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## “We The Plaintiffs” – A Retort

A chart is making its way around the Internet called “We The Plaintiffs ... A Closer Look at America’s Obsession with Lawsuits.” It is written by – or was given to – a company named “eLocalLawyers.”

The chart is heavy on graphics and low on truth. For a truthful perspective on “tort” (or personal injury) litigation today, a far better source is the impeccably researched academic study, “The empirical effects of tort reform,” by Cornell Law School Professor Theodore Eisenberg, a leading authority on the use of empirical analysis in legal scholarship.<sup>1</sup> Eisenberg says,

Through advertising and propagation of incomplete or distorted information, interest groups such as the U.S. Chamber of Commerce and the American Medical Association obscure the status of both the legal system and primary actors’ behavior.

“We The Plaintiffs” joins this club. Here’s what is really true about the U.S. civil justice system.

**The only “sue-happy” people in this country are banks and debt collectors.**

- According to the most recent data from the National Center for State Courts (NCSC), tort [*i.e.*, personal injury] cases represent only 5% of all incoming civil cases today.<sup>2</sup> On the other hand, nearly 70% of civil caseloads are contract-based.<sup>3</sup> Why so many contract

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<sup>1</sup> Theodore Eisenberg, “The Empirical Effects of Tort Reform” (April 1, 2012). *Research Handbook on the Economics of Torts*, Forthcoming; Cornell Legal Studies Research Paper No. 12-26, <http://ssrn.com/abstract=2032740>.

<sup>2</sup> National Center for State Courts, *Examining the Work of State Courts: An Analysis of 2009 State Court Caseloads* (2011) at 11, <http://www.courtstatistics.org/Other-Pages/CSP2009.aspx>; National Center for State Courts, “Contract-Based Litigation Represents 70 Percent of Civil Caseloads,” <http://www.courtstatistics.org/Civil/CivilContract.aspx>. Tort cases have consistently been a small percentage of incoming civil cases: 6 percent in 2007, 4.4 percent in 2008 and 5 percent in 2009. National Center for State Courts, *Examining the Work of State Courts: An Analysis of 2009 State Court Caseloads* (2011) at 11, <http://www.courtstatistics.org/Other-Pages/CSP2009.aspx>; National Center for State Courts, “Contract-Based Litigation Represents 70 Percent of Civil Caseloads,” <http://www.courtstatistics.org/Civil/CivilContract.aspx>; National Center for State Courts, *Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads* (2010) at 26, <http://www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/EWSC-2008-Online.ashx>.

<sup>3</sup> National Center for State Courts, *Examining the Work of State Courts: An Analysis of 2009 State Court Caseloads* (2011) at 11, <http://www.courtstatistics.org/Other-Pages/CSP2009.aspx>; National Center for State Courts,

disputes? It is worth looking at Kansas, a state that has adopted statistical reporting which allows examination of its court data.<sup>4</sup> In Kansas, only 2% of incoming civil cases involved torts, yet a whopping 80% of incoming civil cases involved contract disputes.<sup>5</sup> Of that number, fully 75% of these were debt collection cases; 7% were mortgage foreclosures.<sup>6</sup>

- According to an extensive study by the Rand Institute for Civil Justice, for the typical injury, “the injured person does not even consider the notion of seeking compensation from some other person or entity....”<sup>7</sup> Only 10 percent ever file a claim, which includes informal demands and insurance claims.<sup>8</sup> *Only two percent file a lawsuit.*<sup>9</sup> The study concludes that these statistics are at odds with any notion that we live in an overly litigious society.<sup>10</sup>

### Medical malpractice cases.

- Each year, hundreds of thousands of Americans are killed or injured by avoidable medical errors. According to a November 2010 study by the Office of Inspector General of the U.S. Department of Health and Human Services, about 1 in 7 patients in hospitals experience a serious medical error, 44 percent of which are *preventable*.<sup>11</sup> Despite the amount of preventable medical negligence nationwide, very few injured patients file suit. According to the 1990 Harvard Medical Practice Study, eight times as many patients are injured by medical malpractice as ever file a claim; 16 times as many suffer injuries as receive any compensation.<sup>12</sup>
- According to an April 2011 National Center for State Courts report, “despite the widespread prevalence of medical negligence,”<sup>13</sup> in 2008 medical malpractice

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“Contract-Based Litigation Represents 70 Percent of Civil Caseloads,”

<http://www.courtstatistics.org/Civil/CivilContract.aspx>.

<sup>4</sup> National Center for State Courts, “Contract Caseload Composition in Kansas,”

<http://www.courtstatistics.org/Civil/CivilContractComposition.aspx>.

<sup>5</sup> National Center for State Courts, *Examining the Work of State Courts: An Analysis of 2009 State Court Caseloads* (2011) at 11, <http://www.courtstatistics.org/Other-Pages/CSP2009.aspx>; National Center for State Courts,

“Contract-Based Litigation Represents 70 Percent of Civil Caseloads,”

<http://www.courtstatistics.org/Civil/CivilContract.aspx>.

<sup>6</sup> National Center for State Courts, “Contract Caseload Composition in Kansas,”

<http://www.courtstatistics.org/Civil/CivilContractComposition.aspx>.

<sup>7</sup> Rand Institute for Civil Justice, *Compensation for Accidental Injuries in the United States* (1991) at 129,

<http://www.rand.org/pubs/reports/R3999.html>.

<sup>8</sup> *Id.* at 120-121, 175, <http://www.rand.org/pubs/reports/R3999.html>.

<sup>9</sup> *Id.* at 122, <http://www.rand.org/pubs/reports/R3999.html>.

<sup>10</sup> *Id.* at 129, <http://www.rand.org/pubs/reports/R3999.html>.

<sup>11</sup> U.S. Department of Health and Human Services, Office of the Inspector General, *Adverse Events in Hospitals: National Incidence Among Medicare Beneficiaries* (November 2010) at i-ii, <http://oig.hhs.gov/oei/reports/oei-06-09-00090.pdf>.

<sup>12</sup> Brennan et al., “Incidence of Adverse Events and Negligence in Hospitalized Patients — Results of the Harvard Medical Practice Study I,” *New England Journal of Medicine* (1991),

<http://www.nejm.org/doi/full/10.1056/NEJM199102073240604#t=article+Results>.

<sup>13</sup> Robert C. LaFountain and Cynthia G. Lee, “Medical Malpractice Litigation in State Courts” (April 2011) at 2, [www.courtstatistics.org/~media/Microsites/Files/CSP/Highlights/18\\_1\\_Medical\\_Malpractice\\_In\\_State\\_Courts.ashx](http://www.courtstatistics.org/~media/Microsites/Files/CSP/Highlights/18_1_Medical_Malpractice_In_State_Courts.ashx)

case filings “represented well under 2 percent of all incoming civil cases, and less than 8 percent of incoming tort cases”<sup>14</sup> in the general jurisdiction courts of 12 states reporting. In an October 2011 study, researchers found that from 2000 to 2009, med mal filings fell by 18 percent in the general jurisdiction courts of seven states reporting.<sup>15</sup> In five of those states, filings fell by between 18 and 42 percent.<sup>16</sup> These findings are consistent with the April 2011 National Center for State Courts report, which concluded that “[c]ontrary to the claims of some tort reform advocates, medical malpractice caseloads have been decreasing over time.”<sup>17</sup> And according to Public Citizen, “By almost any measure, medical malpractice payments were at their lowest level on record in 2011.... Both the number of medical malpractice payments made on behalf of doctors and the inflation-adjusted value of such payments were at their lowest levels since 1991, the earliest full year in which the government collected such data.”<sup>18</sup>

- And just to emphasize – these claims are not frivolous. As the Harvard School of Public Health put it in a 2006 study, “[P]ortraits of a malpractice system that is stricken with frivolous litigation are overblown.”<sup>19</sup> Specifically, “Some critics have suggested that the malpractice system is inundated with groundless lawsuits, and that whether a plaintiff recovers money is like a random ‘lottery,’ virtually unrelated to whether the claim has merit,” said lead author David Studdert. “These findings cast doubt on that view by showing that most malpractice claims involve medical error and serious injury, and that claims with merit are far more likely to be paid than claims without merit.”<sup>20</sup>

**Figures claiming the “cost” of our tort system is \$251 billion, or 2.2% of our GDP, or \$808 per person, come from a widely-discredited report by an insurance industry consulting firm.**

- There is only one source for numbers like this – insurance consulting firm Towers Watson, which issues an annual report called “Tort System Costs.” These numbers have been criticized and debunked for years, including in the *Wall Street Journal*,<sup>21</sup> *Business Week*<sup>22</sup> and *Congressional Quarterly*,<sup>23</sup> as well as by the Economic Policy Institute<sup>24</sup> and

<sup>14</sup> Robert C. LaFountain and Cynthia G. Lee, “Medical Malpractice Litigation in State Courts” (April 2011) at 2, [www.courtstatistics.org/~media/Microsites/Files/CSP/Highlights/18\\_1\\_Medical\\_Malpractice\\_In\\_State\\_Courts.ashx](http://www.courtstatistics.org/~media/Microsites/Files/CSP/Highlights/18_1_Medical_Malpractice_In_State_Courts.ashx)

<sup>15</sup> National Center for State Courts, “Tort Reforms Can Shape Medical Malpractice Caseload Trends,” <http://www.courtstatistics.org/Civil/CivilMedicalMalpractice.aspx>.

<sup>16</sup> National Center for State Courts, “Tort Reforms Can Shape Medical Malpractice Caseload Trends,” <http://www.courtstatistics.org/Civil/CivilMedicalMalpractice.aspx>.

<sup>17</sup> Robert C. LaFountain and Cynthia G. Lee, “Medical Malpractice Litigation in State Courts” (April 2011) at 3, [www.courtstatistics.org/~media/Microsites/Files/CSP/Highlights/18\\_1\\_Medical\\_Malpractice\\_In\\_State\\_Courts.ashx](http://www.courtstatistics.org/~media/Microsites/Files/CSP/Highlights/18_1_Medical_Malpractice_In_State_Courts.ashx)

<sup>18</sup> Public Citizen, “Medical Malpractice Payments Sunk to Record Low in 2011,” July 11, 2012, <http://www.citizen.org/npdb-report-2012>.

<sup>19</sup> David M. Studdert et al., “Claims, Errors, and Compensation Payments in Medical Malpractice Litigation,” *New England Journal of Medicine* (2006), <http://www.nejm.org/doi/full/10.1056/NEJMsa054479#t=article>.

<sup>20</sup> Harvard School of Public Health, “Study Casts Doubt on Claims That the Medical Malpractice System Is Plagued By Frivolous Lawsuits,” May 10, 2006, <http://www.hsph.harvard.edu/news/press-releases/2006-releases/press05102006.html>.

<sup>21</sup> Liam Plevin, “Math Divides Critics as Startling Toll of Torts is Added Up,” *Wall Street Journal*, March 13, 2006.

<sup>22</sup> Editorial, “How Partisanship Puts Big Solutions Out of Reach,” *Business Week*, March 14, 2005.

academics like Daniel Capra, Philip Reed Professor of Civil Justice Reform at Fordham University School of Law, who used words like “folly,” “disingenuous,” “nothing but absurd and self-serving overkill” and “vastly overinclusive” to describe them.<sup>25</sup>

- Towers Watson data actually have no connection whatsoever to the costs of lawsuits, litigation or the courts. By its own admission, Towers Watson does not examine jury verdicts, settlements, lawyers’ fees, court costs or any actual costs of what might generally be considered the “tort” system. It examines only insurance losses, *i.e.*, the kinds of funds that companies pay people who file insurance claims (like fender-benders) – *even if no lawsuit was filed!* They count this as a “cost” even though insurance companies have collected billions of dollars in premiums from everyday Americans to pay these claims. Moreover and incredibly, included in this figure are billions of dollars in bloated insurance industry overhead (salaries, bonuses, lobbying costs, perks like private jets and country club memberships, advertising expenses, rent and utilities for insurance company headquarters and commission paid to agents). This figure also entirely ignores the fact that “much of the unnecessary cost in the system results from corporate wrongdoing, causing injury, and ‘hardball’ litigation tactics of insurance companies that deny legitimate claims.”<sup>26</sup> What’s more, it ignores the amount of money the civil justice system saves the economy in terms of injuries and deaths that are prevented due to safer products and practices, wages not lost, health care expenses not incurred and so on.

**Most lawyers in America do not represent everyday citizens who sue; they represent corporations who either fight them or fight each other.**

- In their book, *Chicago Lawyers: The Social Structure of the Bar* (1982), authors John P. Heinz and Edward O. Laumann estimated that in 1975 “more than half (53 percent) of the total effort of Chicago’s bar was devoted to the corporate client sector, and a smaller but still substantial proportion (40 percent) was expended on the personal client sector. When the study was replicated twenty years later, the researchers found that about 61% of the total effort of all Chicago lawyers was devoted to the corporate sector and only 29% to the personal/small business sector. The number of lawyers in Chicago had doubled meant that the total effort devoted to the personal sector had increased by 45% but the corporate sector grew by 126%.”<sup>27</sup>
- As University of Wisconsin Law Professor Marc Galanter has written, “The United States is a highly legalized society that relies on law and courts to do many things that

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<sup>23</sup> “‘Tort Reform’ Battle: A Simple Case of Complexity,” *Congressional Quarterly Weekly*, January 29, 2005.

<sup>24</sup> Economic Policy Institute, “The Frivolous Case for Tort Law Change” (May 2005), <http://www.epi.org/publication/bp157/>.

<sup>25</sup> Daniel Capra, “An Accident and a Dream: Problems With the Latest Attack on the Civil Justice System,” 20 *Pace L. Rev.* 339, 346-7 (2000), [digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1272&context=plr](http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1272&context=plr).

<sup>26</sup> Daniel Capra, “An Accident and a Dream: Problems With the Latest Attack on the Civil Justice System,” 20 *Pace L. Rev.* 339, 342 (2000), [digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1272&context=plr](http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1272&context=plr).

<sup>27</sup> Marc Galanter, “An Oil Strike in Hell, Contemporary Legends About the Civil Justice System,” 40 *Arizona L. Rev.* 717, 718-719 n. 8 (1998)(citations omitted), [marcgalanter.net/Documents/anoilstrikeinhell.pdf](http://marcgalanter.net/Documents/anoilstrikeinhell.pdf).

other industrial democracies do differently [like provide universal health care]. And it is worth noting that one realm in which this country has remained the leading exporter is what we may call the technology of doing law – constitutionalism, judicial enforcement of rights, organization of law firms, alternative dispute resolution, public interest law. For all their admitted flaws, American legal institutions provide influential (and sometimes inspiring) models for the governance of business transactions, the processing of disputes, and the protection of citizens in much of the world.”<sup>28</sup>

**Slanted corporate “polls,” which say Americans *want* to relinquish their own legal rights, are biased and inaccurate; truthful surveys *even of small businesses* show a completely different picture.**

- In 2008, the National Federation of Independent Businesses, a “small business” lobby group that is one of the U.S Chamber of Commerce’s closest allies in their fight to limit corporate liability for wrongdoing, released a survey of its members called *Small Business Problems & Priorities*.<sup>29</sup> The survey listed 75 issues and asked members to indicate which were most important to them. Out of 75 issues, “Cost and Frequency of Lawsuits/Threatened Lawsuits” ranked #65, just below “Solid and Hazardous Waste Disposal.”<sup>30</sup>
- In the 1990s, pollster John Zogby conducted a poll for New York’s major business “tort reform” coalition, New Yorkers for Civil Justice Reform, which supposedly showed widespread support for “tort reform.” Richard Behn, who headed another national polling organization, took a look at this poll and said, “Although John Zogby is a respected pollster, the survey he prepared for New Yorkers for Civil Justice Reform is clearly designed to test voter response to a set of arguments designed to enhance the positions of New Yorkers for Civil Justice Reform. There are no counter arguments included in the poll to provide any balance to these statements.” Moreover, he called the polls “incendiary...filled with loaded language...[an effort to] move public opinion in a particular direction advantageous to the poll sponsor.”<sup>31</sup>
- Similarly, in 1995, Frank Luntz, working for Newt Gingrich, conducted a similar “push-poll.” Luntz admitted that he had “counted people as favoring civil law reform if they accepted, in telephone polls, the statement that ‘we should stop excessive legal claims, frivolous lawsuits and overzealous lawyers.’” Diane Colasanto, former President of the American Association for Public Opinion Research, said, “You can’t measure public opinion with leading questions like these.” Similarly, Donald Ferree of the University of

<sup>28</sup> Marc Galanter, “Pick a Number, Any Number,” *American Lawyer* (April 1992), at 82, 84.

<sup>29</sup> National Federation of Independent Businesses, *Small Business Problems & Priorities* (June 2008), [www.nfib.com/Portals/0/ProblemsAndPriorities08.pdf](http://www.nfib.com/Portals/0/ProblemsAndPriorities08.pdf)

<sup>30</sup> National Federation of Independent Businesses, *Small Business Problems & Priorities* (June 2008) at 78, [www.nfib.com/Portals/0/ProblemsAndPriorities08.pdf](http://www.nfib.com/Portals/0/ProblemsAndPriorities08.pdf)

<sup>31</sup> Letter from Numbercrunchers, Inc. President Richard J. Behn to New York State Bar Association President Joshua Pruzansky, June 23, 1997.

Connecticut's Roper Center said such leading questions "sharply overstate support for the measures in question."<sup>32</sup>

**"Tort reformers" often use exaggerated or fabricated anecdotes to drive their message even though, as noted in the "We The Plaintiffs" chart, cases are thrown out!**

- Our legal system has checks and balances in place so that if a person brings a case that a judge deems frivolous, the case is thrown out. This was the outcome of most examples cited on the "We The Plaintiffs" chart. But the truth is that attorneys do not bring frivolous cases, because lawyers who represent injured people only make money if they win. Even conservatives like James Gattuso, when with the Heritage Foundation, wrote in the *Wall Street Journal* that the contingency fee system both ensures that injured persons who could not otherwise afford legal representation obtain access to the legal system and, "rather than encourage baseless lawsuits, the contingent fee actually helps screen them out of the system."<sup>33</sup> The system works. No one believes that insurance companies today are throwing money at frivolous claims.
- As described by Professors William Haltom and Michael McCann in their 2004 book *Distorting the Law; Politics, Media and the Litigation Crisis*,<sup>34</sup> business lobbies often point to some extraordinary occurrence – some exaggerated or fabricated "horror story" – to symbolize what they want to call "ordinary" about the tort system. However, descriptions of these cases are always highly misleading or wrong. Egregious examples include:
  - **Stella Awards.** This is a list of six crazy "real lawsuits" circulating around the Internet since May 2001, all of which are entirely made up. According to Snopes.com, a website that debunks urban legends, "All of the entries in the list are fabrications: a search for news stories about each of these cases failed to turn up anything, as did a search for each law case."<sup>35</sup> In 2003, *Washington Post* media columnist Howard Kurtz reported on confronting *U.S. News & World Report* owner Mort Zuckerman about referencing these fictitious cases. "Great stuff," said Kurtz after describing two of the crazy lawsuits cited by Zuckerman. "Unfortunately for Zuckerman, totally bogus. Two Web sites – StellaAwards.com and Snopes.com – say the cases...are fabricated, and no public records could be found for them. Zuckerman has plenty of company. A number of newspapers and columnists have touted the phantom cases since they surfaced in 2001 in a Canadian newspaper."<sup>36</sup>

<sup>32</sup> Frank Greve, "Pollster overstated contract's appeal," *Houston Chronicle*, November 11, 1995, [http://www.chron.com/CDA/archives/archive.mpl/1995\\_1307101/pollster-overstated-contract-s-appeal-gop-survey-n.html](http://www.chron.com/CDA/archives/archive.mpl/1995_1307101/pollster-overstated-contract-s-appeal-gop-survey-n.html).

<sup>33</sup> James Gattuso, "Don't Rush to Condemn Contingency Fees," *Wall Street Journal*, May 15, 1986.

<sup>34</sup> William Haltom and Michael McCann, *Distorting the Law; Politics, Media and the Litigation Crisis*. Chicago: University of Chicago Press (2004).

<sup>35</sup> "Stella Awards," *Snopes.com*, April 11, 2008, <http://www.snopes.com/legal/lawsuits.asp>.

<sup>36</sup> Howard Kurtz, "A Little Snag in Those Frivolous Suits; U.S. News's Examples Were 'Myths,'" *Washington Post*, June 23, 2003.

- **Newsweek Cover Story.** On December 15, 2003, *Newsweek* ran a cover story called “Lawsuit Hell,” a data-starved article based almost entirely on misreported or incompletely described anecdotes. The media watchdog organization, Fairness & Accuracy in Reporting, severely attacked the story in the March/April 2004 issue of its magazine, *Extra!*, in a story called “Trial by Anecdote; Newsweek’s ‘lawsuit explosion’ blown away by facts.” Author Neil deMause wrote that the story was “based on faulty assumptions and outright misstatements.”<sup>37</sup> *Washington Monthly* magazine also severely attacked the article’s accuracy.<sup>38</sup>

### “Loser Pays” is a Loser Idea.

“We The Plaintiffs” suggests that someone who brings a lawsuit and loses should pay the other side’s expenses. This is known as the “British rule,” which the Founding Fathers had no interest in bringing to our country. It would mean that injured people who can’t pay next month’s rent would have to pay the enormous hourly lawyers’ fees and court costs of the insurance company that they sue if they happen to lose in court. Even if injured victims have a strong legal case, they probably won’t ever bring it because of the economic devastation they might face if they lose. That is why big corporations want this law.

*July 19, 2012*

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<sup>37</sup> Neil deMause, “Trial by Anecdote; Newsweek’s ‘lawsuit explosion’ blown away by facts” (March/April 2004), <http://www.fair.org/index.php?page=1174>.

<sup>38</sup> Stephanie Mencimer, “False Alarm; How the media helps the insurance industry and the GOP promote the myth of America’s ‘lawsuit crisis,’” *Washington Monthly* (October 2004), <http://www.washingtonmonthly.com/features/2004/0410.mencimer.html>.