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**BEFORE THE HOUSE COMMITTEE ON SMALL BUSINESS**

**HEARING ON SMALL BUSINESS LITIGATION REFORM**

**July 22, 2004**

Mr. Chairman, members of the Committee, I am Joanne Doroshow, President and Executive Director of the Center for Justice & Democracy, a national public interest organization (and a small business) that is dedicated to educating the public about the importance of the civil justice system. I appreciate the opportunity to address the issue of small businesses liability, although half the bill under consideration by this committee, H.R. 2813, has nothing whatsoever to do with small businesses.

**SMALL BUSINESSES - INTRODUCTION**

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

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

If you listen to some of the lobbyists here today, they will tell you that lawsuits by consumers are creating economic "crises" that are wiping out small businesses. They tell Congress that "tort reform" legislation is needed for small businesses to survive. But as the two examples above illustrate, the notion that lawmakers must restrict the rights of injured consumers in order for

small businesses to grow or even survive in this country is one of the most sensationalized fictions driving the “tort reform” movement today.

The actions of those savvy New York politicians and the folks at Enterprise Florida reflected exactly what internal business surveys have consistently shown for years: when it comes to this country’s business climate, liability issues rank far below other matters of greater importance, like workforce, healthcare and a range of tax and regulatory issues. In fact, in the National Federation of Independent Businesses (NFIB)’s most recent poll, the issue “Cost and Frequency of Lawsuits” is ranked 64th (out of 75) of issues that are important to small businesses.<sup>1</sup> Some problems that businesses considered to be of greater concern were:

- Traffic, Parking, Highways (61st)
- Anti-Competitive Practices, e.g. Price Fixing (54th)
- Handling Business Growth (47th)
- Using Computer(s), the Internet or New Technology Effectively (45th)
- Locating Business Help When Needed (39th)

Whereas groups like the NFIB and the U.S. Chamber of Commerce have all made “tort reform” one of their top legislative priorities at the federal and state level, survey after survey shows that their members believe other issues are far more pressing for their own survival and growth. Businesses virtually always put “lawsuits” or “liability” toward the bottom of their list of concerns, if they mention it at all. (Some of these surveys are mentioned at the end of this testimony, Appendix A.) Moreover, while NFIB lobbyists are telling you one thing, their own research says another, to wit:

Job creation plans continue to exceed the high points of expansions in the 1980s and early-to-mid 1990s. Job openings are high, profit trends are favorable and capital spending is solid.... “Sales were strong, so inventory was taken off the shelves as fast as owners put it out,” said NFIB chief Economist William Dunkelberg.... [R]eports of favorable profit trends remain the best since 2000.<sup>2</sup>

### **THE FLAWED U.S. CHAMBER OF COMMERCE REPORT: *LIABILITY COSTS FOR SMALL BUSINESSES***

Every year, an insurance industry-consulting firm, Tillinghast–Towers Perrin,<sup>3</sup> estimates what it calls the overall annual “cost” of the U.S. tort system. In its 2003 report, Tillinghast put this cost at \$129 billion for “Commercial Lines.” This year, the U.S. Chamber of Commerce issued a report entitled “Liability Costs for Small Businesses” that claimed to breakdown Tillinghast’s estimate among businesses of varying sizes and finding that “the tort liability price tag for small businesses in America is \$88 billion a year.” This figure is fallacious.

First, the basic methodology behind this number is severely flawed. Tillinghast’s numbers do not examine jury verdicts, settlements, lawyers’ fees or any actual costs of what might generally be considered the legal system. Rather, Tillinghast’s numbers were calculated from total liability insurance premiums, primarily as reported by the insurance reporting firm, A.M. Best, as well as Tillinghast’s own “internal” sources.

Each year, consumer groups and many academics have criticized this methodology.<sup>4</sup> In January 2004, Americans for Insurance Reform, a coalition of over 100 public interest groups from around the country, provided a detailed analysis of why Tillinghast's numbers are wrong, and are inappropriate for demonstrating either total costs of the U.S. tort system, or cost trends over time.<sup>5</sup>

The Chamber's report is based entirely on Tillinghast's figures.<sup>6</sup> In fact, it appears that any figures that they found differing from Tillinghast's numbers were then "scaled" so they would equal Tillinghast's.<sup>7</sup> Here are just some of the problems:

**The definition of "tort liability costs" is incorrect.** The "tort system costs" identified by the Chamber and Tillinghast are calculated by *including the immense costs of operating the wasteful and inefficient insurance industry*. Fully 21 percent of so-called "liability" costs are what Tillinghast calls insurance industry "overhead" (e.g. salaries of executives, rent and utilities for insurance company headquarters, commission paid to agents, advertising and other acquisition costs).<sup>8</sup> And on top of that, it also includes costs like commercial auto insurance liability claims for fender benders, for which policyholders pay insurance premiums, the vast majority of which are settled without any attorneys being hired or anyone being sued. Thus, the Chamber's analysis is of a system it calls the "tort" system, but which is, in fact, vastly larger than the actual tort system.

**The Chamber uses Tillinghast's distorted facts.** Throughout its report, Tillinghast makes unfounded assumptions, adjusts figures without any basis, and fails to provide explanations or sources. On the rare occasion when it does provide "sources," they include such impossible-to-verify citations as "internal Tillinghast Reviews,"<sup>9</sup> "internal Tillinghast study,"<sup>10</sup> "Tillinghast-Towers Perrin's internal database,"<sup>11</sup> "various studies published by Tillinghast and Conning & Company,"<sup>12</sup> and "our best estimate."<sup>13</sup>

For example, it attributes 21 percent of so-called "tort" costs to "administration," or insurance industry "overhead." As explained above, it is wrong to call this a "tort" cost, but also, the number itself is not verifiable.<sup>14</sup> As another example, Tillinghast simply adds into its "estimate" of total tort costs an additional 32 percent (in 2002) of the expense of the entire liability insurance industry, to cover what it guesses to be "self- (un) insured" costs. While it is true that self-insurance is a growing percentage of the entire system, Tillinghast neither explains the basis of its estimates nor makes any adjustment to reflect the greater efficiencies of self-insurance programs. Tillinghast apparently assumes that the self-insurance system requires the same inefficient delivery system as the insurance industry, which is untrue. By using this device, Tillinghast overstates the costs of the tort system significantly.

**The Chamber and Tillinghast do not measure the countervailing costs saved by the tort system; nor do they place any value on the rights granted to all Americans by the tort system itself.** Any analysis of tort system costs must consider the countervailing benefits of the legal system, which pays people for real damages that must be repaid in some way. If someone is brain damaged, burned, or rendered paraplegic as a result of the misconduct of another but cannot obtain compensation from the culpable party through the tort system, he or she may be

forced to turn elsewhere for compensation, such as to taxpayer-funded health and disability programs. In other words, the costs of injuries are not eliminated, but merely shifted onto someone else, such as the taxpayer.

Moreover, the tort system provides the financial incentive for companies and institutions to act more safely. The Chamber entirely ignores this point, failing to take into account the amount of money that the tort 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.

Finally, the right of injured people to sue and collect compensation from the perpetrators of their harm is one of the great achievements of American democracy. In our system, the poorest and most vulnerable, including those in need of medical care, the disrupted families of injured children or people who have suffered violations of their fundamental rights, can hold the largest wrongdoer accountable for causing harm. This is a precious and priceless right, the value of which the Chamber and Tillinghast entirely overlook in their reports.

**Small businesses are being price-gouged by the profiteering insurance industry.** In the NFIB's most recent survey poll, the issue "Cost and Availability of Liability Insurance" ranked as number 2 in importance by small business owners. Its ranking increased from 13th in the 2000 survey. More than 30 percent of owners regard it as a critical issue, compared with 11 percent in 2000—a three-fold increase.<sup>15</sup>

Well, no wonder. This country has been in a "hard" insurance market since 2001. It is remarkable that the Chamber would issue a report on tort costs for small businesses without even mentioning the well-known insurance cycle, which results in cost increases having nothing to do with the tort system – and cannot be solved by restricting victims' rights.

Insurance is a cyclical business. Its costs are cyclical as well. Three times in the last 30 years, insurance policyholders have experienced particularly large and sudden rate hikes. This is typical of what policyholders experience during the so-called "hard market" part of the insurance industry's cycle. The cause of the hard market is always the same: a drop in investment income for insurers compounded by underpricing in prior years. When investment income drops, insurers always respond the same way: by reducing coverage, canceling policies and/or raising premiums, often dramatically. Since 2001, we have been in a "hard market" period, but it is ending now.

In conducting any evaluation of insurance industry costs, it is critical to take into consideration the insurance cycle and insurer accounting practices, particularly overreserving, during the hard market. Yet in this report, the Chamber, relying on Tillinghast, fails to mention it or even take note of the insurance cycle at all, even though it is the best explanation for many of the findings Tillinghast seeks to blame on rising tort costs.<sup>16</sup> This omission seems particularly conspicuous because in other Tillinghast publications, the company not only acknowledges the cycle, but also advises insurers on how to "ride" the cycle to maximize profit.<sup>17</sup>

Today, the situation for businesses has changed dramatically from even last year. Property/casualty insurance company profits are soaring and the "hard market" is over.

**Skyrocketing Profits.** According to the Property Casualty Insurers Association of America and Insurance Services Office, Inc., the property-casualty insurance industry’s after-tax net income skyrocketed an astounding 997 percent between 2002 and 2003, to \$29.9 billion.<sup>18</sup> Those huge profits were boosted thanks to a 10 percent increase in premiums even though losses rose just 2 percent, according to that report. Weiss Ratings similarly found that property/casualty insurers made a profit of over \$32 billion in 2003. As they put it: “Escalating premiums have caused profits to soar.”<sup>19</sup> While small businesses have been hit with rising health insurance premiums, those insurers have also enjoyed huge profits: up 311 percent in 2003, when they enjoyed a \$30 billion profit.<sup>20</sup>

Here’s a new “poll” idea for NFIB: Ask small businesses for their reaction to these skyrocketing insurance industry profits.

**The industry’s economic cycle has turned.** The Council of Insurance Agents & Brokers reports that commercial property/casualty premium increases have eased greatly and are now returning to the levels they were at the end of 1999. As of the first quarter of 2004, small businesses saw their rates rise only 3 percent from the prior quarter.

	<u>2001</u>	<u>4Q 2002</u>	<u>4Q 2003</u>	<u>1Q 2004</u>
<u>OVERALL RESULTS</u>				
Small Comm. Accounts	21%	8%	4%	3%
Mid-size Comm. Accounts	32%	19%	5%	1%
Large Comm. Accounts	36%	21%	4%	-3%
<u>SPECIFIC LINES</u>				
Business Interruption	30%	13%	2%	-1%
Construction	46%	34%	13%	8%
Commercial Cars	28%	18%	7%	3%
Property	47%	21%	5%	-5%
General Liability	27%	19%	6%	3%
Umbrella Liability	56%	34%	11%	4%
Workers’ Compensation	24%	21%	9%	4%
D&O		32%	13%	7%
Employment Practices		32%	10%	5%

Moreover, the most recent renewals survey by the Risk Insurance Management Society shows a “march to a soft market”: “Insurance buyers are seeing flat renewals or price breaks as the market continues to soften, a recently released survey concludes. Price declines in the second quarter were more common than increases in every major category of coverage except workers compensation, according to the benchmark survey by the New York-based Risk & Insurance Management Society Inc.”<sup>21</sup>

## **WHERE'S THE CRISIS?**

During past and current liability insurance crises, the insurance industry has tried to cover up its pricing errors by blaming juries, lawyers and the legal system for liability insurance price jumps. Lobbyists pushing for this legislation argue about the alleged need for such legislation to limit lawsuits by consumers, including arguments that the litigation system is “out of control” or “broken.” There is no basis for this view.

According to the National Center for State Courts, tort filings have dropped approximately 4 percent in the last 10 years, while contract filings, which are not covered by this legislation, rose 21 percent.<sup>22</sup> Adjusting tort filings for population growth would show that the drop in tort cases was even more dramatic, since total population in the states studied rose 13 percent during that time. “Tort filings ... peaked in 1990 and have actually shown a generally downward movement since that time.”<sup>23</sup>

Moreover, according to the Bureau of Justice Statistics, in 2001, median awards to plaintiff winners (in the 75 most populous counties), was \$27,000<sup>24</sup>: That’s down from \$31,000 in 1996.<sup>25</sup> Median punitive damage awards to plaintiff winners (awarded to only 3 to 5 percent of prevailing plaintiffs) was \$25,000 in 2001,<sup>26</sup> down from \$38,000 in 1996.<sup>27</sup>

Moreover, while the casualty count in the workplace and marketplace runs into the billions of dollars annually, overall, only 10 percent of injured Americans ever file a claim for compensation, including informal demands and insurance claims. Only two percent file lawsuits. The Rand Institute concludes that these statistics are at odds with any notion that we live in an overly litigious society.<sup>28</sup>

In sum, all insurance industry sectors are now enjoying astronomical profits on the backs of policyholders. Insurance rates are starting to drop due to predictable market conditions. And new data proves, once again, that jury verdicts and lawsuit filings are dropping in the United States. As in the past, the proponents of federal tort legislation continue to rely on myths about litigation and its impact on businesses to support disrupting state authority and protecting wrongdoers. There is no need for such an extraordinary federal measure as H.R. 2813.

## **H.R. 2813: A DEEPLY FLAWED BILL**

The proposed Small Business Liability Reform Act of 2003 would be a significant preemption of state law, dictating federal products liability standards to the courts in all 50 states. Each of these standards would weaken the rights of innocent consumers who are wrongfully injured. It offers nothing for consumers. Rather, it is a carefully crafted bill to provide relief and protections for the businesses and trade associations lobbying for it.

Moreover, while the bill limits consumers’ ability to recover damages if they are injured from defective products, this part of the bill leaves corporations completely unhampered to sue if they suffer injury, i.e. commercial loss, from defective products. This is entirely unfair. Further, it

does not touch corporate actions under contract or property law, even though contract case filings outnumber tort filings.<sup>29</sup>

Tort cases represent only about 10 percent of civil case filings in state courts in 1993 (the most recent year available), and only 5 percent of tort cases are based on product liability (including toxic substances) – about 5 out of every 1000 cases filed.<sup>30</sup> On the other hand, contract cases – more than two-thirds of which were filed by businesses<sup>31</sup> – represent about 11 percent of civil case filings.<sup>32</sup> It is not credible to argue that the 5-per-thousand product liability case filings are clogging the courts, when business-plaintiff contract cases are filed 15 times as frequently.

## **TITLE I- SMALL BUSINESS LIABILITY RESTRICTIONS**

Many businesses with fewer than 25 employees produce products that threaten the public's health and safety. They should not be entitled to the blanket liability protections H.R. 2813 provides.

For example, several years ago the Consumer Federation of America conducted a review of recent Consumer Product Safety Commission press releases and found that several companies with fewer than 25 employees had been fined or cited for failing to conform with federal mandatory safety standards or because a product was alleged to contain a product defect. Many of these products were toys, fireworks or baby products -- underscoring the impact this bill will have on the health and safety of children.

Moreover, according to the Violence Policy Center, small companies that would be covered by this bill include “many manufacturers of assault weapons, Saturday Night Special handguns, and even 50 caliber sniper rifles. Many of these companies have experienced safety-related problems with their products or have been defendants in product liability lawsuits. The legislation would protect Intratec, the manufacturer of the TEC-DC9 assault pistol, and Hi-Point, maker of the Carbine used in the April 1999 Columbine massacre in Littleton, Colorado.”<sup>33</sup>

**Punitive Damages Cap – Protecting the Worst Wrongdoers:** The bill establishes a punitive damages cap of \$250,000 or three times compensatory damages, whichever is less. This provision effectively would punish wrongdoing based on the harm done to the victim, not the culpability of the conduct.

Punitive damages are imposed by judges and juries to punish egregious misconduct and to hold companies accountable for their most reckless or deliberately harmful acts. The size of the punitive award should be based on the egregiousness of the actions, the extent to which the company acted with malice and awareness of the harm that would result, and the financial size of the company, and in any event, should be up to a judge and jury to decide. As the Rand Institute for Civil Justice, funded in part by insurance companies, has noted, “Punitive damages are designed to punish a defendant for grossly inappropriate action and, in so doing, to deter further such actions by signaling that their consequences can be severe.”<sup>34</sup> Arbitrary limits on punitive damages severely undercut this deterrent value.

**Complete Abolition of Joint and Several Liability for Non-Economic Damages:** The bill would overturn many state laws, burdening the most seriously injured consumers. The doctrine of joint and several liability has been part of the common law for centuries. It is a rule that applies to allocating damages when more than one defendant is found *fully responsible* for causing an entire injury. If one of them is insolvent or cannot pay compensation, the other defendants must pick up the tab so the innocent victim is fully compensated. Courts have *always* held that joint and several liability applies only to injuries for which the defendant is fully responsible. That means that the defendant's negligent or reckless behavior must be an "actual and proximate" cause of the entire injury. This is a high standard.<sup>35</sup>

Moreover, by limiting this provision to non-economic damages, women who work inside the home, children, seniors and the poor, who are more likely to receive a greater percentage of their compensation in the form of non-economic damages if they are injured, are disproportionately hurt. Non-economic damages compensate injured consumers for intangible but real injuries, like infertility, permanent disability, disfigurement, pain and suffering, loss of a limb or other physical impairment. The human suffering accompanying injuries caused by wrongful conduct deserves full compensation.

## **TITLE II: PRODUCT LIABILITY RESTRICTIONS**

**Elimination of Strict Liability for Product Sellers.** H.R. 2813 eliminates strict liability and replaces it with a negligence standard -- which requires the consumer to prove that the seller failed to use reasonable care with regards to the product. It protects sellers where there was no reasonable opportunity for the consumer to inspect the product, or if inspection would not have revealed the aspect responsible for the harm. Seller liability is maintained for violations of an express warranty, or for intentional wrongdoing.

Strict liability for product sellers is the standard developed by courts because they recognized that stores are often in the best position to spot a product defect and to notify consumers about the dangers. Under this new standard, retailers would no longer have a duty to warn their customers about known product defects nor would they even have an incentive to stop selling products they know are unsafe. In addition, by holding every defendant in a product's chain of distribution -- including product sellers -- strictly liable, the tort system can alleviate the need for the injured consumer to discover and use complex and often difficult-to-obtain evidence about which defendant was responsible for a particular product defect and the resulting injury. The negligence standard under this bill can be very difficult and very expensive to prove.

**Negligent Gun Sales.** The bill exempts from its provisions three types of liability theories for negligent gun sales: negligent entrustment, negligence per se and dram shop action. The intent of this section is to exempt from the bill actions brought by consumers injured as a result of negligent gun sales. However, the bill fails to accomplish this purpose. According to the Violence Policy Center, there are additional liability theories that have been used successfully against firearm retailers and proprietors of gun clubs or target ranges, that would be covered by the bill's extremely broad "product seller" and "product liability action" definitions. For example, theories of nuisance and trespass have been used successfully by plaintiffs harmed by bullets fired at gun clubs. To use these other theories, an injured consumer would now have to

show that the seller was negligent, breached an express warranty or engaged in intentional wrongdoing. A nuisance action, increasingly used in firearm litigation, would not fall within any of these categories. Thus, the bill would provide great benefits for these gun companies at the expense of consumers.

**Restricting Vicarious Liability.** The bill protects renters and lessors from liability of damages caused by the people who rent or lease their products. This provision would specifically overturn the automobile rental and insurance laws of many states, including that of my state, New York, and generally overturn the common law of vicarious liability in a majority of states. This is extremely dangerous, as this doctrine is the best way to protect injured victims of products rented or leased to uninsured and under-insured people in their states. California, Florida, New York, and the District of Columbia -- states with the largest tourism businesses and, therefore, the most active rental car markets -- have applied vicarious liability to automobile rental companies, and as someone who frequently rents cars, I rely on this protection. Repealing this provision of New York law would leave some victims uncompensated, especially when the driver in an accident had only the legal minimum auto insurance coverage or no insurance at all, which is common in New York City where many individuals do not own cars.

This bill preempts the judgment of these states like my own, which have had unique experiences in dealing with the problem of uninsured and under-insured renters. Vicarious liability encourages rental companies to monitor their goods and customers more carefully, ensuring safer usage of their products in the marketplace. By making automobile rental companies accountable, they have incentives to make sure that their renters are qualified, safe, and use their products properly.

## CONCLUSION

From the mid-1980s until today, the nation's business communities -- large and small -- have been advancing a legislative agenda to limit their liability for causing injuries. One of the principal arguments on which they rely is that laws that make it more difficult for injured people to go to court (*i.e.*, "tort reform") are economically necessary for small businesses and for a state's economy. This argument is utterly groundless. Surveys show that issues such as workforce development, healthcare and taxes are the issues businesses believe challenge their growth and viability, not civil lawsuits.

Moreover, not a single aspect of H.R. 2813 has anything at all to do with so-called "frivolous litigation." The only impact of this bill will be to take away the rights of most people who live in this country, while letting a handful of companies escape accountability for reckless misconduct that causes injury and death.

# APPENDIX A

## THE REAL CONCERNS OF BUSINESSES- NATIONAL SURVEYS

**NATIONAL SMALL BUSINESS UNITED (NSBU) (CONDUCTED IN PARTNERSHIP WITH ARTHUR ANDERSEN ENTERPRISE GROUP); SURVEY OF SMALL AND MID-SIZED BUSINESSES, TRENDS FOR 2000.**<sup>36</sup> NSBU describes itself as “the nation’s oldest bipartisan small business advocate for small American businesses.”

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

**Findings:**

- When asked to name the “three most significant challenges to the future growth and survival of their business,” the top three factors were: 1. finding and retaining qualified employees (61 percent of respondents named this as one of their top three challenges); 2. state and federal regulations (35 percent); and 3. economic uncertainty (29 percent).
- Other areas of concern cited were: keeping up with technology, access to adequate capital, taxes, labor costs, healthcare insurance benefits and conducting business on the Internet.
- Neither lawsuits nor liability laws made the list.
- Those results were consistent with earlier NSBU/Arthur Andersen surveys, which have never deemed lawsuits a top concern.<sup>37</sup>
- Even with regard to “legislative concerns” from which respondents could choose from a pre-defined list, healthcare reform, tax reform, capital gains tax incentives, social security reform, estate tax repeal and payroll tax reform all outpolled “product liability/tort reform.”
- Similarly, in 1999, 2000 and 2001, litigation was not mentioned in a list of top 10 concerns facing the small business community cited by the NSBU Small Business Congress. While tax reform, healthcare reform, pension reform and bankruptcy reform were placed on its legislative agenda, “lawsuit reform” was not.<sup>38</sup>

## AMERICAN EXPRESS, VOICES FROM MAINSTREET SURVEY.<sup>39</sup>

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

**Findings:**

- The survey results list the top 10 issues that are “very important” to small businesses. Neither lawsuits nor liability laws made the list.
- Employee health care insurance ranked number one.
- Other concerns that made this list were: tax cuts/reform, improving the quality of the workforce, reducing government regulations, availability of capital, crime, social security reform, reducing the budget deficit, Internet security, reducing estate taxes and minimum wage guidelines.
- These results are consistent with an earlier American Express survey, where small businesses listed “improving schools/training young people for work” and “healthcare” as the most important priorities, but never mentioned litigation.<sup>40</sup>

**NATIONAL FEDERATION OF INDEPENDENT BUSINESSES (NFIB) EDUCATION FOUNDATION. 2000 SMALL BUSINESS PROBLEMS AND PRIORITIES.**<sup>41</sup>

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

**Findings:**

- Interestingly, NFIB chose not to even list “lawsuits” or “liability laws” as problem areas from which members could choose.
- The only category remotely connected to general liability was called “cost and availability of liability insurance,” a problem for which insurance industry practices are far more responsible than lawsuits. This issue ranked #13.
- Nearly half of all respondents rated the cost of health care insurance a critical concern. Federal taxes on business income and finding qualified workers ranked second and third, respectively. Three of the six most important concerns involved taxes.
- Such findings were consistent with the issues discussed in the 2000 Congressional Small Business Summit, which focused on short-term tax relief, health care, social security, government regulations, worker shortages and the tax code.<sup>42</sup>

**NATIONAL FEDERATION OF INDEPENDENT BUSINESSES (NFIB). 2000 SURVEY (RELEASED FEBRUARY 6, 2001).**<sup>43</sup>

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

**Findings:**

- 63 percent of respondents selected rising health care costs as one of the top three most serious problems they face, followed by high taxes and an uncertain economy. Workers compensation insurance costs were also mentioned.

- Neither liability laws nor lawsuits were mentioned in any materials accompanying release of the survey.

**CENTER FOR GOVERNMENT RESEARCH (CGR) (RELEASED BY BUSINESS COUNCIL OF NEW YORK STATE). BARRIERS TO SMALL BUSINESS GROWTH IN NEW YORK STATE – A BAROMETER OF OPINIONS, NOVEMBER 1998.<sup>44</sup>**

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

**Findings:**

- Local property taxes were considered the most significant barrier to growth of their business. Health care costs came second, followed by the state personal income tax, energy costs and wage/salary costs, federal taxes, finding qualified workers, declining population and the state sales tax. All of these outperformed liability laws, which ranked 10th.
- Nearly half the respondents claimed state taxes affected growth.<sup>45</sup> Those firms who considered it harder to do business in New York than in any other state listed barriers to growth as follows: 1. health care costs, 2. local property taxes, 3. the state personal income tax, 4. energy costs and 5. federal taxes.<sup>46</sup>

**NEW JERSEY**

**NATIONAL FEDERATION OF INDEPENDENT BUSINESSES (NFIB). 1999 NFIB/NEW JERSEY SURVEY ON THE STATE BUSINESS CLIMATE.<sup>47</sup>**

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

**Findings:**

- Litigation/lawsuits tied with property taxes and “other insurance costs” for last place in this survey. More important concerns were: lack of qualified workers (24 percent), over-regulation (23 percent), health insurance costs (16 percent), business taxes (12 percent) and access to capital/loans (5 percent).
- In 1998, litigation/lawsuits again tied with “property taxes” for last place in the rankings.

## OTHER STATE NFIB SURVEYS

Quality workers and regulatory reform were the two biggest worries for Washington's small business owners, according to a 1999 survey of the 17,000 state NFIB members.<sup>48</sup> A 2000 survey of Oregon NFIB members found that health care costs and taxes, including the personal income tax, capital gains tax, personal property tax and unemployment insurance tax, were the most pressing issues for Oregon small business owners.<sup>49</sup> In a 1999 NFIB Pennsylvania study, most business owners placed affordability of employee group health insurance and implementing state unemployment insurance on the top of their "worry" list.<sup>50</sup> That same year, the local director of NFIB's Hawaii chapter reported that 77 percent of small business owners in Hawaii viewed taxes and fees as their greatest problems.<sup>51</sup> When asked to weigh in on issues of concern in 1997, Illinois NFIB members cited prevailing wages, educational funding and quality of graduates and health insurance.<sup>52</sup>

## NOTES

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<sup>1</sup> NFIB, "Small Business Problems and Priorities." June 2004. at 7-8.

<sup>2</sup> NFIB, "Small Businesses Signal Best Economy in 20 Years," July 13, 2004.

<sup>3</sup> In nearly every Tillinghast publication, except this one, Tillinghast describes itself as "a premier independent actuarial advisor to the insurance and financial services industry; our major clients include most of the world's top insurers," yet that description is conspicuously missing from the "U.S. Tort Costs" report. See, e.g., Tillinghast, *Enterprise Risk Management in the Insurance Industry: 2003 Benchmarking Survey Report*; Tillinghast, *2003 Stop Loss Survey*, at 7; Tillinghast, *Riding the Insurance Cycle, Part 2*, at 4; Tillinghast, *Update U.S.: Focus on Variable Annuity Market*, Sept. 2003, at 16.

<sup>4</sup> E.g., in a January 29, 1999 independent study prepared for the New York State Bar Association, Daniel Capra, Philip Reed Professor of Civil Justice Reform at Fordham University School of Law, called these figures "vastly overinclusive." Ralph Nader noted in 1991 congressional testimony, "If consumer advocates came to Congress asking for a complete overhaul of the nation's regulatory laws based on made up and mischaracterized numbers like these, we would rightfully be laughed out the door." Committee on Commerce, Science and Transportation, Sept. 19, 1991.

<sup>5</sup> See, Tillinghast's "Tort Cost" Figures Vastly Overstate the Cost of the American Legal System, [http://www.insurance-reform.org/pr/Tillinghast\\_Overstates.pdf](http://www.insurance-reform.org/pr/Tillinghast_Overstates.pdf)

<sup>6</sup> See U.S. Chamber Institute for Legal Reform, *Liability Costs for Small Business*, 7-8 ("The most recent Tillinghast study estimates the total costs of the tort liability system to be \$233 billion.... Of the \$233 billion overall tort liability costs, Tillinghast estimated that \$129 billion falls on businesses.... The U.S. Chamber Institute for Legal Reform sought to understand how these costs affect different segments of the business community.")

<sup>7</sup> U.S. Chamber Institute for Legal Reform, *Liability Costs for Small Business*, Table 1 notes 2, 3, Table 2 notes 2, 3.

<sup>8</sup> Tillinghast, *U.S. Tort Costs: 2003 Update*, 14, 17.

<sup>9</sup> Tillinghast, *U.S. Tort Costs: 2003 Update*, App. 4 note 3.

<sup>10</sup> *Ibid.* App. 5 notes 2, 3, 4.

<sup>11</sup> *Ibid.* at 16.

<sup>12</sup> *Ibid.* App. 4 note 6.

<sup>13</sup> *Ibid.* at 17 (The report states that "[n]o consistent historical database exists," and "studies . . . typically have been limited to a particular state, coverage or exposure," before stating the authors' "best estimate.")

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- <sup>14</sup> See *ibid.* at 14 (The report provides no source, no basis for the figure, and no definition, but rather just states that “these costs are consistently defined and measurable over time.”)
- <sup>15</sup> NFIB, “Small Business Problems and Priorities,” June 2004, at 7-8.
- <sup>16</sup> For example, the report notes “tort cost growth experienced in 2001 and 2002 . . . akin to what was last experienced in the 1970s and 1980s,” but never points out that these are the three hard markets of the last 30 years, which explains the sharply rising premiums. Instead, the report goes on to list various alleged causes for the 2001-02 growth without any mention of the cycle. Tillinghast, *U.S. Tort Costs: 2003 Update*, at 3.
- <sup>17</sup> Tillinghast, *Riding the Insurance Cycle, Parts 1 and 2*, available at <http://www.tillinghast.com/tillinghast/publications/asp/regionpubs.asp?region=NA>.
- <sup>18</sup> Insurance Services Office, Inc., & Property Casualty Insurers Association of America, “Sharp Increase in P/C Industry’s Net Income Propels Surplus Upward in 2003,” April 2004. [http://www.iso.com/press\\_releases/2004/04\\_14\\_04.html](http://www.iso.com/press_releases/2004/04_14_04.html)
- <sup>19</sup> Weiss Ratings, “Property and Casualty Insurers Earn \$32.3 Billion in 2003; Industry Reports \$48 Billion Investment Gain,” July 14, 2004, [http://www.weissratings.com/News/Ins\\_General/20040714general.htm](http://www.weissratings.com/News/Ins_General/20040714general.htm).
- <sup>20</sup> Weiss Ratings, “Life and Health Insurers’ Profits Climb 311% in 2003; \$6.9 billion gain in individual annuity business,” July 6, 2004, [http://www.weissratings.com/News/Ins\\_General/20040706general.htm](http://www.weissratings.com/News/Ins_General/20040706general.htm).
- <sup>21</sup> Michael Bradford, “RIMS renewals survey shows ‘march to a soft market,’” *Business Insurance Online*, posted July 15, 2004.
- <sup>22</sup> National Center for State Courts, “Examining the Work of State Courts, 2003” at 23.
- <sup>23</sup> *Ibid.*
- <sup>24</sup> Bureau of Justice Statistics, “Civil Trial Cases and Verdicts in Large Counties, 2001,” April 2004, at 5.
- <sup>25</sup> *Ibid.*, at 7.
- <sup>26</sup> *Ibid.*, at 5, 6.
- <sup>27</sup> Bureau of Justice Statistics, “Civil Trial Cases and Verdicts in Large Counties, 1996,” Sept. 1999, at 9.
- <sup>28</sup> *Compensation for Accidental Injuries in the United States*, Rand Institute for Civil Justice (1991).
- <sup>29</sup> See National Center for State Courts, “Examining the Work of State Courts, 2003” at 26.
- <sup>30</sup> Bureau of Justice Statistics, “Tort Cases in Large Counties,” April 1995, at 2.
- <sup>31</sup> Bureau of Justice Statistics, “Contract Cases in Large Counties,” Feb. 1996, at 2, 3.
- <sup>32</sup> Bureau of Justice Statistics, “Tort Cases in Large Counties,” April 1995, at 2.
- <sup>33</sup> Violence Policy Center, *Deadly Exceptions: Gun Manufacturers That Would be Protected by the “Small Business” Cap on Punitive Damages*, February 2000.
- <sup>34</sup> Erik Moller, Nicholas M. Pace, Stephen J. Carroll, *Punitive Damages in Financial Injury Jury Verdicts*, Rand Institute for Civil Justice 10 (1997).
- <sup>35</sup> (See, e.g., Richard Wright, “The Logic and Fairness of Joint and Several Liability,” 23 *Memphis State Law Review* 45 (1992).
- <sup>36</sup> “Survey of small and mid-sized businesses: Trends for 2000.” Conducted by Arthur Andersen and National Small Business United.
- <sup>37</sup> See, e.g., “Survey of Small and Mid-Size Businesses: Trends for 1998,” found at <http://www.nsbu.org/survey/7th/index.html>; “Highlights of the 1997 NSBU/Arthur Andersen Survey of Small and Mid-Sized Businesses,” found at <http://www.nsbu.org/survey.htm>; “1996 NSBU/AA Survey Highlights,” NSBU News Release, June 27, 1996, found at <http://www.nsbu.org/survey96.htm>.
- <sup>38</sup> “The Voice of Small Business Is Shaped: Final Results from Small Business Congress 2001,” February 14, 2001, found at [http://www.nsbu.org/media\\_center/pr021401.htm](http://www.nsbu.org/media_center/pr021401.htm); “Final Results From Small Business Congress 2000,” February 7, 2000, found at <http://www.nsbu.org/pr/pr020700.htm>; “Final Results From The 1999 Small Business Congress,” February 9, 1999, found at <http://www.nsbu.org/pr/pr020999.htm>.

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<sup>39</sup> “Small Business Says Affordable Healthcare Is Their Highest Priority on the National Agenda; High Costs Prevent One Out of Two Small Firms from Offering Employees Healthcare Insurance,” *Business Wire*, July 10, 2000.

<sup>40</sup> “Small Business Owners Want Improvements In Education And Affordable Healthcare – Top Concerns Ahead Of Tax Cuts And Reductions In Regulatory Burdens,” March 16, 2000, found at <http://www.nsbu.org/pr/pr031600amex.htm>.

<sup>41</sup> NFIB Education Foundation, “2000 Small Business Problems & Priorities,” found at [http://www.google.com/search?q=cache:www.nfib.com/media/releases/sbet\\_prob.htm+NFIB+Education+Foundation&hl=en](http://www.google.com/search?q=cache:www.nfib.com/media/releases/sbet_prob.htm+NFIB+Education+Foundation&hl=en).

<sup>42</sup> “2000 Congressional Small Business Summit Referendum Summary,” found at <http://www.google.com/search?q=cache:www.nfib.com/2000summit/referendum.html+NFIB+Small+Business+Problems+Priorities&hl=en>.

<sup>43</sup> “Health care mandates threaten New York small businesses, new NFIB survey finds,” February 6, 2001. On file with CJ&D.

<sup>44</sup> “Barriers to Small Business Growth in New York State,” Center for Governmental Research Inc. (November 1998).

<sup>45</sup> “Study: Property taxes, health-care costs hurt small businesses” (March 1999), on file with CJ&D. A 2000 survey of New York Business Council members echoes such concerns over taxes. See, “Survey: Business Council Members See Improvement—And Room For More—In New York’s Business Climate, Taxes,” October 17, 2000 found at <http://www.bcnys.org/whatsnew/2000/1017srvy.htm>.

<sup>46</sup> “Study: Property taxes, health-care costs hurt small businesses” (March 1999), on file with CJ&D.

<sup>47</sup> “Results of the 1999 NFIB/New Jersey Survey on the State Business Climate,” on file with CJ&D.

<sup>48</sup> Sleeth, Amy, “Quality workers, regulatory reform top NFIB survey,” *Puget Sound Business Journal*, February 5, 1999.

<sup>49</sup> Brown, Craig, “Insurance, Taxes Top Issues For Small Businesses, Report Says,” *The Oregonian*, February 9, 2001.

<sup>50</sup> Miller, Michael, “Benefit costs are a top concern for Pennsylvania small business,” *Pittsburgh Business Times*, April 9, 1999.

<sup>51</sup> “NFIB calls for tax/fee reductions,” *Pacific Business News*, February 5, 1999.

<sup>52</sup> Janecke, Ron, “Illinois small-business owners weigh in on issues,” *St. Louis Business Journal*, February 3, 1997.