rule
95: punitive cap

Iowa
Pre-1985: joint and several liability
86: structured settlements

87: collateral source rule
87: structured settlements
97: joint and several liability

Kansas
Pre-1985: joint and several liability
87: cap, noneconomic (except med mal)
87: punitive cap
88: cap, noneconomic (extended to med mal)
88: collateral source rule (declared unconstitutional in 93)

Kentucky
88: joint and several liability (codified common law rule)
88: collateral source rule (declared unconstitutional in 95)

Louisiana
Pre-1985: joint and several liability
87: joint and several liability
96: joint and several liability

Maine

Maryland
86: collateral source rule
86: cap, noneconomic
86: structured settlements

Massachusetts

Michigan
86: collateral source rule
86: structured settlements
87: joint and several liability
95: joint and several liability

Minnesota
86: cap, noneconomic (repealed in 90)
86: collateral source rule
88: joint and several liability
03: joint and several liability

Mississippi
89: joint and several liability
04: cap, noneconomic
04: punitive cap
04: joint and several liability

Missouri

87: joint and several liability
87: collateral source rule
05: collateral source rule
05: joint and several liability
05: punitive cap (declared unconstitutional in 14)

Montana:
87: joint and several liability (declared unconstitutional in part in 94)
87: collateral source rule
95: joint and several liability (response to 94 court decision)
03: punitive cap

Nebraska
Pre-1985: collateral source rule;
92: joint and several liability

Nevada
Pre-1985: joint and several liability
87: joint and several liability (with exceptions)
89: punitive cap

New Hampshire
86: cap, noneconomic (declared unconstitutional in 91)
86: punitive cap (abolished)
89: joint and several liability

New Jersey
Pre-1985: contingency fees
87: joint and several liability
87: collateral source rule
95: punitive cap
95: joint and several liability

New Mexico
87: joint and several liability (codified common law)

New York
86: joint and several liability (with exceptions)
86: collateral source rule
86: structured settlements
03: structured settlements (response to court decision)

North Carolina
95: punitive cap
11: collateral source rule

North Dakota
87: joint and several liability

87: collateral source rule
87: structured settlements
93: punitive cap

Ohio
87: joint and several liability
87: collateral source rule (declared unconstitutional in 94)
96: cap, noneconomic (declared unconstitutional in 99)
96: joint and several liability (declared unconstitutional in 99)
96: punitive cap (declared unconstitutional in 99)
96: collateral source rule (declared unconstitutional in 99)
03: joint and several liability
04: collateral source rule
04: punitive cap
04: cap, noneconomic (with exceptions)

Oklahoma:
95: punitive cap
04: joint and several liability
09: cap, noneconomic (declared unconstitutional in 13)
09: joint and several liability (declared unconstitutional in 13)
11: cap, non-economic (with exceptions)
11: joint and several liability
11: structured settlements
11: collateral source

Oregon
87: cap, noneconomic (declared unconstitutional in 99; reversed in 16)
87: joint and several liability
87: collateral source rule
95: joint and several liability

Pennsylvania
Pre-1985: contingency fees (declared unconstitutional in 84)
02: joint and several liability (declared unconstitutional in 05)
11: joint and several

Rhode Island

South Carolina
05: joint and several liability
11: punitive cap

South Dakota
86: structured settlements
87: joint and several liability

Tennessee

11: punitive cap
11: cap, noneconomic
13: joint and several liability

Texas
87: joint and several liability (with exceptions)
87: punitive cap
95: joint and several liability
95: punitive cap
03: joint and several liability

Utah
86: joint and several liability
99: joint and several liability

Vermont
Pre-1985: joint and several liability

Virginia
87: punitive cap

Washington
86: cap, noneconomic (declared unconstitutional in 89)
86: joint and several liability (with exceptions)
86: structured settlements

West Virginia
05: joint and several liability
15: joint and several liability
15: punitive cap

Wisconsin
95: joint and several liability
11: punitives cap
11: joint and several liability

Wyoming
86: joint and several liability

PART 2: TORT RESTRICTIONS AFFECTING PRODUCTS LIABILITY CASES

Alabama
Pre-1985: collateral source rule
87: punitive cap (declared unconstitutional in 93)
87: collateral source rule (declared unconstitutional in part in 96 but overruled by Court in 00)
87: structured settlements (declared unconstitutional in 91)
99: punitive cap
11: product liability defenses

Alaska
Pre-1985: products collateral source rule
86: cap, noneconomic
86: joint and several liability
86: collateral source rule
88: joint and several liability (ballot initiative)
97: punitive cap
97: cap, noneconomic
97: joint and several liability
97: statute of repose (products and other cases)

Arizona
Pre-1985: products liability defenses; products statute of repose (declared unconstitutional in 93)
89: products liability defenses
87: joint and several liability (with exceptions)
97: joint and several liability (exceptions removed)
12: products liability defenses

Arkansas
Pre-1985: products liability defenses
03: punitive cap (declared unconstitutional in 11)
03: joint and several liability (with exceptions)

California
86: joint and several liability (ballot initiative)
87: products liability defenses (inherently
dangerous products) but tobacco cases exempt in 97

Colorado
86: cap, noneconomic
86: joint and several liability
86: punitive cap
86: products statute of repose
86: collateral source rule
03: product liability defenses

Connecticut
Pre-1985: products punitive cap
86: collateral source rule
86: joint and several (i.e. proportional) liability
86: contingency fees (plaintiff waiver allowed 96)
86: structured settlements

Delaware
Pre-1985: collateral source rule

District of Columbia
Pre-1985: collateral source rule

Florida
86: joint and several liability (except pollution, intent)
86: collateral source rule
86: contingency fees
86: punitive cap
86: cap, noneconomic (declared unconstitutional in 87)
99: joint and several
99: punitive cap
99: product statute of repose
07: collateral source rule

Georgia
Pre-1985: products statute of repose
87: collateral source rule (declared unconstitutional in 91)
87: joint and several liability
87: products punitive cap (one per product) (declared unconstitutional in 90))
05: joint and several
87: products liability defenses
05: joint and several liability

Hawaii
86: joint and several liability (with exceptions)

Idaho
Pre-1985: products statute of repose
87: cap, noneconomic
87: joint and several liability (with exceptions)
87: structured settlements
90: collateral source rule
03: punitive cap
03: joint and several liability (repeals exceptions)
03: cap, noneconomic

Illinois
86: collateral source rule
86: joint and several liability
95: cap, noneconomic (declared unconstitutional in 97)
95: joint and several liability (declared unconstitutional in 97 reinstating 86 law)
95: punitive cap (declared unconstitutional in 97)
95: products statute of repose (declared unconstitutional in 97)
95: products liability defenses (declared unconstitutional in 97)

Indiana
Pre-1985: joint and several liability, products liability defenses
86: collateral source rule
95: punitive cap
95: products liability defenses
95: joint and several liability, products

Iowa
Pre-1985: joint and several liability
86: structured settlements
86: products liability defenses
87: collateral source rule
87: structured settlements
97: joint and several liability
97: products statute of repose
04: product liability defenses

Kansas
Pre-1985: products liability defenses; products statute of repose
86: products liability defenses
87: cap, noneconomic
87: punitive cap
88: collateral source rule (declared unconstitutional in 93)

Kentucky
Pre-1985: products liability defenses; products statute of repose
88: joint and several liability (codified common law rule)
88: collateral source rule (declared unconstitutional in 95)

Louisiana
Pre-1985: joint and several liability
87: joint and several liability
88: products liability defenses
96: joint and several liability

Maine
96: products liability defense

Maryland
86: collateral source rule
86: cap, noneconomic
86: structured settlements

Massachusetts

Michigan
86: collateral source rule
86: structured settlements
87: joint and several liability
95: products liability cap, noneconomic
95: product liability defenses
95: joint and several liability
95: products liability defenses

Minnesota
86: cap, noneconomic (repealed in 90)
86: collateral source rule
88: joint and several liability
03: joint and several liability

Mississippi
89: joint and several liability
93: products liability defenses
04: cap, noneconomic
04: punitive cap
04: joint and several liability
04: product liability defenses

Missouri
87: joint and several liability
87: collateral source rule
87: products liability defenses
05: punitive cap (declared unconstitutional in 14)
05: collateral source rule
05: joint and several liability

Montana:
87: joint and several liability (declared unconstitutional in part in 94)
87: collateral source rule
87: products liability defenses
95: joint and several liability (response to 94 court decision)
03: punitive cap

Nebraska
Pre-1985: collateral source rule; products statute of repose
92: joint and several liability

Nevada
Pre-1985: joint and several liability
87: joint and several liability (except products, toxics, intent)
89: punitive cap

New Hampshire
86: cap, noneconomic (declared unconstitutional in 91)
86: punitive cap (abolished)
88: products liability defenses
89: joint and several liability

New Jersey
Pre-1985: contingency fees
87: joint and several liability
87: collateral source rule
87: products liability defenses
95: punitive cap
95: joint and several liability
95: products liability defenses

New Mexico
87: joint and several liability (codified common law)

New York
86: joint and several liability (with exceptions)
86: collateral source rule
86: structured settlements
03: structured settlements (response to court decision)

North Carolina
Pre-1985: products statute of repose
95: punitive cap
95: products liability defenses
11: collateral source rule

North Dakota
Pre-1985: products liability defenses
87: products liability defenses
87: collateral source rule
87: structured settlements
87: joint and several liability
93: punitive cap
93: products liability defenses
95: products liability defense
95: products statute of repose (declared unconstitutional in 00)

Ohio
87: products liability defenses (but codified common law)

87: joint and several liability
87: collateral source rule (declared unconstitutional in 94)
96: cap, noneconomic (declared unconstitutional in 99)
96: joint and several liability (declared unconstitutional in 99)
96: punitive cap (declared unconstitutional in 99)
96: collateral source rule (declared unconstitutional in 99)
96: products liability defenses (declared unconstitutional in 99)
96: products statute of repose (declared unconstitutional in 99)
03: joint and several liability
04: cap, noneconomic (with exceptions)
04: punitive cap
04: collateral source rule
04: products statute of repose

Oklahoma:
95: punitive cap
04: joint and several liability
09: joint and several liability (declared unconstitutional 13)
09: product liability defenses (declared unconstitutional 13)
11: cap, non-economic (with exceptions)
11: joint and several liability
11: structured settlements
11: collateral source

Oregon
Pre-1985: products statute of repose
87: cap, noneconomic (declared unconstitutional in 99, reversed in 16)
87: joint and several liability
87: collateral source rule
87: products liability defenses
95: joint and several liability

Pennsylvania
Pre-1985: contingency fees (declared unconstitutional in 84)
02: joint and several liability (declared unconstitutional in 05)
11: joint and several liability

Rhode Island
Pre-1985: products statute of repose (declared unconstitutional in 94)

South Carolina
05: joint and several liability
11: punitive cap

South Dakota
Pre-1985: products liability defenses
86: structured settlements

87: joint and several liability
95: products liability defenses

Tennessee
Pre-1985: products liability defenses; products statute of repose
11: product liability defenses
11: punitive cap
11: cap, noneconomic
13: joint and several liability

Texas
Pre-1985: products statute of repose
87: joint and several liability (except environmental)
87: punitive cap
93: products liability defenses
93: products statute of repose
95: joint and several liability
95: punitive cap
03: joint and several liability
03: products statute of repose
03: product liability defenses

Utah
Pre-1985: product liability defenses; product liability statute of repose (declared unconstitutional 85)
86: joint and several liability
89: products liability defenses
99: joint and several liability

Vermont:
Pre-1985: joint and several liability

Virginia
87: punitive cap

Washington
Pre-1985: products statute of repose
86: cap, noneconomic (declared unconstitutional in 89)
86: joint and several liability (with exceptions)
86: structured settlements

West Virginia
05: joint and several liability
15: joint several liability
15: punitive cap

Wisconsin
95: joint and several liability

11: punitives cap
11: joint and several liability
11: product liability defenses
11: product statute of repose

Wyoming
86: joint and several liability

PART 3: TORT RESTRICTIONS AFFECTING MEDICAL MALPRACTICE CASES

Alabama
87: med mal cap, noneconomic (declared unconstitutional in 91)
87: med mal collateral source rule
87: med mal structured settlements (declared unconstitutional in 05)
87: punitive cap (declared unconstitutional in 93)
99: punitive cap

Alaska
86: cap, noneconomic
86: joint and several liability
86: collateral source rule
88: joint and several liability (ballot initiative)
97: cap, noneconomic
97: punitive cap
05: med mal cap, noneconomic

Arizona
Pre-1985: med mal collateral source rule
87: joint and several liability
89: med mal structured settlements (declared unconstitutional in 94)
93: collateral source rule

Arkansas
03: punitive cap (declared unconstitutional in 11)
03: joint and several liability
03: med mal structured settlements

California
Pre-1985: med mal cap, noneconomic; med mal collateral source rule; med mal contingency fees; med mal structured settlements
86: joint and several liability (ballot initiative)

Colorado
86: cap, noneconomic
86: joint and several liability
86: punitive cap
86: collateral source rule
88: med mal cap, noneconomic
88: med mal cap, total
88: med mal structured settlements
92: med mal collateral source rule

Connecticut
Pre- 1985: med mal collateral source rule

86: collateral source rule
86: joint and several (i.e. proportional) liability
86: contingency fees (plaintiff waiver allowed 96)
86: structured settlements

Delaware
Pre-1985: collateral source rule; med mal contingency fees; med mal structured settlements

District of Columbia
Pre-1985: collateral source rule

Florida
Pre-1985: med mal collateral source rule, med mal structured settlements
86: joint and several liability (with exceptions)
86: collateral source rule
86: contingency fees
86: punitive cap
86: cap, noneconomic (declared unconstitutional in 87)
86: med mal structured settlements
88: med mal cap, noneconomic (depending on arbitration) (declared unconstitutional in 91)
99: punitive cap
99: joint and several liability
03: med mal cap, noneconomic (declared unconstitutional for wrongful death, 14)
04: med mal contingency fees (ballot initiative)
07: collateral source rule

Georgia
87: punitive cap
87: joint and several liability
87: collateral source rule (declared unconstitutional in 91)
05: joint and several liability
05: med mal cap, noneconomic (declared unconstitutional in 10)
05: med mal structured settlements

Hawaii
86: cap, noneconomic damages (with exceptions)
86: joint and several liability

Idaho
87: cap, noneconomic
87: joint and several liability (with exceptions)
87: structured settlements
90: collateral source rule
03: punitive cap
03: joint and several liability (repeals exceptions)

Illinois
Pre-1985: med mal collateral source

85: medical malpractice structured settlements
85: med mal contingency fees (repealed in 13)
86: joint and several liability
86: collateral source rule
95: cap, noneconomic (declared unconstitutional in 97)
95: joint and several liability (declared unconstitutional in 97)
95: joint and several liability (declared unconstitutional in 97 reinstating 86 law)
95: punitive cap (declared unconstitutional in 97)
05: med mal cap, noneconomic (declared unconstitutional in 10)

Indiana
Pre-1985: med mal cap, all damages; med mal contingency fee (patient comp fund); joint and several liability,
86: collateral source rule
95: punitive cap

Iowa
Pre-1985: joint and several liability, med mal collateral source
86: structured settlements
87: collateral source rule
87: structured settlements
97: joint and several liability

Kansas
Pre-1985: joint and several liability, med mal collateral source (declared unconstitutional in 85)
86: med mal cap, total and non-economic (declared unconstitutional in 88)
86: med mal structured settlements (declared unconstitutional in 88)
87: punitive cap
88: collateral source rule (declared unconstitutional in 93)
88: med mal cap, noneconomic (general tort 87 cap extended to med mal)

Kentucky
88: joint and several liability (codified common law rule)
88: collateral source rule (declared unconstitutional in 95)

Louisiana
Pre-1985: med mal cap, total (except future damages); joint and several liability
87: joint and several liability
96: joint and several liability

Maine
85: med mal structured settlements
85: med mal contingency fees
89: med mal collateral source rule

Maryland
86: collateral source rule
86: cap, noneconomic

86: structured settlements
05: cap, noneconomic (lowered for med mal)

Pre-1985: collateral source rule
86: cap, noneconomic
86: structured settlements

Massachusetts
86: med mal cap, noneconomic (with exceptions)
86: med mal collateral source rule
86: med mal contingency fees

Michigan
86: med mal cap, noneconomic
86: collateral source rule
86: structured settlements
87: joint and several liability
93: med mal cap, noneconomic
95: joint and several liability

Minnesota
86: cap, noneconomic (repealed in 90)
86: collateral source rule
88: joint and several liability
03: joint and several liability

Mississippi
89: joint and several liability
02: med mal cap, noneconomic
02: med mal joint and several liability
04: med mal cap, noneconomic
04: punitive cap
04: joint and several liability

Missouri
86: med mal cap, noneconomic
86: med mal structured settlements
87: collateral source rule
87: joint and several liability
05: collateral source rule
05: joint and several liability
05: med mal cap, noneconomic (lowered) (declared unconstitutional in 12)
05: med mal joint and several
05: med mal structured settlements
05: punitive cap (declared unconstitutional in 14)
15: med mal cap, noneconomic

Montana:
87: joint and several liability (declared unconstitutional in part in 94)
87: collateral source rule
95: med mal cap, noneconomic
95: med mal structured settlements
95: joint and several liability (response to 94 court decision)
03: punitive cap

Nebraska
Pre-1985: collateral source med mal cap, total
92: joint and several liability

Nevada
Pre-1985: med mal collateral source rule; joint and several liability
87: joint and several liability (with exceptions)
89: punitive cap
02: med mal cap, noneconomic
02: joint and several liability
02: med mal joint and several liability
04: med mal joint and several liability (initiative)
04: med mal cap, noneconomic (initiative)
04: med mal joint and several liability (initiative)
04: med mal structured settlements (initiative)
04: med mal contingency fees (initiative)

New Hampshire
Pre-1985: med mal cap, noneconomic (declared unconstitutional in 80); med mal collateral source rule (declared unconstitutional in 80); med mal contingency fees (declared unconstitutional in 80)
86: cap, noneconomic (declared unconstitutional in 91)
86: punitive damages (abolished)
89: joint and several liability

New Jersey
Pre-1985: contingency fees
87: joint and several liability
87: collateral source rule
95: punitive cap
95: joint and several liability

New Mexico
Pre-1985: med mal cap, total (with exceptions)
87: joint and several liability (codified common law)
92: med mal structured settlements

New York
86: joint and several liability
86: collateral source rule

86: structured settlements
86: med mal contingency fees
03: structured settlements (response to court decision)

North Carolina
95: punitive cap
11: collateral source rule
11: med mal cap, noneconomic (with exceptions)

North Dakota
Pre-1985: med mal collateral source; med mal cap (declared unconstitutional in 79)
87: joint and several liability
87: collateral source rule
87: structured settlements
93: punitive cap
95: med mal cap, noneconomic

Ohio
Pre-1985: med mal cap, total (declared unconstitutional in 91)
87: joint and several liability
87: med mal structured settlements (declared unconstitutional in 94)
87: collateral source rule (declared unconstitutional in 94)
96: cap, noneconomic (declared unconstitutional in 99)
96: joint and several liability (declared unconstitutional in 99)
96: punitive cap (declared unconstitutional in 99)
96: collateral source rule (declared unconstitutional in 99)
03: med mal cap, noneconomic
03: joint and several liability
03: med mal collateral source rule
03: med mal structured settlements

Oklahoma:
Pre-1985: joint and several liability
95: punitive cap
03: med mal cap, non-economic (with exceptions)
03: med mal collateral source
04: med mal cap, non-economic (expanded)
04: joint and several liability
09: joint and several liability (declared unconstitutional 13)
09: product liability defenses (declared unconstitutional 13)
11: cap, non-economic (with exceptions)
11: joint and several liability
11: structured settlements
11: collateral source rule

Oregon
87: cap, noneconomic (declared unconstitutional in 99, reversed in 16)
87: joint and several liability

87: med mal punitive cap (abolished against doctors)
87: collateral source rule
95: joint and several liability

Pennsylvania
Pre-1985: med mal collateral source rule; contingency fees (declared unconstitutional in 84)
96: med mal punitive cap
02: joint and several liability (declared unconstitutional in 05)
02: med mal collateral source rule
02: med mal structured settlements
11: joint and several liability

Rhode Island
86: med mal collateral source rule (declared unconstitutional 01)

South Carolina
05: joint and several liability
05: med mal cap, noneconomic
11: punitive cap

South Dakota
Pre-1985: med mal collateral source rule; med mal cap, noneconomic
86: structured settlements
86: med mal cap, general (declared unconstitutional in 96 reverting law to earlier cap)
87: joint and several liability

Tennessee
Pre-1985: med mal collateral source rule
11: punitive cap
11: cap, noneconomic
13: joint and several liability

Texas
Pre-1985: med mal cap, total except medical costs (declared unconstitutional in 88)
87: joint and several liability
87: punitive cap
95: joint and several liability
95: punitive cap
03: joint and several liability
03: med mal cap, noneconomic
03: med mal structured settlements

Utah
85: med mal collateral source rule
86: med mal cap, noneconomic
86: joint and several liability
86: med mal structured settlements
99: joint and several liability

10: med mal cap, noneconomic (adjusted)

Vermont:
Pre-1985: joint and several liability

Virginia
Pre-1985: med mal cap, total
87: med mal (children injured at birth, no right to sue, no noneconomic or punitive damages)
87: punitive cap

Washington
Pre-1985: med mal collateral source rule,
86: cap, noneconomic (declared unconstitutional in 89)
86: joint and several liability (with exceptions)
86: structured settlements
06: med mal collateral source rule

West Virginia
86: med mal cap, noneconomic
86: med mal joint and several liability
03: med mal cap, noneconomic
03: med mal joint and several liability
03: med mal collateral source
05: joint and several liability
15: med mal cap, noneconomic
15: joint several liability
15: punitive cap

Wisconsin
86: med mal cap, noneconomic (expired 91)
86: med mal contingency fees
95: med mal cap, noneconomic (declared unconstitutional in 05)
95: joint and several liability
95: med mal structured settlements
95: med mal collateral source rule
06: med mal cap, noneconomic
11: punitives cap
11: joint and several liability

Wyoming
86: joint and several liability