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CENTER FOR JUSTICE &
DEMOCRACY
NEWS

Dear Friend,

We are thrilled to tell you about a CJ&D's brand new partnership with New York Law School! This is an exciting collaboration that will significantly enhance CJ&D's work furthering public appreciation for tort law and the civil justice system.

Under this partnership, CJ&D will continue all of its current advocacy work as the only national consumer organization in the country exclusively dedicated to protecting the civil justice system, with its new official headquarters at NYLS. We will continue releasing studies, White Papers and fact sheets on civil justice issues, presenting testimony before Congress and state legislatures, and helping to organize events advocating the rights of consumers and patients.

In addition, we see this as a wonderful opportunity for students to learn about issues affecting access to the civil courts, how civil justice issues interact with the advocacy world, and about the vital work of trial lawyers.

We hope you are excited about this as we are! Please contact us for more information. We look forward to a long and successful partnership with NYLS!

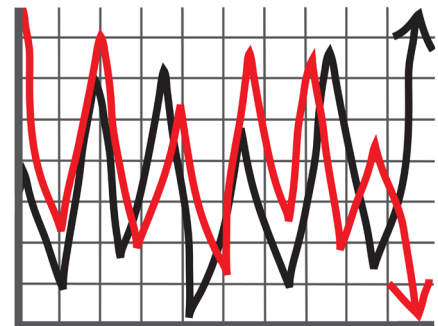
Sincerely,
Joanne Doroshov
Executive Director

IN THIS ISSUE: CIVIL JUSTICE AND BUDGET DEFICITS

CIVIL LAWSUITS DON'T INCREASE BUDGET DEFICITS

Speaking before the Citizens Budget Commission on September 23, 2011, Michael A. Cardozo, New York City's corporation counsel, proposed ways to save the city money. He called for, among other things, "caps" on compensation for people killed or injured due to negligence in city hospitals and other city misconduct. "In a time of financial crisis and budgetary cuts, \$561 million is not just a huge number," he said. "It represents an unacceptable trade-off in favor of individual plaintiffs at the expense of providing needed services to New Yorkers."

What Cardozo failed to mention is that the largest portions of total payouts against the city have been for claims against its police (\$135.8 million, which includes \$56.4 for excessive force and false arrest) and hospitals (\$134.4 million), where patient safety efforts remain abysmal and promises only to get worse now that all state hospitals will no longer be accountable for causing brain



damage in newborns. And here's the biggest irony. Reports the September 23, 2011 *New York Times City Room Blog*, "Mr. Cardozo also pointed to the city's own use of lawsuits to generate revenue," winning a "\$104 million verdict against Exxon Mobil for allowing a gasoline additive to infect groundwater in Queens," "\$9.5 million from Amtrak for failing to reimburse the city for the cost of fixing two bridges" and "\$8 million from the state for improperly charging the city for Medicaid expenditures." Apparently to Car-

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CIVIL LAWSUITS DO NOT COST JOBS

Unsafe workplaces are a huge strain on our economy. According to a February 2011 National Institute for Occupational Safety and Health (NIOSH) report, "[b]etween 1992 and 2002, there were 64,333 civilian workers who died from injuries sustained while working in the U.S., generating a total societal cost of over \$53 billion." As the American Society of Safety Engineers explained in a February 4, 2011 letter to U.S. House Oversight and Government Reform Committee Chair Darrell Issa (R-Cal.), "If this nation is to improve its competitiveness in world markets, the need to address costs associated with unsafe workplaces cannot be overlooked. New National Institute for

Occupational Safety and Health (NIOSH) research...makes that need perfectly clear...."

An earlier study by NIOSH Director of Education and Information Division, Paul A. Schulte, which examined occupational injury and illness data from 1990 through June 2005, put the financial burden even higher—between \$128 and \$155 billion—costs which he called "significant but underestimated."

Other recent data confirm the enormous costs of workplace illness and injury:

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Occupational Safety and Health Administration. As reported on the agency's website, "Businesses spend \$170 billion a year on costs associated with occupational injuries and illnesses," with "[l]ost productivity from injuries and illnesses costing companies \$60 billion each year."

Liberty Mutual Research Institute for Safety. According to the company's *2010 Workplace Safety Index*, "[T]he cost of the most disabling workplace injuries and illnesses in 2008 amounted to \$53.42 billion in direct U.S. workers compensation costs, averaging more than one billion dollars per week."

Bureau of Labor Statistics. In 2009, there were 3.3 million non-fatal occupational injury and illness cases reported by private U.S. industry, with over one-half of cases requiring days away from work, job transfer or restriction.

National Safety Council. Workplace deaths and injuries cost the nation \$142.2 billion in 2004, with a total of 120 million days lost due to such deaths and injuries.

"Tort reform" groups like the U.S. Chamber of Commerce, the National Federation of Independent Businesses (NFIB) and the American Tort Reform Association have turned a blind eye to these statistics, which show the glaring need for greater workplace safety, opting instead to exploit the country's economic crisis through a misleading PR and lobbying

campaign that equates liability limits for corporate wrongdoing with job creation. More specifically, these groups claim that lawsuits by consumers are creating economic "crises" that are wiping out small businesses, making "tort reform" critical to small business growth and survival.

No credible study has found a link between litigation by consumers against corporations and job loss. As the Economic Policy Institute concluded in a comprehensive May 2005 report: "The economic case made by critics for changing the U.S. tort law system can only be called frivolous. ...With respect to job creation in particular, significant tort law change would be more likely to slow employment growth than to promote it. Endlessly repeating that so-called 'tort reform' will create jobs does not make it true."

In fact, when small businesses themselves, as opposed to their lobbyists and PR spokespeople, are asked about their main concerns, liability issues rank far below other matters of greater importance, if at all. Take the National Small Business Association's (NSBA's) 2011 mid-year survey of small business members from every industry in every state in the nation, where neither lawsuits nor liability was mentioned as a significant challenge to their future growth and survival. The three most significant challenges: economic uncertainty, decline in customer spending and cost of health insurance. Moreover, when asked which

issues were most important for policymakers to address, small businesses ranked reducing the national deficit, reducing the tax burden and reigning in the costs of health care reform as top priorities. And in March 2011, NSBA released a top 10 list of members' priority issues for the 112th Congress, a list which did not include lawsuits or liability.

Similarly, in NFIB's most recent "Small Business Problems & Priorities" survey, "Cost and Frequency of Lawsuits/Threatened Lawsuits" ranked 65 out of a possible 75 matters that small businesses care about, just below "Solid and Hazardous Waste Disposal." This ranking is consistent with earlier NFIB surveys, where issues such as workforce development, healthcare and taxes, not civil lawsuits, are what businesses believe challenge their growth and viability.

So what's going on here? As a July 9, 2007 *Business Week* article put it, corporate front-groups are "trying to co-opt small business to advance a Big Business agenda," namely insulation from legal accountability for consumer harm. This "tort reform" push does not sit well with many small-business owners, who can find themselves at the plaintiff's table against big business. "Very often it's small companies being harmed by larger corporations and needing to seek redress through the civil justice system," American Independent Business Alliance co-founder Jeff Milchen told *Business Week*.

THE REAL COSTS OF THE TORT SYSTEM

On December 2010, insurance industry-consulting firm Towers Watson issued a "study" that estimated what it calls the overall "cost" of the U.S. tort system in 2009. Towers put this figure at a whopping \$248.1 billion, saying it translates to \$808 per person. This number is the firm's latest "tort cost" calculation, which the company has issued annually for over two decades and "tort reformers" use to attack the nation's civil justice system.

Even with all its flaws, the Towers report, *2010 Update on U.S. Tort Cost Trends*, provides no support for claims that "tort costs" are growing beyond what would be expected, much less any problem or crisis. More specifically, the "study" found that over the last 19 years, tort system costs grew at only 3.3 percent annually, which is less than the GDP (4.6 percent). Although "tort costs" by Towers's definition are not increasing, that does not excuse the multitude of prob-

lems with its yearly reports, which have been effectively debunked over and over again.

For example, a March 2006 *Wall Street Journal* article said, "...[C]ritics of past years' studies — and there are many — say the number and the projections that come with it are deeply flawed. For instance, they include payments that don't involve the legal system at all.

Say somebody smashes his car into the back of your new SUV and his insurance company sends you a \$5,000 check to fix the damage. That gets counted as a tort cost in [Towers's] number. Critics say it's just a transfer payment from somebody who wasn't driving carefully to somebody who has been legitimately wronged. How is that evidence of a system run amok?"

Similarly, a May 2005 study by the Economic Policy Institute said, "Any work that relies on [Towers's] seriously flawed reports is, to that extent, also unreliable. An example of work that is largely dependent on [Towers'] flawed reports is the 2004 Economic Report of the President, which is published by the president's three-member Council of Economic Advisors (CEA). In 2004 the CEA devoted nearly 20 pages of its Economic Report to the tort system, relying extensively — and mistakenly

— on [Towers's] flawed estimates for its facts."

More recently, in January 2010, Americans for Insurance Reform (AIR), a coalition of over 100 public interest groups from around the country including CJ&D, issued its latest detailed analysis of why Towers's numbers are wrong and inappropriate for demonstrating either total costs of the U.S. tort system or cost trends over time. Among AIR's findings:

- Towers's figures have nothing to do with the actual costs of the legal system, such as jury verdicts, settlements, lawyers' fees or court costs.
- Towers only examines insurance losses whether or not a lawsuit was filed, insurers' "guess" of what future losses could be and all the industry's bloated overhead (e.g.,

executive salaries and bonuses, lobbying costs, private jets).

- Towers cites itself for much of the data and fails to disclose sources or provide explanations.
- Towers entirely ignores the amount of money saved by the civil justice system, which provides the financial incentive for companies and institutions to act more safely.

These criticisms are just as relevant today. For that reason, policymakers, opinion leaders and taxpayers should be extremely wary of Towers's latest "tort cost" report, which in addition to being misleading and shoddy, gives no credence to the notion that our civil justice system is out of line. If anything is out of line, it's Towers Watson.

OTHER STATES THERE IS NO "TORT LITIGATION CRISIS"

Tort cases represent a small percentage of civil caseloads. According to the National Center for State Courts (NCSC), in 2008, monetary disputes (contract and small claims cases) combined for 73 percent of all civil caseloads in seven states reporting, while tort cases represented 4.4 percent in those states. In 2007, tort filings were equally low as a percentage of civil caseloads vis-à-vis monetary disputes in the same seven states — 6 percent vs. 69 percent, respectively.

Tort caseloads are declining. From 2007 to 2008, tort caseloads fell by 6 percent in 13 general jurisdiction courts reporting, while contract litigation (often businesses suing businesses) increased by 27 percent. Similarly, long-term NCSC data show tort caseloads experiencing a 25 percent decline in those courts from 1999 to 2008, with contract caseloads increasing by 63 percent in the same courts during the same period.

Contract cases, not tort cases, are clogging the courts. Based on 2008 data from eleven states, NCSC researchers found that "[w]hen tort and contract caseloads are examined side by side, contracts dominate in every jurisdiction. With the overall and median proportion of contracts in these 11 states above 90 percent, and given their growing numbers, contract case processing is doubtless an increasing concern for all state courts." According to the authors, "Increasing numbers of contract cases, already known to comprise the preponderance of civil caseloads, appear to be having a neg-

ative effect on some courts' civil clearance rates. Of the 28 unified and general jurisdiction courts shown below, only 7 have achieved rates at or above 100 percent."

Moreover, "contract clearance rates are consistently lower than those for tort caseloads." NCSC data from 2008 show 22 unified and general jurisdiction courts were "more successful clearing the smaller (although sometimes more complex) tort caseloads, with medians above 100 percent," as compared to the median clearance rates for the larger contract caseloads in both types of courts. As the researchers conclude, "Examination of two of the aforementioned components of civil caseloads — contract and tort cases — confirms that increasing contract caseloads may be hampering courts' efforts to clear civil cases."

Medical malpractice claims are infrequent and continue to decline. In 2008, incoming med mal cases averaged 2.8 percent of the tort caseload in nine states reporting. As NCSC researchers put it, "Just as torts typically represent a single-digit proportion of civil caseloads, medical malpractice cases comprise a similar proportion of torts. Despite their continued notoriety, rarely does a medical malpractice caseload exceed a few hundred cases in any one state in one year." What's more, "[l]ike other torts, medical malpractice claims continue to decline," falling by 15 percent from 1999 to 2008 in the general jurisdiction courts of 7 states reporting.

CIVIL LAWSUITS DON'T INCREASE BUDGET DEFICITS *continued...*

dozo, civil lawsuits achieve justice when the city has been wronged but not when pursued by victims hurt by the city's own wrongdoing.

Throughout U.S. history, a critical function of our civil justice system has been deterrence of unsafe practices through imposition of financial liability upon wrongdoers. As conservative economic theorist and Judge Richard Posner has written, the tort system's economic function is deterrence of noncost-justified accidents, with tort law creating economic incentives for "allocation of resources to safety." Shirley Svorny, adjunct scholar at the conservative Cato Institute, recently wrote that even in the medical field, these cost incentives work and, "Legislators who see mandatory liability caps as a cost-containment tool should look elsewhere."

The amount of money the civil justice system saves local, state and federal economies in terms of injuries and deaths prevented due to safer products and practices, health care costs not incurred, wages not lost, etc., is incalculable but significant. Some have estimated this total savings to be perhaps a trillion dollars a year.

Yet tort reformers and their allies continue to ignore the tort system's cost-saving function, seizing upon the current economic climate as a pretext for restricting the legal rights of injured consumers. Eliminating injured patients' access to the courts is one of the top items on their agenda. For example, in September 2011, the Health Coalition on Liability and Access (HCLA) —whose members include insurance companies, medical associations, the American Tort Reform Association and other corporate front groups —urged the congressional deficit reduction Super Committee to put medical liability restrictions, including a \$250,000 cap on non-economic damages, in its deficit reduction plan.

As the Center for Justice & Democracy and 20 other major consumer and patient safety groups explained in an

October 2011 letter to Super Committee Co-Chairs U.S. Rep. Jeb Hensarling (R-Tex.) and U.S. Sen. Patty Murray (D-Wash.), such extreme proposals do little to reduce total health care spending. This was the finding of a March 2011 Congressional Budget Office (CBO) analysis, which put budget savings for liability limits, like federal "caps" on damages for injured patients, at a mere 0.4 percent.

Moreover, the consumer-patient safety coalition argued, even in discovering this miniscule amount, CBO ignored factors that would not only lower the figure but likely increase the deficit should the proposed "tort reforms" become law. First, CBO's cost calculations acknowledged that limiting liability meant "less accountable and more unsafe hospitals, and with accompanying increases in cost and physician utilization inherent in caring for newly maimed patients" but brushed aside its fiscal impact. There will be new burdens on Medicaid and Medicare as well, none of which were considered by CBO. Patients who are brain-damaged, mutilated or rendered paraplegic as a result of medical negligence and cannot obtain compensation from culpable parties through the tort system may be forced to turn elsewhere, like taxpayer-funded programs such as Medicaid and Medicare. What's more, whenever there is a successful medical malpractice lawsuit, Medicare and Medicaid can both claim either liens or subrogation interests in whatever the patient recovers, reimbursing the government for some of the patient's health care expenditures. Without the lawsuit, Medicare and Medicaid will lose funds that the government would otherwise be able to recoup. Again, none of these lost funds was factored in by CBO.

Cutting off injured patients' legal rights is clearly not the solution. Rather the focus should be on avoidance of medical errors, which costs taxpayers billions of dollars every year. According to a June 2010 report commissioned by the Society of Actuaries and carried out by the actuarial and consulting firm Milliman, an

estimated 1.5 million preventable medical errors cost the U.S. economy \$19.5 billion in 2008. This \$19.5 billion price tag is consistent with an earlier Institute of Medicine study, which put the total national costs of preventable adverse events (lost income, lost household production, disability and health care costs) somewhere between \$17 billion and \$29 billion annually. The Milliman report also found that the 1.5 million errors "resulted in over 2,500 excess deaths and over 10 million excess days missed from work missed due to short-term disability." As the authors point out, all medical error, mortality and lost productivity figures in the Milliman study come from limited data, meaning that the firm's calculations significantly underestimate the actual costs of avoidable medical errors.

One thing is clear: Tort restrictions will do nothing but shift the financial burden from negligent providers onto taxpayers and enable dangerous doctors, hospitals and other medical wrongdoers to be more unsafe, costing us all even more money.



185 West Broadway
New York, NY 10013
Phone: 212.431.2882
centerjd@centerjd.org
<http://centerjd.org>

IMPACT

Editor:
Daniel Albanese

Written By:
Emily Gottlieb

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