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FALSE, INFLATED DRIVEL

WHAT'S WRONG WITH THE U.S. CHAMBER OF COMMERCE'S "TORT COST" REPORT

For decades, "tort reform" groups have published so-called "empirical analyses" of what they call "tort costs." These reports are bogus for many reasons, the main one being that they *fail to examine any tort costs*![1] While corporate consulting groups had largely stopped issuing such spurious "tort cost" reports following widespread criticism (described later), the U.S. Chamber of Commerce Institute for Legal Reform (ILR) recently decided to revive this sad tradition.

In November 2022, ILR published a new report[2] claiming it analyzed "tort costs" during the pandemic year of 2020 — a year when courts across America were virtually shut down and nearly all tort cases were put on hold.[3] (The American Tort Reform Association has also recently included an even wackier "tort cost" analysis in another report, described later.[4])

When an analysis finds that, in a year when courts are essentially closed, "tort costs" somehow rose to $443 billion, amounting 2.1 percent of U.S. gross domestic product, you know something is wrong. Indeed, instead of even considering actual tort system costs, like say, the budgets of federal and state courts which are fairly easy to determine, ILR shifts its gaze entirely to the wasteful, inefficient, and (especially during COVID) profiteering U.S. property/casualty insurance industry.[5]

The insurance industry didn't just profit off the pandemic; it price-gouged policyholders, made a windfall by refusing to refund premiums during quarantine, touted the pandemic's fabulous impact on insurers' bottom line, and then rewarded shareholders with dividends.[6] Obviously, these are not "tort costs."

Here's more of what's wrong with ILR's analysis:

Insurance premiums or losses are not "tort costs.

Before examining how badly the Chamber inflates its insurance data, it's important to understand why equating insurance premiums or costs with tort costs is a huge error and the very thing that led to such harsh criticism of prior reports.

- **Transfer payments.** The transfer of insurance money from a wrongdoer to a victim is not a "tort cost." It is not a system "cost" at all. As the Economic Policy Institute succinctly explained in its 2005 critique of similar methodology used by ILR:

  > [The report] improperly treats the transfer payments of the tort system as "tort system costs." … Transfer payments merely shift money from the injurers or their insurers to the injured.…Someone – the wrongdoers, taxpayers (through government-sponsored social programs), other insurers (such as health insurance), charities, or the victim – will need to pay or absorb these costs.[7]

- **No litigation.** Typical auto liability claims (such as fender-benders) are overwhelmingly settled without claimants hiring attorneys or suing anyone, and with most claims paying only for the damage to the car and perhaps some medical expenses (economic loss) but without any compensation at all for noneconomic loss. To count costs covering all the tiny scrapes of fenders as "tort costs" is a massive mistake. Yet auto accident claims account for $196.5 billion — more than 44 percent of ILR's total tort cost figure.

- **"First party" coverages.** With first party coverage, such as no-fault auto insurance, policyholders do not seek compensation from a wrongdoer but cover their losses through their own insurance. Some major auto insurance system costs, like medical payments, can cover anyone hurt in the car, as well as uninsured motorists and underinsured motorists. They amount to many billions of dollars, none of which should be identified as "tort costs."

ILR apparently collected data about "earned premiums" and "incurred losses," which are highly-inflated figures.

Even assuming it was appropriate to examine insurance data to determine tort costs (which it is clearly not), the types of insurance data examined by the Chamber are flawed even for determining insurance trends.

- **Bloat.** There is only one part of the premium dollar that has anything to do with claims and lawsuits. That's the "pure premium" or "loss cost." Yet that's not what ILR bothers to look at. To swell its numbers, it calls "tort costs" all the industry bloat that contributes to the rest of the premium dollar: industry overhead, rent and utilities for insurance company headquarters, commissions paid to agents, multi-million-dollar salaries, bonuses, lobbying costs, jet planes, advertising expenses. Obviously, it is a huge error to consider these expenses "tort costs."

- **Profit.** Also inappropriately included in their "tort cost" figures are insurance industry profits, which contribute to premiums and were particularly "out-of-control" during the pandemic.

  - Across the board, U.S. property/casualty insurance companies reported large profits in 2020, extending into 2021,[8] while accumulating record-breaking surplus (increasing to $914 billion and now a trillion dollars).[9]

- This profit was made, in part, off the backs of small businesses owners whose "business interruption" insurance claims were largely rejected by insurers.[10]

- Large premium increases, which began before the pandemic, grew through 2020 and continued, greatly contributing to industry profits.[11] These increases were and continue to be unjustified and amount to systemic price-gouging.[12]

- Auto insurance companies in particular made a windfall from the pandemic.

  - Early into the pandemic, the Consumer Federation of America and the Center for Economic Justice began pressing auto insurance carriers for premium refunds as people stopped driving. While some companies responded with some premium relief, they did so only for a short time. As a result, as both groups put it, "The staggering drop in accidents this year resulted in a dramatic drop in claims paid by insurers, handing companies massive windfall profits even after accounting for the woefully inadequate premium relief provided in the spring."[13]

- **"Incurred losses."** ILR calculates premiums which are partly based on a figure known as insurance "incurred losses." But an "incurred loss" is not what an insurer has actually paid out. "Incurred losses" include billions of dollars of estimates — not actual costs — that insurers make in rate filings and have in the past proved to be *wildly overstated.*[14] "Incurred losses" increase when insurers increase reserves to pay claims. During hard market periods (the most recent of which began in 2019), the increases in reserves are not the result of actual increases in claims or payouts (*e.g.*, lawsuits, jury verdicts, or other tort system costs). Rather, they are an accounting device used by insurers to mask profits and justify rate hikes.[15] They are clearly not "tort costs."[16]

Other costs and savings are ignored.

- ILR's calculations are not discounted one cent for the benefit that is gained from repairing damage. If a fender-bender caused $500 in auto repairs to fix, the insurance company of the person who caused the accident pays. No lawyers are involved. ILR does not deduct a cent from the $500 spent as a benefit to society. This is absurd.

- More broadly, ILR ignores any countervailing costs *saved* by the tort system, which provides the financial incentive for companies and institutions to act more safely. This includes 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.

Widespread criticism.

Earlier "insurance-not-tort-cost" reports received brutal criticism from scholars and experts for deceptive and discredited numbers.

- Conservative theorist Judge Richard Posner used terms like “fictitious” to describe analyses like this.[17]

- Civil justice and insurance experts have written that such figures are “without scientific merit and present a very misleading picture of the American tort system and its costs.”[18]

- The *Wall Street Journal* said in a March 2006 article, “[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. 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?”[19]

- On March 14, 2005, *Business Week* called a similar analysis a “wild exaggeration,” stating that it “includes everything from payouts for fender-benders to the salaries of insurance industry CEOs.”[20]

- A January 2005 *Congressional Quarterly* article said, “The company’s estimates of tort costs include the insurance industry’s administrative expenses and payments on claims that never involve courts or lawyers, such as auto collisions.”[21]

- In October 2004, Stephanie Mencimer wrote in the *Washington Monthly*, the report “includes in its definition of the ‘tort system’ insurance company administrative costs and overhead and the salaries of highly paid insurance company CEOs…. One thing it doesn’t include: court budgets, which makes its study seem a lot more like an assessment of the insurance industry than of the legal system.”[22]

- In a January 29, 1999 report, Fordham University Law School Professor Daniel Capra called such figures “folly,”[23] “disingenuous,”[24] “nothing but absurd and self-serving overkill,”[25] and “vastly overinclusive.”[26] Moreover, he pointed out 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.”[27]

- A recent American Tort Reform Foundation Report cites a similarly-flawed 2021 analysis from the Waco, Texas company, “The Perryman Group,” run by a guy named Ray Perryman. Perryman has been called “the most bought economist in Texas” and is known to “produce any conclusion you want.” Thomas Saving, former chairman of the economics department at Texas A&M, said of his work, “It's just this black box. Hocus-pocus,” and “Go to an American Economics Association meeting and ask who Ray Perryman is. Nobody will have ever heard of him.”[28]

Notes

[1] *See, e.g.,* Towers Watson, *U.S. Tort Costs Trends, 2011 Update* (2012), http://www.towerswatson.com/en-US/Insights/IC-Types/Survey-Research-Results/2012/01/2011-Update-on-US-Tort-Cost-Trends and numerous reports from predecessor companies, Towers Perrin and Tillinghast-Towers Perrin; Lawrence J. McQuillan et al., *Jackpot Justice: The True Cost of America's Tort System*, Pacific Research Institute (2007), http://www.legalreforminthenews.com/2007PDFS/PRI_2007JackpotJusticeFinal.pdf

[2] U.S. Chamber of Commerce Institute for Legal Reform, *Tort Costs in America; An Empirical Analysis of Costs and Compensation of the U.S. Tort System* (November 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/11/Tort-Costs-in-America-An-Empirical-Analysis-of-Costs-and-Compensation-of-the-U.S.-Tort-System.pdf

[3] *See, e.g.,* Benjamin Gideon, "Maine Voices: To delay resuming civil trials is to delay justice," *Press Herald*, April 30, 2021, https://www.pressherald.com/2021/04/30/maine-voices-civil-trials/. Today, the pandemic-created backlog of civil cases is so large that "the already rare civil jury trial is likely to lay dormant for the foreseeable future." Richard L. Jolly, Valerie P. Hans and Robert S. Peck, *The Civil Jury: Reviving an American Institution*, U.C. Berkeley School of Law, Civil Justice Research Initiative (September 2021), https://civiljusticeinitiative.org/wp-content/uploads/2021/09/CJRI_The-Civil-Jury-Reviving-an-American-Institution.pdf. Early into the pandemic, insurance lawyers and consultants began discussing ways companies could "capitalize" on the pandemic, which meant taking advantage of the case backlog to force sick and injured people to accept lowball settlement offers. Susanne Sclafane, "COVID-19 Court Delays May Turn the Social Inflation Tide," *Carrier Management*, May 29, 2020, https://www.carriermanagement.com/news/2020/05/29/207234.htm. Indeed, this is exactly what happened. Brittany Kriegstein and Noah Goldberg, "With no trials because of COVID-19, victims are left waiting to settle their civil lawsuit cases," *New York Daily News*, February 21, 2021, https://www.nydailynews.com/new-york/ny-personal-injury-trials-delayed-covid-19-injured-plaintiffs-wait-20210222-4fxab6cuvzholnrglw4cmffada-story.html; Ronald D. White, "What happens when COVID shuts civil courts?" *Los Angeles Times*, September 11, 2020, https://www.latimes.com/business/story/2020-09-11/covid-shuts-courts-mediation-arbitration-boom; Consumer Federation of America, Letter to Commercial Insurance Executives, June 4, 2020, https://consumerfed.org/wp-content/uploads/2020/06/Letter-to-Commercial-Insurers-Re-Unrest-and-Biz-Interruption.pdf; A.M. Best, "California Notice: Some Insurers Exploiting COVID-19 Court Closures," May 20, 2020, https://news.ambest.com/newscontent.aspx?AltSrc=104&RefNum=225472

[4] American Tort Reform Foundation, *Judicial Hellholes 2022/2023* (December 2022), https://www.judicialhellholes.org/wp-content/uploads/2022/12/ATRA_JH22_FINAL-2.pdf

[5] IRL notes, "Our estimates are based on insurance premiums earned and losses incurred in each year." An "incurred loss" is not what an insurer has actually paid out. It includes billions of dollars of estimates — not actual costs — that insurers make in rate filings and have in the past proved to be wildly overstated. For more explanation, *see* J. Robert Hunter, Joanne Doroshow and Douglas Heller, *How the Cash Rich Insurance Industry Fakes Crises and Invents Social Inflation,* Consumer Federation of America and Center for Justice and Democracy (2020), https://centerjd.org/content/study-how-cash-rich-insurance-industry-fakes-crises-and-invents-social-inflation

[6] "Progressive reported over $3.3 billion in net income between April and September 2020 (Q2 and Q3), which was $1.5 billion, or 82% more than it earned during the same period last year. On December 4, Progressive announced a $4.50 per share annual dividend for its shareholders (~$2.6 billion), which was nearly double the 2019 annual dividend. GEICO's pre-tax earnings tripled during the second and third quarters of 2020 to $2.34 billion compared with $769 million in 2019. The third quarter earnings were up 83% from $835 million in earnings for the third quarter of 2019. Allstate reported auto insurance underwriting income for the combined two quarters of $1.87 billion, more than a billion dollars better than 2019." Consumer Federation of America, "Auto Insurance Refunds Needed as New Data Show Crashes Remain Well Below Normal Due to Pandemic; 23% Fewer Accidents in September and October," December 22, 2020, https://consumerfed.org/press_release/auto-insurance-refunds-needed-as-new-data-show-crashes-remain-well-below-normal-due-to-pandemic-23-fewer-accidents-in-september-and-october/

[7] Lawrence Chimerine and Ross Eisenbrey, "The frivolous case for tort law change: Opponents of the legal system exaggerate its costs, ignore its benefits," Economic Policy Institute, May 16, 2005, http://www.epi.org/publications/entry/bp157/

[8] Angela Childers, "Liberty Mutual reports sharply higher profit despite cat losses," *Business Insurance*, May 6, 2021, https://www.businessinsurance.com/article/20210506/NEWS06/912341678/Liberty-Mutual-reports-sharply-

higher-Q1-profit-despite-cat-losses; Leslie Scism, "AIG's Profit Rises on Premium Growth, Investment Gains," *Wall Street Journal*, May 6, 2021, https://www.wsj.com/articles/aigs-profit-rises-from-premium-growth-investment-gains-11620332347; Leslie Scism and Allison Prang, "Travelers More Than Doubles Quarterly Income," *Wall Street Journal*, October 20, 2020, https://www.wsj.com/articles/travelers-profit-rose-in-third-quarter-11603192181 ("Property-casualty insurer Travelers Cos. more than doubled its net income in the third quarter, benefiting from auto policyholders driving fewer miles and increased premium rates.")

[9] Leslie Scism, "AIG's Profit Rises on Premium Growth, Investment Gains," *Wall Street Journal*, May 6, 2021, https://www.wsj.com/articles/aigs-profit-rises-from-premium-growth-investment-gains-11620332347; Fitch Ratings, "U.S. P/C Insurers Report 2020 Underwriting Profits Despite Costs of COVID-19: Fitch," *Insurance Journal*, April 12, 2021, https://www.insurancejournal.com/news/national/2021/04/12/609503.htm ("pricing continues to increase at a level unseen since 2003").

[10] "Moody's Says COVID-19 Impact on P&C Insurance Sector Was 'Moderate,'" *Claims Journal*, May 24, 2021, https://www.claimsjournal.com/news/national/2021/05/24/303903.htm ("Businesses have filed about 1,700 business-interruption claims because of COVID-19 shutdowns, but those cases are largely being decided in favor of insurers, Moody's said"); Noor Zainab Hussain and Suzanne Barlyn, "Travelers Insurance Profit Soared in Q4 on Fewer Claims, Investment Gains," *Insurance Journal*, January 21, 2021, https://www.insurancejournal.com/news/national/2021/01/21/598175.htm

[11] Gavin Souter, "Property/casualty insurance prices keep rising," *Business Insurance*, April 6, 2021, https://www.businessinsurance.com/article/20210406/NEWS06/912340957/Propertycasualty-insurance-prices-keep-rising ; Matthew Lerner, "Global prices rise 22% in Q4: Marsh," *Business Insurance*, February 4, 2021, https://www.businessinsurance.com/article/20210204/NEWS06/912339588/Global-prices-rise-22-in-Q4-Marsh-Global-Insurance-Market-Index- ("Global commercial insurance prices rose 22% in the fourth quarter of 2020, the largest year-over-year increase in the Marsh Global Insurance Market Index since its inception in 2012"); Claire Wilkinson, "Chubb's Q4 profit doubles," February 3, 2021, *Business Insurance*, https://www.businessinsurance.com/article/20210203/NEWS06/912339556/Chubb%E2%80%99s-Q4-profit-doubles ("We had … excellent financial results, headlined by rapid premium revenue growth and margin improvement — a trend we are confident will continue"); Leslie Scism and Allison Prang "Travelers Profit Increases 50%, Fueled by Car-Insurance Unit," *Wall Street Journal*, January 21, 2021, https://www.wsj.com/articles/travelerss-net-written-premiums-rise-under-3-in-fourth-quarter-11611230451

[12] *See*, *e.g.*, Emily Gottlieb and Joanne Doroshow, "Trucking Companies Are Being Price-Gouged By Insurance Companies" and *Big Trucks: An Avoidable Public Safety Crisis*, Center for Justice & Democracy (November 2022), https://centerjd.org/content/study-big-trucks-avoidable-publicsafety-crisis. *See also*, J. Robert Hunter, Joanne Doroshow and Douglas Heller, *How the Cash Rich Insurance Industry Fakes Crises and Invents Social Inflation,* Consumer Federation of America and Center for Justice and Democracy (2020), https://centerjd.org/content/study-how-cash-rich-insurance-industry-fakes-crises-and-invents-social-inflation

[13] Consumer Federation of America, "Auto Insurance Refunds Needed as New Data Show Crashes Remain Well Below Normal Due to Pandemic; 23% Fewer Accidents in September and October," December 22, 2020, https://consumerfed.org/press_release/auto-insurance-refunds-needed-as-new-data-show-crashes-remain-well-below-normal-due-to-pandemic-23-fewer-accidents-in-september-and-october/; Leslie Scism and Allison Prang, "Travelers More Than Doubles Quarterly Income," *Wall Street Journal*, October 20, 2020, https://www.wsj.com/articles/travelers-profit-rose-in-third-quarter-11603192181 ("Property-casualty insurer Travelers Cos. more than doubled its net income in the third quarter, benefiting from auto policyholders driving fewer miles and increased premium rates.")

[14] *See*, *e.g.*, J. Robert Hunter, Joanne Doroshow and Douglas Heller, *How the Cash Rich Insurance Industry Fakes Crises and Invents Social Inflation,* Consumer Federation of America and Center for Justice and Democracy (2020), https://centerjd.org/content/study-how-cash-rich-insurance-industry-fakes-crises-and-invents-social-inflation; Jay Angoff, *Falling Claims and Rising Premiums in the Medical Malpractice Insurance Industry* (July 2005), http://www.centerjd.org/ANGOFFReport.pdf

[15] For more detailed explanation of how the insurance cycle works, *see* J. Robert Hunter, Joanne Doroshow and Douglas Heller, *How the Cash Rich Insurance Industry Fakes Crises and Invents Social Inflation,* Consumer Federation of America and Center for Justice and Democracy (2020), https://centerjd.org/content/study-how-cash-rich-insurance-industry-fakes-crises-and-invents-social-inflation

[16] Lawrence Chimerine and Ross Eisenbrey, "The frivolous case for tort law change: Opponents of the legal system exaggerate its costs, ignore its benefits," Economic Policy Institute, May 17, 2005, http://www.epi.org/publications/entry/bp157/

[17] Richard Posner, "Is the Tort System Costing the United States $865 Billion a Year?—Posner," *Becker-Posner Blog* (April 2007), http://www.becker-posner-blog.com/2007/04/is-the-tort-system-costing-the-united-states-865-billion-a-year--posner.html

[18] Tom Baker, Herbert M. Kritzer and Neil Vidmar, "Jackpot Justice and the American Tort System: Thinking Beyond Junk Science," July 1, 2008, http://ssrn.com/abstract=1152306

[19] Liam Pleven, "Math Divides Critics as Startling Toll of Torts is Added Up," *Wall Street Journal,* March 13, 2006, https://www.wsj.com/articles/SB114221023993396116

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[21] John Cochran, "'Tort Reform' Battle: A Simple Case of Complexity," *Congressional Quarterly Weekly*, January 29, 2005.

[22] Stephanie Mencimer, "False Alarm," *Washington Monthly* (October 2004), http://www.washingtonmonthly.com/features/2004/0410.mencimer.html.

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

[24] Id. at 347.

[25] Ibid.

[26] Id. at 346.

[27] Id. at 342.

[28] Laura Johannes, "Economist Ray Perryman Is Hailed As a Genius -- for Self Promotion," *Wall Street Journal*, May 10, 1995.