No. 2006-1212

In the Supreme Court of Ohio

CERTIFIED QUESTION FROM THE U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION
CASE NO. 3:06CV40010

MELISA ARBINO,
Plaintiff-Appellant (Petitioner),
v.
JOHNSON & JOHNSON, et al.,
Defendants-Appellees (Respondents).

BRIEF OF DEFENDANTS-APPELLEES (RESPONDENTS) JOHNSON & JOHNSON, ORTHO-McNEIL PHARMACEUTICAL, INC. AND JOHNSON & JOHNSON PHARMACEUTICAL RESEARCH AND DEVELOPMENT, LLC

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I. INTRODUCTION AND OVERVIEW

This Court asked the parties to this appeal to address the constitutionality of three specific statutes enacted by the General Assembly in 2005. Instead, Petitioner Melisa Arbino has launched a largely undifferentiated attack on "damage caps" and S.B. 80 in general, claiming that prior decisions of this Court interpreting different statutes establish a precedent so broad that the General Assembly must "muster the greater political will to amend the Constitution itself" (Pet. Br. at 5) before it can enact legislation affecting civil justice system. A careful analysis of those precedents within the context of the proper presumption accorded legislative enactments, the high burden a proponent of a "facial" constitutional challenge carries, and well-established constitutional principles, demonstrate that Petitioner's arguments must fail.

Although each of the three statutes in question deserves and will be accorded a separate analysis, a brief comment on Petitioner's wholesale attack on S.B. 80 is in order. S.B. 80, effective April 7, 2005, is not 1996 tort reform or 1987 tort reform. During the nine years following the General Assembly's enactment of H.B. 350, numerous studies documenting the costs of our nation's tort system, its impact on state economies, and the experiences of states that passed tort reform in the 1980s became available.[1] Prior to the passage of S.B. 80, the General Assembly – "the body best equipped" to hold "[a] full

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[1] See, e.g., Amicus Brief of Ohio Alliance for Civil Justice ("OACJ"), at 6-8; Amicus Brief of the Ohio Hospital Association ("OHA"), et al., at 16-18.

discussion of the competing principles and controversial issues"[2] relating to these issues – heard the testimony of more than 30 experts, considered reams of studies and documented statistics, and made extensive fact findings on the current state of Ohio's civil justice system.[3]

Further, those hearings, studies and discussions were conducted in the context of 21st century state and federal jurisprudence. State jurisprudence includes at least 22 decisions that have upheld noneconomic damage cap legislation,[4] while punitive damage limits in 34 states, when challenged, have been overwhelmingly upheld against the type of attack mounted by Respondent.[5] Federal jurisprudence includes the landmark 2003 United States Supreme Court decision – *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003), 538 U.S. 408. *State Farm* instituted "constitutional tort reform"[6] when it held that the Due Process Clause of the Fourteenth Amendment of the United States Constitution requires state court systems to conduct de novo reviews of punitive damage awards issued by juries, and vacate those that failed to comply with constitutionally

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[2] *Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assoc., Inc.* (2006), 108 Ohio St.3d 494, 514 ¶ 84 (dissent, Lanzinger, J.).

[3] See OACJ Amicus Br. at 5-8; Amicus Brief of the Prod. Liab. Advisory Council, Inc. ("PLAC"), at 38-39.

[4] OACJ Amicus Br. at 28-35; Amicus Brief of Nat'l Federation of Ind. Bus. Legal Found., et al. ("Nat'l Federation") at 12-14.

[5] See Nat'l Federation Amicus Br. at 15-16; PLAC Amicus Br. at 22; OHA Amicus Br. at 18, n.17.

[6] Geistfeld, Constitutional Tort Reform (2005), 38 Loy.L.A.L.Rev. 1093.

mandated "guideposts."[7] The Due Process Clause protects defendants from common law procedures that lead to "indiscriminate[]" and "arbitrary" punitive damage awards with a "devastating" potential for harm.[8] Ohio is no different.[9]

As numerous commentators have noted, the due process concerns identified in *State Farm* apply equally to jury awards of noneconomic damages. Both forms of damages are "particularly problematic as a matter of due process."[10] "This is especially true given the largely common origins of punitive damages and noneconomic compensatory damages" and the similar flaws that inflict both – "including inadequate guidance to juries, lack of objective criteria against which to measure outcomes, and the absence of principled bases for judicial review ***."[11]

The U.S. Supreme Court embarked upon constitutional tort reform because: 1) "the manner in which punitive damages are awarded *** led the Court to break from historical practice and to ratchet up the level of judicial scrutiny for such awards";[12] and 2) federal constitutional tort reform could actually "serve the valuable role of forcing

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[7] For a thorough discussion of the significance of *State Farm* and its predecessors, see PLAC Amicus Br., at 7-13.

[8] 538 U.S. at 417.

[9] See PLAC Amicus Brief, Appendix B (surveying punitive damage awards nationally and in Ohio).

[10] Geistfeld, Due Process and the Determination of Pain and Suffering Tort Damages (2006), 55 DePaul L.Rev. 331.

[11] DeCamp, Beyond *State Farm*: Due Process Constraints on Noneconomic Compensatory Damages (2003), 27 Harv. J.L.&Pub.Pol'y 231, 234.

[12] Id.

state courts and legislatures to identify more clearly the substantive objectives of tort liability."[13]

Ohio's General Assembly accepted the challenge posed by the U.S. Supreme Court. It has addressed the "particularly problematic" issues presented in punitive and noneconomic damage awards by enacting legislation limiting the judgment that can be entered on such awards. It is axiomatic that "the policy or wisdom of a statute *** is the exclusive concern of the legislative branch of the government."[14] Petitioner cites to examples of unfairness in the *current* tort system as supporting her argument that the reforms are unconstitutional. Compare Pet. Br., pp. 29-40 (arguing that damage caps discriminate against groups who have historically received lower noneconomic damage awards) and Dobbs, The Law of Torts, § 377 (2001) ("the claim of pain is *** a serious threat to the defendant, since, lacking any highly objective components, it permits juries to roam through their biases in setting an award") and DeCamp, 27 Harv. J.L.&Pub. Pol'y at fn. 174 (describing a study showing that mock jurors "who were not permitted to award punitive damages awarded more in compensatory damages, particularly for pain and suffering ***"). The solution devised by the Ohio Assembly may not have been the one chosen by counsel for Petitioner, or even by members of this Court, but it is the role

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[13] Geistfeld, 38 Loy.L.A.L.Rev. at 1115.

[14] *State ex rel. OATL v. Sheward* (1999), 86 Ohio St.3d 451 ("*Sheward*") at 456, quoting *State ex rel. Bishop v. Mt. Orab Village School Dist. Bd. of Edn.*(1942), 139 Ohio St. 427, 438.

of the General Assembly, as "the ultimate arbiter of public policy,"[15] to identify and codify the substantive goals of tort law.

II. COUNTERSTATEMENT OF FACTS

On December 20, 2000 Respondent Johnson & Johnson Pharmaceutical Research & Development submitted a new drug application ("NDA") to the Food and Drug Administration ("FDA") for ORTHO-EVRA®, a norelgestromin/ethinyl estradiol transdermal system. On November 20, 2001, the FDA approved ORTHO-EVRA® as a prescription medicine for the prevention of pregnancy. As a prescription drug, Ortho-Evra® can only be dispensed with the counseling of a physician. ORTHO-EVRA® is the first and only once-a-week birth control patch. The ORTHO-EVRA® transdermal patch delivers hormones, similar to those utilized in birth control pills, over a 7-day period while oral contraceptives are administered on a daily basis. Thus, the pharmacokinetic profiles are different and direct comparisons cannot be made between the two delivery systems.

As part of the approval process, the drug manufacturer must provide detailed information about clinical studies and proposed labeling to be used when the medicine is approved for distribution. 21 U.S.C. § 355 et seq. The FDA-approved label for ORTHO-EVRA® includes sections on Warnings and Contraindications and has, since its initial approval in November of 2001, warned about the risk of thromboembolic disorders.

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[15] *State ex rel. Cincinnati Inquirer v. Dupius* (2002), 98 Ohio St.3d 126 at ¶ 21; *Weaver v. Edwin Shaw Hosp.* (2004), 104 Ohio St.3d 390 at ¶ 31.

FDA regulations provide for revised labeling when a manufacturer becomes aware of "reasonable evidence of an association of a serious hazard with a drug." 21 C.F.R. § 201.57(e). Thus, as with all prescription pharmaceutical products, Johnson & Johnson Pharmaceutical Research & Development and Ortho-McNeil Pharmaceutical, Inc. continue to evaluate ORTHO-EVRA® post-marketing, communicate with the FDA, and revise prescribing information and warnings as appropriate. The FDA approves such revised labeling only where the association between a serious hazard and the drug is scientifically substantiated. *Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products*, 71 Fed. Reg. 3922, 3934-3935 (FDA Jan. 24, 2006); see, also, 44 Fed. Reg. 37434, 37453 (1979). The determination as to whether labeling revisions are necessary "is, in the end, squarely and solely FDA's under the Act." 71 Fed. Reg. at 3934.

Petitioner has alleged that she experienced blood clots, a thromboembolic disorder, as a direct result of her use of ORTHO-EVRA®. She filed suit against Respondents Johnson & Johnson, Ortho-McNeil Pharmaceutical, Inc., and Johnson & Johnson Pharmaceutical Research and Development LLC (collectively "Respondents"), seeking compensatory and punitive damages under a variety of product liability theories. Petitioner's Complaint was removed to federal court and subsequently transferred to Multidistrict Litigation ("MDL") consolidated before U.S. District Court Judge David Katz in the Northern District of Ohio, Western Division.

In addition to tort claims, Petitioner's First Amended Complaint seeks a judgment declaring four separate provisions of Ohio Senate Bill 80 to be unconstitutional on their

face. Petitioner alleges that her injuries do not meet the definition of permanent, catastrophic injury in R.C. 2315.18, but that she seeks an award greater than the maximum of noneconomic damages for non-catastrophic injury permitted under the statute. She also seeks punitive damages in excessive of the limits set forth in R.C. 2315.21, and opposes the admission of collateral source evidence permitted by R.C. 2315.20.

After Petitioner filed a motion for partial summary judgment on her statutory constitutional challenges, the State of Ohio intervened. Judge Katz certified four questions of law to this Court pursuant to S.Ct.Prac.R. XVIII(6); this Court agreed to decide three of the certified questions:

> 1. Is Ohio Revised Code § 2315.18, as amended by Senate Bill 80, effective, April 7, 2005, unconstitutional on the grounds as stated by the Plaintiffs?
>
> 2. Is Ohio Revised Code § 2315.20, as amended by Senate Bill 80, effective, April 7, 2005, unconstitutional on the grounds as stated by the Plaintiffs?
>
> 3. Is Ohio Revised Code § 2315.21, as amended by Senate Bill 80, effective, April 7, 2005, unconstitutional on the grounds as stated by the Plaintiffs?

(Petitioner's Appendix ("Appx.") 1.)

Petitioner's brief does not separately address the three statutes that are the subject of the three certified questions. Respondents will address each of the three questions in the order set forth in this Court's certification: 1) the noneconomic damage cap (R.C.

2315.18); 2) collateral sources (R.C. 2315.20)[16]; and 3) the punitive damages cap (R.C. 2315.21).

III. ARGUMENT

A. Standard of Review

All of Petitioner's challenges are facial challenges – "the most difficult to bring successfully because a challenger must establish that there exists no set of circumstances under which the statute would be valid." *Harrold v. Collier* (2005), 107 Ohio St.3d 44, at ¶ 37. In addition, black-letter law establishes that every "statute is presumed to be constitutional and every reasonable presumption will be made in favor of its validity." *State ex rel. Haylett v. Ohio Bur. of Workers' Comp.* (1999), 87 Ohio St.3d 325, 328.

Petitioner's primary weapon for her broad, facial attack is the doctrine of "stare decisis." This Court's prior interpretations of different statutes, however, do not determine the constitutionality of current R.C. 2315.18, 2315.20, or 2315.21. Specifically, Petitioner's argument (Pet. Br. at 5) that this Court would have to "mov[e] [an] *** entire mountain" of precedent to find R.C. 2315.18 constitutional on its face, is overbroad and contrary to the statute-specific analysis required to resolve any constitutional challenge. The doctrine of "stare decisis" is not an issue; Respondents are not asking this Court to overturn any of its prior decisions. Respondents merely ask this Court to uphold the statutes before it.

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[16] Petitioner has all but abandoned her constitutional challenge to the collateral source statute; Respondents will nevertheless provide this Court the analysis required to answer the certified question. R.C. 2315.20 is discussed extensively in the Amicus Brief filed by the Ohio Association of Civil Trial Attorneys ("OACTA"), pp. 3-20.

This Court's decisions interpreting prior tort reform statutes do not apply to the three statutes effective April 7, 2005 that are presently before this Court. See, e.g., *Hedges v. Nationwide Mut. Ins. Co.* (2006), 109 Ohio St.3d 70, syllabus:

> The interpretation of R.C. 3937.18(A) in *Moore v. State Auto* (2000), 88 Ohio St.3d 27 *** applies only to the 1994 S.B. 20 version of the statute. Thus, *Moore* does not apply to the version of R.C. 3937.18(A) as amended by 1997 H.B. 261.

In *Moore v. State Auto*, this Court not only declared that a statute permitting insurers to limit uninsured and underinsured motorists coverages to "bodily injury" to be ambiguous, but also contrary to the "purpose" of such coverages and "invalid." 88 Ohio St.3d 31, 33. Such broad statements did not, however, hinder this Court's review of an amended statute, or conclusion that the amended statute was both unambiguous and an enforceable restriction of coverages to "bodily injury." *Hedges*, supra. Similarly, broad statements in cases interpreting prior tort reform statutes do not bind this Court in its analysis of the statutes that are the subject of this appeal. Since cases interpreting prior tort reform statutes "do[] not apply" to R.C. 2315.18, there is no need for this Court to reconsider or reverse those cases.

Even if this Court were to find it necessary to overturn a prior case challenging a different statute under Article I, Section 5, stare decisis is not as restrictive as Petitioner suggests. As this Court recognized in *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, "our precedents are not sacrosanct," and "[l]ike the United States Supreme Court, *** we have overruled prior decisions where the necessity and propriety of doing do has been established." Id., ¶ 44 (punctuation and citations omitted). The doctrine of

stare decisis is not inflexible; it is a prudential policy limitation on the powers of a court which should be applied in a manner consistent with sound jurisprudence. *Lawrence v. Texas* (2003), 539 U.S. 558, 577; *Payne v. Tennessee* (1991), 501 U.S. 801, 827, 828.

More importantly, principles applicable to the reexamination of prior case law interpreting *statutes* do not necessarily apply to the reexamination of cases interpreting *the Ohio Constitution*. *Galatis* set forth the factors to be considered before this Court will overturn a prior court interpretation of a statute or the common law. Sound jurisprudence requires a less rigid standard of stare decisis when the issue before the Court is interpretation of a constitutional provision. E.g., *City of Rocky River v. State Employment Relations Bd.* (1989), 43 Ohio St.3d 1, 5 (stare decisis "does not apply with the same force and effect when constitutional interpretation is at issue"). That is so "because in such cases 'correction through legislative action is practically impossible.'" *Payne*, 501 U.S. at 827-828, quoting *Burnette v. Coronado Oil & Gas Co.* (1932), 285 U.S. 393, 407 (Brandeis, J., dissenting). See, also, *City of Rocky River*, 43 Ohio St.3d at 6 ("Given the inability of the legislature to override judge-made law in this area, it is clear that when an earlier decision is demonstrably wrong *** it is incumbent on the court to make the necessary changes and yield to the force of better reasoning.").

A less rigid standard is particularly appropriate for deeply divided decisions that "have been questioned by Members of the Court in later decisions ***." See *44 Liquormart, Inc. v. Rhode Island* (1996), 517 U.S. 484, 510 ("Because the 5-to-4 decision *** concerned a constitutional question about which this Court is the final arbiter, we decline to give force to its highly deferential approach."); *Payne*, 501 U.S. at 828 (noting

the frailty of closely divided constitutional decisions "with spirited dissents challenging [their] basic underpinnings"). *Sheward* falls within that category. The majority's 4-3 decision in *Sheward* provoked two lengthy and vigorous dissenting opinions. Just three months later, two Justices agreed with Chief Justice Moyer that the general practice of summarily deciding pending cases that raise issues resolved by a recent decision of this Court, should not apply to *Sheward*:

> Regrettably, I am compelled to make an exception to that practice in this case. In view of irregularities in the assumption of jurisdiction and the inclusion of inappropriate references to the conduct of the General Assembly in *State ex. Rel. Ohio Academy of Trial Lawyers v. Sheward*, as is more fully described in my dissent therein, I cannot agree that *Sheward* should control the outcome of this case.

Burger v. City of Cleveland Heights (1999), 87 Ohio St.3d 188, 198-99.[17]

In short, Petitioner's insistence that this Court's prior decisions interpreting prior statutes "requires that [the General Assembly] muster the greater political will to amend the Constitution itself" (Pet. Br. at 5), fails to account for the possibility that the existence of high barriers to constitutional amendment support a less rigid application of stare decisis to court interpretations of constitutional provisions. Even were it not dicta, *Sheward*'s brief discussion of damages caps represents a dramatic departure from established legal principles which should be reconsidered. But because it is dicta, this Court need not formally refute it.

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[17] For a comprehensive analysis of *Sheward*, see PLAC Amicus Br. at 22-29.

B. Certified Question No. 1

Ohio Revised Code Section 2315.18 does not violate the Ohio Constitution.

R.C. 2315.18 (Appx. 56-59), enacted as part of Senate Bill 80, has never been construed by this Court. With certain exceptions not applicable here,[18] the statute declares there to be: 1) no limit on economic damages in a tort action; 2) no limit on noneconomic damages for permanent and substantial deformity or functional injury (hereinafter "catastrophic" injury);[19] and 3) a limit on recoverable noneconomic damages for non-catastrophic injury in the greater of $250,000 or three times economic damages (up to a maximum of $350,000, or $500,000 for a single occurrence).

In the trial of a tort action to a jury, a jury returning a general verdict in favor of the injured party will include interrogatories setting forth the jury's finding as to total compensatory damages, and specifying which portion of those damages represent economic and noneconomic loss. R.C. 2315.18(D) (Appx. 58). Thereafter, the trial court shall enter judgment reflecting all of the economic damages set forth in the jury interrogatories. R.C. 2315.18(E)(1) (Appx. 58). In cases of catastrophic injury, the trial court will also enter the full amount of noneconomic damages appearing in the jury

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[18] The statute does not apply to tort actions filed in Ohio's Court of Claims, tort actions against political subdivisions subject to Chapter 2744, or wrongful death actions. R.C. 2315.18(H) (Appx. 59). Further, "tort actions" is defined to exclude medical and breach of contract claims. R.C. 2315.18(A)(7) (Appx. 57).

[19] R.C. 2315.18(B)(3) provides that "[t]here shall not be any limitation" of noneconomic damages for "[p]ermanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system" and "[p]ermanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities" (Appx. 57-58).

interrogatory. Id.; see, also, R.C. 2315.18(B)(3) (Appx. 57-58). In cases of non-catastrophic injuries, the trial court will enter a judgment for noneconomic damages that does not exceed the greater of $250,000, or three times the economic loss determined by the jury, up to a maximum of $350,000 (single plaintiff) or $500,000 (multiple plaintiffs, single occurrence). R.C. 2315.18(E)(1) (Appx. 58); R.C. 2315.18(B)(2) (Appx. 57); R.C. 2315.18(B)(2) (Appx. 57).

1. The uniform judicial application of R.C. 2315.18 to noneconomic damage awards found by a jury does not violate Art. I, Sec. 5 of the Ohio Constitution (right of trial by jury).

Ohio's constitutional right of trial by jury does not guarantee every plaintiff the full amount of every type of damage upon which a jury is instructed; a statute requiring trial judges to apply fixed limits on the total amount of noneconomic damages a tort plaintiff can receive is consistent with the language and purpose of the constitutional provision.

a. A statute setting forth a uniform rule of law to be applied by judges after the jury has completed its fact-finding process, and which does not give judges the discretion to enter an award based on their own opinion of the facts, does not violate Ohio's jury trial guarantee.

Section 5, Article I of the Ohio Constitution states that:

> The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

(Appx. 226.) The single word "inviolate" does not mandate that every jury award is exempt from applicable laws. While the right of a trial by a jury is "inviolate," the awards issued by the jury are subject to both the common and statutory law. Petitioner's claim that the Ohio Constitution guarantees that jurors will immutably "set damages" (Pet. Br. at 15) is not supported by the language or the history of the right to a jury trial, and is inimical to its continued "capacity for growth and development ***." *Markota v. East Ohio Gas Co.* (1951), 154 Ohio St. 546, 556. Trial judges, for example, have not only the right, but the *duty* to enter judgments notwithstanding the verdict when the evidence supporting it is insufficient as a matter of law, to vacate jury verdicts that are contrary to the manifest weight of the evidence, and to vacate, either entirely or subject to additur or remittitur, awards that are grossly excessive or inadequate. *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 92. In undertaking the latter duty, trial judges must themselves weigh the evidence and judge witness credibility, albeit in a more limited sense. Id.

The power of trial judges to vacate jury awards is not expressed in Art. I, Sec. 5 as an exception to "inviolate" jury trials. Rather, such powers and duties either preexisted the Constitution (and thus were incorporated within Art. I, Sec. 5 at the time of its adoption) or evolved through this Court's recognition that Article I, Section 5 must be interpreted so as to permit "change, development [and] improvement" in the jury system. *Markota,* 154 Ohio St. at 555 (rejecting argument that additur violates the right of trial by jury). When viewed in light of the origins of the right of trial by jury, decisions such as *Rohde* and *Markota* demonstrate that this Court has historically applied "inviolate" in a manner far less rigid than that advocated by Petitioner.

Nor is Petitioner's interpretation supported by the history of Art. I, Sec. 5. The right of a jury trial – which "derives from Magna Charta" and "is reasserted both in the Constitutional of the United States and in the Constitution of the State of Ohio"[20] – was designed to protect against biased fact-finding by judges. See, e.g., Blackstone, Commentaries on the Law (B. Gavit Ed. 1941), 689-90:

> [I]n setting and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in, either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder.

This fear became the animating force for the "American attachment" to the right of trial by jury:

> A special American attachment for juries arose from the colonial worry about English common lawyers appointed by London to preside over the colonial courts who, it was feared, had a greater attachment to imperial rule than to impartial justice.

Reid, Constitutional History of the American Revolution, The Authority of Rights (1986), 51. See, also, id. at 49 (juries "furnished the citizenry with a shield against venal jurists, purchased testimony, dependent officials, and partial judgments"); Henderson, The Background of the Seventh Amendment (1966), 80 Harv.L.Rev. 289, 293 (at the Constitutional Convention in Philadelphia, "Mr. Gerry urged the necessity of Juries to guard [against] corrupt Judges"), quoting 2 Records of the Federal Convention of 1787 (M. Farrand Ed. 1937), 587.

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[20] *Cleveland Ry. Co. v. Halliday* (1933), 127 Ohio St. 278, 284.

Although mistrusted as fact-finders, judges were clearly the sole arbiter of the law. See, e.g., Henderson, "The Background of the Seventh Amendment," 80 Harv.L.Rev. 289, 303 (1966) (since at least the late eighteenth century, and "it seems that as early as 1755 the legal profession considered that a judge could take the case away from the jury by such preemptory instructions"); *Keller v. Stark Electric Ry. Co.* (1921), 102 Ohio St. 114, 117-118 (trial courts may direct verdicts without offending the right of a jury trial):

> And the question a reviewing court would be called upon to answer in such case would be, Did the trial court give to the evidence the extent and effect it was entitled under the law to receive? – not whether this case was one triable to a jury at common law, and therefore one to which the right of trial by jury was guaranteed by the Constitution; that being a question long settled in favor of plaintiff's contention and in no sense debatable.

The jury as the finder of facts to which the judge applied the law, formed the two basic elements of "the right of trial by jury as it was recognized by the common law." *Dunn & Witt v. Kanmacher & Stark* (1875), 26 Ohio St. 497, 503; *Keller,* 102 Ohio St. at 116. That common law right also included a right to twelve jurors, a unanimous verdict, an impartial and competent jury, and a right to have a jury determine factual issues in dispute. Scott, Trial by Jury and the Reform of Civil Procedure (1918), 31 Harv. L. Rev. 669, 672-678.

b. <u>Interpretations of Art. I, Sec. 5 that allow for the improvement and development of jury trials are essential to the continued validity of the jury system.</u>

The right of jury trial embodied in the United States and Ohio Constitutions was not intended to bind courts "to the exact procedural incidents or details of jury trial

according to the common law." *Galloway v. United States* (1943), 319 U.S. 372, 390. Simply because additurs did "not appear to have had the approval of English authorities at the time of the adoption of the federal Constitution," for example, did not make the practice "inconsistent with the right to a jury trial." *Markota*, 154 Ohio St. at 555-556 (Opinion of Taft, J.) Likewise, simply because noneconomic damage caps did not appear to have the approval of English authorities at the time of the adoption of Ohio's Constitution does not make the statute inconsistent with the right of jury trial.

Because the common law itself is subject to evolution and change, constitutional interpretations should not seek to impose an unnatural rigidity upon it:

> When the Constitution of the United States was adopted and when the Constitution of this state was adopted, the common law was something more than a miscellaneous collection of precedents. It was a system, then a growth of some five centuries, to guide judicial decision. One of its principles, certainly as important as any other, and that which assured the possibility of the continuing vitality and usefulness of the system, was its capacity for growth and development, and its adaptability to every new situation to which it might be needful to apply it.

Markota at 556. The growth and development of the common law requires the use of "new devices *** to adapt the ancient institution [of jury trials] to present needs and to make of it an efficient instrument in the administration of justice." *Colgrove v. Battin* (1973), 413 U.S. 149, 157.

Legislative damage caps do not permit fact-finding by judges or violate constitutional rights to a jury trial. See, e.g., *Estate of Sisk v. Manzanares* (D. Kan. 2003), 270 F.Supp.2d 1265, 1277-78 (concluding that plaintiff's arguments that a Kansas

statute limiting wrongful death noneconomic damages to $250,000 violated the Seventh Amendment "are plainly without merit"). The Seventh Amendment to the United States Constitution (unlike Ohio's right of jury trial) contains an *explicit* prohibition against judicial reexaminations of jury findings – i.e., "no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of common law." *Sisk* at 1277, quoting the Seventh Amendment, U.S. Constitution. The prohibition of *court* reexamination, however, did not preclude a legislative cap for noneconomic damages:

> Federal courts uniformly have held that statutory damage caps do not violate the Seventh Amendment, largely because a court does not "reexamine" a jury's verdict or impose its own factual determination regarding what a proper award might be. Rather, the Court simply implements the legislative policy decision to reduce the amount recoverable to that which the legislature deems reasonable.

Id. at 1277-78 (footnotes omitted).

This analysis rests on three principle grounds. *First*, judicial enforcement of a legislative cap on recoverable damages does not require a judge to revisit any factual determinations made by a jury:

> In this Court's judgment, a legislature adopting a prospective rule of law that limits all claims for pain and suffering in all cases is not acting as a fact finder in a legal controversy. It is acting permissibly within its legislative powers that entitle it to create and repeal causes of action. The right of jury trials in cases at law is not impacted. Juries always find facts on a matrix of laws given to them by the legislature and by precedent, and it can hardly be argued that limitations imposed by law are a usurpation of the jury function.

Franklin v. Mazda Motor Corp. (D. Md. 1989), 704 F.Supp. 1325, 1331. See, also, *Hemmings v. Tidyman's, Inc.* (C.A.9, 2002), 285 F.3d 1174, 1202 ("In applying a provision, a court does not 'reexamine' the jury's verdict or impose its own determination as to what a proper award might be. Rather, it implements the legislative policy decision by reducing the amount recoverable to that deemed to be a reasonable maximum by Congress."), quoting *Madison v. IBP, Inc.* (C.A.8, 2001), 257 F.3d 780, 804.[21]

Second, since a statutory cap on recoverable damages is imposed uniformly on successful plaintiffs, such caps do not implicate the concerns with biased decision-making that the right of trial by jury protects against. *Davis v. Omitowoju* (C.A.3, 1989), 883 F.2d 1115, 1165 (finding it "instructive" that the right to jury trial embodied in the Seventh Amendment "was perceived as a guard against judicial bias, thus giving rise to the Seventh Amendment proscription against the Court 'reexamining' any fact found by a jury"). A legislature making "a rational policy decision in the public interest" is far different from "a judicial decision which only affects the parties before it"; the former offends neither "the terms, the policy [nor] the purpose" of the jury trial guarantee. Id.

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[21] Several state supreme courts have cited this fundamental principle in upholding noneconomic damage caps against state and federal constitutional challenges. See, e.g., *Evans v. State* (Alaska 2002), 56 P.3d 1046, 1051 (damages cap "did not constitute a re-examination of the factual question of damages"); *Kirkland v. Blaine County Med. Ctr.* (Idaho 2000), 4 P.3d 1115, 1120 (nothing in a damages cap "prohibits a plaintiff from presenting his or her full case to the jury and having the jury determine the facts of the case based on the evidence presented at trial"); *Murphy v. Edmonds* (Md. 1992), 601 A.2d 102, 117 (explaining that the legislatively imposed noneconomic damages cap "removed the issue [of damages in excess of $350,000] from the juridical arena," that the cap "fully preserves the right of having a jury resolve the factual issues with regard to the amount of noneconomic damages," and that the cap does not interfere "with the jury's proper role and its ability to resolve the factual issues which are pertinent to the cause of action").

Third, a blanket rule of law declaring all statutory damages caps unconstitutional is fundamentally inconsistent with widespread historical acceptance of the right of the legislature to provide for statutory or treble damages:

> We further note the paradoxical implications of Plaintiffs' claim: If a judge cannot limit damages found by a jury in accordance with a statute, how can a judge impose statutorily mandated double or treble damages without also imposing on the jury's province as sole factfinder? And yet "[a]wards of double or treble damages authorized by statute date back to the 13th century *** and the doctrine was expressly recognized in cases as early as 1763." *Browning-Ferris Ind. of Vermont, Inc. v. Kelco Disposal Inc.*, 492 U.S. 257, 274, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989).

Hemmings, 285 F.3d at 1202. Accord *Kirkland*, 4 P.3d at 1119 ("[A]t the time the Idaho Constitution was adopted, there were territorial laws providing for double and treble damages in certain civil actions***. Therefore, the Framers could not have intended to prohibit in the Constitution all laws modifying jury awards.").

c. Petitioner's cases do not support her argument.

An examination of the six cases cited by Petitioner as "binding precedent" (Pet. Br. at 15) shows that none dictate this Court's analysis of R.C. 2315.18. Two of the cases – *Chester Park Co. v. Schulte* (1929), 120 Ohio St. 273 and *Toledo Rys. & Light Co. v. Paulan* (1916), 93 Ohio St. 396 – simply reiterate that trial judges may not substitute their own fact-findings for those of the jury in a specific case. They have no relevance to this Court's consideration of a statutory law that uniformly dictates the judgment trial judges must enter on noneconomic damage awards. The next case, *Markota v. East Ohio Gas Co.* (1961), 154 Ohio St. 546, *supports* the constitutionality of R.C. 2315.18 (see

supra, pp. 15-16, 18) while *Flory v. New York Cent. R. Co.* (1959), 170 Ohio St. 185, has no constitutional analysis whatsoever.

The remaining cases cited are *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451; *Galayda v. Lake Hosp. Sys., Inc.* (1994), 71 Ohio St.3d 421; and the case relied upon by *Galayda* – *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415.

Sorrell analyzed former R.C. 2317.45, which did not require "that damages be allocated between economic or noneconomic damages or even past or future economic damages." 69 Ohio St.3d at 422. Trial judges were to deduct collateral benefits received by a plaintiff from this undifferentiated jury award, after making factual findings regarding collateral benefits plaintiff had actually received and the total cost associated with those benefits – i.e., the "actual" amount of economic damages suffered by the jury. Id. at 420, n.1. This fact-finding duty invested the trial judge with discretionary authority to determine an individual plaintiff's damages that is not included in R.C. 2315.18.

Similarly, *Galayda* analyzed former R.C. 2323.57(D)(1), which gave a trial judge complete discretion to "modify, approve, or reject" a plan, submitted after the jury returned its verdict, which would order periodic payments of economic and noneconomic future damages that had presumably already been reduced to present value by the jury. Again, that discretion is not present in R.C. 2315.18.

Neither case addresses a statute limited to noneconomic damages – a category of damages that are inherently subjective, often arbitrary, and subject to "forceful criticism":

> There has been forceful criticism of the rationale for awarding damages for pain and suffering in negligence cases. *** Such damages originated under primitive law as a means of punishing wrongdoers and assuaging the feelings of those who have been wronged. *** They become increasingly anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation. Ultimately such losses are borne by a public free of fault as part of the price for the benefits of mechanization.

Fein v. Permanente Med. Group (Cal. 1985), 695 P.2d 665, 681 n. 16 (upholding noneconomic damages cap). *Fein*'s criticism has found support in numerous articles, treatises, and empirical studies.[22]

Finally, this Court's decision in *Sheward* provides no binding precedent. The language relied on by Petitioner (Pet. Br. at 15) is dicta. The *Sheward* syllabus[23] declares an entire bill – Am. Sub. H.B. No. 350 – to be an unconstitutional violation of separation of powers and the one-subject provision of Article II, Section 15(D) of the Ohio Constitution. The rule of law set forth in the syllabus addresses no specific statutory amendment included within H.B. 350 and is not dependent upon any interpretation of the right of trial by jury. The section of *Sheward* cited by Petitioner explains that H.B. 350

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[22] See Geistfeld, 38 Loy.L.A.L.Rev. at fn. 41 (cataloguing law review articles and empirical studies) and fn. 44 (law review articles and treatises).

[23] Former S.Ct.R.Rep.Op. 1(B), provided that "[t]he syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication." *Sheward*, 86 Ohio St.3d at 517 (Moyer, dissenting). That is the rule applicable to determine the precedential value of *Sheward* in this case. See, e.g., *State v. Bush* (2002), 96 Ohio St.3d 235, 237, ¶ 10 (applying the Supreme Court Rule for the Reporting of Opinions in effect at the time the precedential case issued).

violated the separation of powers doctrine because it expressly sought to overrule Ohio Supreme Court interpretations of the Ohio Constitution. The question of whether *any* noneconomic damage cap – much less R.C. 2315.18 – violates the right to a jury trial was not essential to the decision.

At most, the dicta in *Sheward* holds that a substantively different statute suffered the same due process flaw that caused the Court to strike down a noneconomic damage cap in *Morris v. Savoy* (1991), 61 Ohio St.3d 684. *Sheward*, 86 Ohio St.3d at 485. Notably, the majority acknowledges that *Morris* itself "did not conduct any specific analysis" of the right to a jury trial and, to the contrary, suggests that the right was not even implicated. Id. at 485, n.14. Dismissing *that* portion of *Morris*, the footnote goes on to state that:

> *** our decisions subsequent to *Morris* clearly hold that the right to jury trial includes a right to have the jury determine the amount of damages to be awarded. See *Zoppo*; *Galayda*; *Sorrell*, supra.

Id. That footnote cannot have any binding effect on this Court's consideration of R.C. 2315.18. While *Morris* did *not* hold that the noneconomic cap at issue violated the right to a jury trial (and suggested, to the contrary, that the right of jury trial was not even "implicated"), neither *Zoppo,*[24] *Galayda,* nor *Sorrell* analyzed any noneconomic damage cap – much less the noneconomic damage cap set forth in R.C. 2315.18. Such dicta within dicta hardly provides the careful constitutional analysis required to resolve Petitioner's challenge in this case.

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[24] *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552.

2. R.C. 2315.18 does not violate Article I, Section 16 ("right-to-a-remedy") of the Ohio Constitution.

Article I, Section 16 of the Ohio Constitution states that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." The phrase "shall have remedy" does not guarantee a litigant a right to any particular remedy; "[t]he Legislature has complete control over the remedies afforded to parties in the courts of Ohio, and it is a fundamental principle of law that an individual may not acquire a vested right in a remedy or any part of it, that is, there is no right in a particular remedy." *State ex rel. Michaels v. Morse* (1956), 165 Ohio St. 599, 605; see, also, *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, 49 ("We do not suggest that causes of action as they existed at common law or the rules that govern such causes are immune from legislative attention."). Indeed, this Court has recognized that "[o]ur constitutions were made in the contemplation that new necessities would arise with changing conditions of society." *Hardy*, 32 Ohio St.3d at 49, quoting *Fassig v. State ex rel. Turner* (1917), 95 Ohio St. 232, 248. The Ohio Constitution's guarantee of a right to remedy, therefore, requires nothing more than "an opportunity granted at a meaningful time and in a meaningful manner." *Hardy*, 32 Ohio St.3d at 47.

The ability of a plaintiff with non-catastrophic injuries to recover all of his or her economic damages, and up to $350,000 in noneconomic damages, is not "meaningless." This Court has never tied the concept of "meaningfulness" under Section 16, Article I of the Ohio Constitution to the recovery of any particular amount of money. Rather, the

concept asks whether the operation of a statute prevents the plaintiff from having a meaningful opportunity to recover *at all.* See, e.g., *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54 (statute of repose for medical claims); *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, 466 (statute of repose for builders and architects); *Burgess v. Eli Lilly & Co.* (1993), 66 Ohio St.3d 59, 63 (statute of repose for prescription drug (DES)); *Sorrell v. Thevenir*, 69 Ohio St.3d at 426 (as applied to the facts of that case, former R.C. 2317.45 was unconstitutional because it "completely obliterates the entire jury award").

The noneconomic damages cap created by R.C. 2315.18 does not terminate a claim before it has accrued and cannot be applied in a manner that would obliterate a jury award. Instead, it brings predictability to noneconomic damage awards by specifying a range within which such awards must fall. In this way, R.C. 2315.18 reduces the arbitrariness of a verdict that is inevitability the product of the inherent difficulties of placing a monetary value on noneconomic losses. By reducing the arbitrariness of noneconomic damages awards, R.C. 2315.18 enhances the fairness of jury trials and promotes core values underlying the right of trial by jury.

3. R.C. 2315.18 does not violate Art. I, Sec. 16 ("due process") or Art. I, Sec. 2 ("equal protection") of the Ohio Constitution.

Pages 26-42 of Petitioner's Brief argue that two allegedly "materially identical" cases from this Court – *Morris*, 61 Ohio St.3d 684 and *Sheward*, 86 Ohio St.3d 451 – compel the conclusion that R.C. 2315.21 violates equal protection and due process guarantees in the Ohio Constitution. See Heading (Pet. Br. at 26) and p. 28 ("This Court

has twice held that virtually identical caps on noneconomic damages clearly violated equal protection ***") citing *Morris* and *Sheward*; p. 35-36 (*Morris* and *Sheward* establish the absence of any "rational relationship").

Fundamental errors in Petitioner's argument doom it at the outset. *Morris* did *not* conclude that the medical malpractice noneconomic damages cap violated equal protection; it *upheld* the statute against that challenge. 61 Ohio St.3d 692 ("We stop short of finding the statute defective on equal protection grounds").

Second, although *Morris* did hold that the noneconomic damages cap for medical claims in former R.C. 2305.27 did not meet the "rational basis" test applicable under the due process guarantee of the Ohio Constitution, that holding has no effect on this Court's analysis of R.C. 2315.21. *Morris*' holding was based on two conclusions: 1) none of the legislative fact-finding for former R.C. 2307.43 included any evidence that noneconomic damage caps impact medical malpractice insurance premiums;[25] and 2) without an exception for catastrophic injuries, the cap arbitrarily imposed the public benefits of a noneconomic damage cap on a class of those persons most severely injured by medical malpractice. Id. at 690-691. R.C. 2315.18 does not suffer from either flaw. Its different purpose is meticulously supported, and the statute imposes *no cap* on noneconomic damage awards for catastrophic injury.

Third, in an implicit acknowledgment that the carve-out for catastrophic injuries obliterates her due process challenge, Petitioner asks this Court to interpret the Ohio

[25] Subsequent experience in Ohio and other states has demonstrated that the General Assembly had it right. See OHA Amicus Br. at 8-9, 14-17.

Constitution in a manner that gives unspecified, but greater substantive due process rights to injured persons than the due process rights accorded injured plaintiffs under the United States Constitution. (Pet. Br. at 27, n. 19.) That argument fails to recognize that: 1) defendants subjected to arbitrary, excessive awards of noneconomic damages also have due process rights – rights that are protected by the Fourteenth Amendment of the United States Constitution; and 2) U.S. Supreme Court decisions on the scope of those competing due process right are binding on the states.[26] In support of her misplaced argument, Petitioner quotes from this Court's decision in *Hyde v. Reynoldsville Casket Co.* (1994), 68 Ohio St.3d 240. Petitioner fails to inform this Court that the United States Supreme Court *reversed* this Court's decision in *Reynoldsville*, as a violation of the Supremacy Clause in the United States Constitution. See *Reynoldsville Casket Co. v. Hyde* (1995), 514 U.S. 749.

The remainder of Petitioner's argument in this section is marred by these erroneous assumptions and errors. Respondents will nevertheless set forth the appropriate analysis for Petitioner's constitutional challenge.

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[26] See, e.g., *Wightman v. Consolidated Rail Corp.* (1999), 86 Ohio St.3d 431, 439, acknowledging that the Fourteenth Amendment prohibits grossly excessive punitive damage awards by state courts.

a. R.C. 2315.18 is a form of economic regulation subject to the highly deferential rational basis review.

Whether considering due process[27] or equal protection[28] challenges, the economic regulation in R.C. 2315.18 is subject to a "rational basis" review standard. *See Morris*, 61 Ohio St.3d at 688-692.

Application of the "rational relationship" test accords with the principle that a person has no vested interest in any rule of the common law. See *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 214; *Fassig v. State ex rel. Turner* (1917), 95 Ohio St. 232, 248 ("No one has a vested right in the rules of the common law***. The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to new circumstances."), limited on other grounds by *Griffin v. Hydra-Matic Division, General Motors Corp.* (1988), 39 Ohio St.3d 79.

Federal law[29] is in accord. See *Duke Power Co. v. Carolina Environmental Study Group, Inc.* (1978), 438 U.S. 59, 83-84, 93 (statutory damage caps are forms of economic regulation subject to rational basis review):

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[27] Art. I, Sec. 16 provides that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." (Appx. 227.)

[28] Art. I, Sec. 2 provides that "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit *** and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly." (Appx. 221.)

[29] As noted, states are bound by U.S. Supreme Court decisions establishing a due process floor for arbitrary damage awards against defendants. Further, this Court has held that "[t]he limitations placed upon governmental action by the federal and state Equal

> Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." *** Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Id. at 88 n. 32 (citations omitted); *City of Cleburne v. Cleburne Living Ctr.* (1985), 473 U.S. 432, 440 ("When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, *** and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.").

Other states also agree. See *Murphy v. Edmonds* (Md. Ct. App. 1992), 601 A.2d 102, 111 ("Whatever may be the appropriate mode of equal protection analysis for some other statutory classifications, in our view a legislative cap of $350,000 upon the amount of noneconomic damages which can be awarded to a tort plaintiff does not implicate such an important 'right' as to trigger any enhanced scrutiny."); *Gourley v. Nebraska Methodist Health Sys.* (Neb. 2003), 663 N.W.2d 43, 71 (rejecting argument that heightened scrutiny should be applied because of alleged violations of right to jury trial and open courts provisions); *Adams v. Children's Mercy Hosp.* (Mo. 1992), 832 S.W.2d 898, 903 (refusing to apply heightened scrutiny to damages cap where such cap did not violate right of trial by jury or right to open courts); *Phillips v. Mirac, Inc.* (Mich. Ct. App. 2002), 651 N.W.2d 437, 444 (refusing to apply heightened scrutiny to damages cap where right of trial by jury was not implicated).

Protection Clauses are essentially the same." *McCrone v. Bank One Corp.* (2005), 107 Ohio St.3d 272, at ¶ 7; see, also, *State v. Thompson* (2002), 95 Ohio St.3d 264, at ¶ 11.

The arguments Petitioner advances in an effort to apply some form of "heightened" review to R.C. 2315.18 are as flawed as the arguments already discussed. At pages 29-41, Petitioner claims that a "strict scrutiny" standard must be applied because: 1) "fundamental rights" to a jury trial and access to courts are infringed; and 2) damage caps allegedly have a disproportionate impact on "women, children, people of color, the elderly, and people of low income in general" (Pet. Br. at 30). The first argument is circular – if this Court concludes that R.C. 2315.18 violates the right to a jury trial or access to courts, this Court need not even address the due process challenge.

The second argument is misplaced. Even if it were possible to demonstrate through law review articles that damages caps have a disparate impact on one or more suspect or quasi-suspect classes, such a disparate impact would be insufficient to trigger heightened scrutiny of the damages caps. See *Washington v. Davis* (1976), 426 U.S. 229, 239 (noting that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact"). Because Petitioner does not (and cannot) argue that the damages caps were passed with the purpose of discriminating against a suspect (or quasi-suspect) class, the alleged disparate impact is irrelevant. Because "strict scrutiny" does not apply, the numerous cases Petitioner discusses at pages 33-35 of her Brief are simply irrelevant.[30]

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[30] *Heller v. Doe* (1993), 509 U.S. 312, and *Romer v. Evans* (1996), 517 U.S. 620, apply a "rational basis with 'bite'" test to "laws that have created legally differentiated groups such as the mentally retarded, unrelated individuals living together, and homosexuals" (Morgan, Note, Civil Confinement of Sex Offenders: New York's Attempt to Push the

Several important principles flow from the application of rational basis review. *First*, the burden is on Petitioner to demonstrate that the classification or goal at issue is irrational. *State v. Thompson* (2002), 95 Ohio St.3d 264, at ¶ 27 ("[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."); *Minnesota v. Clover Leaf Creamery Co.* (1981), 449 U.S. 456, 464 ("States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'"), quoting *Vance v. Bradley* (1979), 440 U.S. 93, 111.

Second, a legislative classification or goal, and the means employed to achieve it, need not be supported by empirical evidence; if rational speculation supports the noneconomic damages cap in R.C. 2315.18, it will be upheld under the rational basis test. *United States v. Carolene Products Co.* (1938), 304 U.S. 144, 152 ("the existence of facts supporting the legislative judgment is to be presumed"); *Thompson*, 95 Ohio St.3d 264 at ¶ 26 ("a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification'"), quoting *Federal Communications Comm. v. Beach Communications,*

Envelope in the Name of Public Safety (2006), 86 B.U.L.Rev. 1001, 1031); *Nixon v. Shrink Missouri Government PAC* (2000), 528 U.S. 377, applies the unique standard of review applicable to campaign financing laws. *Yajnik v. Akron Dep't of Health* (2004), 101 Ohio St.3d 106, does not involve any issue remotely relevant to this case – this Court cut short the plaintiff's "as applied" challenge to a municipal housing ordinance due to an insufficient record.

Inc. (1993), 508 U.S. 307, 313. Flowing from this premise is the principle that a legislative choice is not subject to courtroom fact-finding:

> [B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature***. In other words, ***a legislative choice is not subject to courtroom factfinding*** and may be based on rational speculation ***unsupported by evidence or empirical data.***

Beach Communications, 508 U.S. at 315 (emphasis added, citations and internal quotations omitted). On page 25 of her Brief, Petitioner erroneously argues that this Court's decision in *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 423, imposes a "'credible empirical evidence'" due process test for tort reform legislation. That portion of *Sorrell* simply notes, in dicta, that the question of whether former R.C. 2317.45 bore a rational relationship to its goal was "debatable" in the absence of "credible empirical evidence." It established no constitutional requirements relating to legislative fact-finding. Nor did *Sorrell* cite the quality of legislative fact-finding as the basis for its due process conclusion. Rather, this Court concluded that giving judges discretion to deduct collateral sources from an undifferentiated verdict was unconstitutional because "the means employed *** to attain the goal are both irrational and arbitrary." Id.

Third, where legislative findings exist, this Court is required to grant substantial deference to those findings. *Williams*, 88 Ohio St.3d at 531 ("we are to grant substantial deference to the predictive judgment of the General Assembly"); *Clover Leaf Creamery*, 449 U.S. at 470 ("it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature"). Judicial deference to legislative findings is

key, because the legislature "is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters v. Nat'l Assn. of Radiation Survivors* (1985), 473 U.S. 305, 330 n. 12. Therefore, "[w]here there was evidence before the legislature supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken." *Clover Leaf Creamery*, 449 U.S. at 464. For nearly 70 years the rule has been that a statute must be declared constitutional under the rational basis test so long as the question of whether the means employed by the statute support the legislature's goals "is at least debatable":

> Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.

Carolene Products, 304 U.S. at 154; see, also, *Clover Leaf Creamery*, 449 U.S. at 466 ("Whether *in fact* the Act will promote more environmentally desirable milk packaging is not the question: the Equal Protection Clause is satisfied by our conclusion that the Minnesota Legislature *could rationally have decided* that its ban on plastic nonreturnable milk just might foster greater use of environmentally desirable alternatives.").

Fourth, the rational basis test does not require the "fit" between the goals asserted by the General Assembly and the ends adopted to pursue those goals to be precise. As this Court explained in *McCrone*, under the rational basis test, a legislative classification

does not violate the Equal Protection Clause simply because in practice it results in some inequality:

> Under this test, "'a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'"

107 Ohio St.3d 272 at ¶ 8 (citations omitted).

b. <u>R.C. 2315.18 is rationally related to the General Assembly's legitimate interest in maintaining a fair and predictable system of civil justice.</u>

Petitioner's arguments at pages 35-42 of her Brief fall far short of the heavy burden required to demonstrate that no reasonably conceivable state of facts could provide a rational basis for the noneconomic damages cap imposed by R.C. 2315.18. The bulk of her argument is based upon an erroneous assumption that R.C. 2315.18 was enacted to counteract an "insurance crisis." See Pet. Br. at 38 ("insurance industry problems"), 39 ("insurance crises") and 40-41 (discussing Wisconsin tort reforms premised upon increased medical malpractice insurance premiums). That is not the basis for R.C. 2315.18.

Uncodified law in Senate Bill 80 articulates the General Assembly's "rational and legitimate state interest in making certain that Ohio has a fair, predictable system of civil justice that preserves the rights of those who have been harmed by negligent behavior, while curbing the number of frivolous lawsuits, which increases the cost of doing business, threatens Ohio jobs, drives up costs to consumers, and may stifle innovation."

(Appx. 110, § 3(A)(3).) The General Assembly found that Ohio's litigation system represented a challenge to Ohio's economy, which depends on businesses providing essential jobs and creative innovation; and that a fair system of civil justice "strikes an essential balance between the rights of those who have been legitimately harmed and those who have been unfairly sued." (Id. at § 3(A)(1)-(2).) While the many reasons why the noneconomic damages cap is rationally related to the General Assembly's purposes are set forth below for the sake of completeness, *any one* of these reasons is sufficient to defeat Petitioner's constitutional challenge. *Clover Leaf Creamery*, 449 U.S. at 465.

The General Assembly could rationally conclude that R.C. 2315.18's cap on noneconomic damages furthered its legitimate interest in making Ohio's civil justice system more fair, curbing the number of frivolous lawsuits and enhancing Ohio's economic climate to promote jobs and innovation. For instance, the General Assembly found that noneconomic damages have "no precise economic value," that awards for such damages "are inherently subjective," that such awards are inflated, and that "[i]nflated damage awards create an improper resolution of civil justice claims." (Appx. at 119-120, § 3(A)(6)(a), (d)-(e).) Common sense demonstrates that limiting amounts that can be awarded for a class of damages that is "inherently subjective" and tends to be "inflated" makes pursuing cases that may be frivolous less worthwhile, since the potential payoff from settlement will be correspondingly smaller. There is also ample "empirical support" for those conclusions.[31]

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[31] See, e.g., Geistfeld, 38 Loy.L.A.L.Rev. 1093, 1006-1107, and fns. 41, 42; OACJ Amicus Br. at 5-8.

And reducing the number of frivolous cases will naturally tend to make Ohio's civil justice system more efficient, predictable and fair. The General Assembly noted that the United States tort system failed to return even 50 cents for every dollar spent to injured persons, that 54% of the cost represented attorneys' fees and administrative costs, and that only 22% of the tort system's cost was used directly to reimburse people for economic damages they sustain. (Appx. at 117, § 3(A)(3)(d).) These findings were drawn from the Tillinghast-Towers Perrin, U.S. Tort Costs: 2002 Update. Petitioner erroneously characterizes this study as focusing "on national trends in medical malpractice cases." (Pet. Br. at 36, n. 30.) As its title indicates, the study analyzes tort costs in general. See Respondents' Appendix "(RAppx.") 1. Nor does it matter that the study "is not peer-reviewed and has no acknowledged individual authors." (Pet. Br. at 37, n. 32.) Legislative choices are not subject to courtroom fact-finding. *Beach Communications*, 508 U.S. at 315.[32]

The General Assembly also could rationally conclude that reducing the incentive to file frivolous lawsuits, and the corresponding reduction in the frivolous lawsuits themselves, would reduce the percentage of U.S. tort system costs spent on attorneys' fees and administration, thereby increasing as a percentage the amount of money that finds its way into the hands of tort victims. It would also reduce the overall costs of a tort

[32] Indeed, the study itself notes that "Tillinghast testified on its findings before the U.S. Congress Joint Economic Committee." (RAppx. 5.) Should this Court have any interest in exploring the debate regarding the version of the study attached by Petitioner – which is *not* the version cited by the General Assembly, the rebuttal may be found in a Report available at http://www.towersperrin.com/tp/jsp/masterbrand_webcache_html.jsp?webc=Tillinghast/United_States/Press_Releases/2005/20050517/2005_05_17.htm.

system that amounts to "a two and one tenth per cent wage and salary tax, a one and three tenth per cent tax on personal consumption, and a three and one tenth per cent tax on capital investment income." (Appx. 117, § 3(A)(3)(d).)

In addition, the General Assembly could rationally conclude that increasing the fairness, efficiency and predictability of Ohio's tort system would enhance Ohio's economic climate to promote jobs and innovation. In the face of polling data indicating that 80% of corporate counsel surveyed identified "litigation environment" as an important factor in deciding where to do business, and 25% cited "limits on damages" as a specific means of stimulating economic growth, the General Assembly could rationally conclude that the price being paid by Ohio citizens for unlimited noneconomic damage awards was too high and in need of correction. (Appx. 116-117, § 3(A)(3)(c).)

Finally, the General Assembly's tailoring of R.C. 2315.18 also supports its constitutionality. In addition to certain categorical exceptions (i.e., wrongful death cases), the General Assembly carved out exceptions for catastrophic injury. Both demonstrate the General Assembly's reasoned and rational approach in furthering its legitimate interest in making Ohio's civil justice system more fair, curbing the number of frivolous lawsuits and enhancing Ohio's economic climate to promote jobs and innovation.

4. R.C. 2315.18 does not violate the doctrine of separation of powers or Art. II, Sec. 15(D) (the "one-subject" rule).

At pages 42-46 of her brief, Petitioner asserts that R.C. 2315.18 offends the separation of powers doctrine because: 1) it usurps judicial power (vested in juries) to

assess damages; and 2) this Court so found in *Sheward*. Neither argument withstands scrutiny.

Petitioner first relies on *Mitchell's Adm'r v. Champaign Cty. Comm'rs* (Ohio Cir. Ct. 1899), 10 Ohio C.D. 801. That case *upheld* a statutory, fixed damage award for the relatives of victims of mob violence, on the grounds that the award was a fine upon the community that failed to prevent the violence. *Mitchell's Adm'r* is consistent with the cases discussed supra, pages 21-22, in which courts have noted that any blanket argument against legislative damage caps is inconsistent with the long-recognized power of legislatures to impose double and treble damages for certain claims and causes of action.[33]

The second argument (Pet. Br. at 44-45), to the extent it discusses noneconomic damage caps, relies on *Morris v. Savoy* (1991), 61 Ohio St.3d 684 and *Sheward*. As explained at pages 24-25, supra: 1) *Morris* struck down a substantively different noneconomic damage cap, based on grounds that have no application to R.C. 2315.18; and 2) the *Sheward* footnote upon which Petitioner relies does not address any noneconomic damages cap at all – much less R.C. 2315.18 – and provides neither binding nor persuasive support for Petitioner's argument.

Legislatures, like courts, have an important and substantive role in the evolution of a state's civil justice system. Both took part in the dramatic expansion of tort liability

[33] See, e.g., R.C. 901.51 (awarding treble damages for the reckless destruction of trees).

during the 20th Century, and both have a role in rebalancing the process in the 21st Century. See, e.g., Friedman, American Law in the Twentieth Century (2002), 349-50:

> In the twentieth century, the old tort system was completely dismantled; the courts and the legislatures limited or removed the obstacles that stood in the way of plaintiffs; and a new body of law developed, law which favored the plaintiffs – to the point where people spoke about a liability "explosion." Some of the changes were slow and incremental; some were dramatic. Some were inventions of judges; some were embodied in complicated statutes.

Contrary to Petitioner's argument, the General Assembly is not excluded from the process: "[I]t is a proper role of the General Assembly to balance competing private and public rights." *State ex rel. Cincinnati Inquirer v. Winkler* (2004), 101 Ohio St.3d 382, 384, ¶ 9. Such choices include legislation that affects the trial of personal injury cases. See, e.g., *Vaccariello v. Smith & Nephew Richards, Inc.* (2002), 94 Ohio St.3d 380, 389 (Cook, J., concurring) ("[T]he weight Ohio assigns to the efficiency and economy of litigation in her own courts versus those courts in distinct jurisdictions is a public policy choice. *** Determining the *soundness* of that public policy for Ohioans is properly the role of the General Assembly"). See, also, *In re McWilson's Estate* (1951), 155 Ohio St. 261, 267-68 ("The General Assembly has simply modified the common law by clear, explicit and unambiguous language and there can be no constitutional or public policy objection to such an act").[34]

Petitioner's invocation of the "one subject" rule (Pet. Br. at 47-50) has no place in this case. This Court has not accepted any certified question relating to S.B. 80 as a

[34] See, also, Nat'l Federation Amicus Br. at 5-12; OACJ Amicus Br. at 16-18.

whole, or the one-subject rule. Further, Senate Bill 80 contains a severability clause (Section 5, Appx. 125), and the three statutes that are the subject of this Court's certification order all clearly relate to the subject of tort reform and the topic of tort damages. Even if it were possible to demonstrate that some other provision in Senate Bill 80 was somehow unrelated to the subject of tort reform, that lack of relationship would have no effect on the constitutionality of the statutes at issue here.

C. Certified Question No. 2

Ohio Revised Code Section 2315.20 does not violate the Ohio Constitution.

Petitioner now contends, for the first time, that she lacks standing to challenge the constitutionality of R.C. 2315.20. (Pet. Br. at 4, n. 3.) She nevertheless asserts that R.C. 2315.20 (Appx. 60-61) is "infirm" based on the arguments she asserted before Judge Katz. (Id.) Those arguments relied entirely on portions of this Court's opinion in *Sheward* that, for reasons explained at page 24, supra, are dicta. This Court should reject Petitioner's assertion that R.C. 2315.20 is "infirm" because the *Sheward* dictum relied on by Petitioner is wrong, and because even under *Sheward*, R.C. 2315.20 may be construed in a manner that renders the statute constitutional.

Sheward erroneously asserted in dicta that "amended R.C. 2317.45 does everything but remove those aspects of its preamended form that were held in *Sorrell* to be arbitrary and unreasonable." 86 Ohio St.3d at 482. The constitutional flaws in the collateral source statute at issue in *Sorrell* were that the statute: 1) *required deductions* based on 2) *findings made by the court.* 69 Ohio St.3d at 422, 423. Neither of these

flaws was present in *Sheward*, which addressed a collateral source statute that simply required *a jury* to *consider* evidence of collateral source payments *before* a verdict is rendered.[35] 86 Ohio St.3d at 481. Other well-established legal principles — such as the requirement that a plaintiff mitigate his or her damages — require a virtually identical form of pre-verdict consideration by the jury of opposing evidence as to the magnitude of a plaintiff's loss. E.g., *State ex rel. Martin v. City of Columbus* (1979), 58 Ohio St.2d 261, 264 (recognizing rule of law that public employee who sues to recover back pay "is subject to have his claim reduced by the amount he earned or in the exercise of due diligence could have earned in appropriate employment during the period of exclusion") (internal quotation omitted).[36] Had it been at issue, the collateral source statute at issue in *Sheward* should have been declared constitutional.

In any event, unlike its predecessors, R.C. 2315.20 does not purport to control the manner in which the jury or judge considers collateral source evidence. R.C. 2315.20 merely authorizes defendants to introduce evidence "of any amount payable as a benefit to the plaintiff as a result of the damages that may result from an injury, death, or loss to

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[35] *Sheward*'s puzzling assertion that "[p]resent R.C. 2317.45 still fails to take into account whether the collateral benefits held against the general verdict are within the damages actually found by the jury" (86 Ohio St.3d at 482), is therefore based on an erroneous premise — that the statute applied *after* the jury's general verdict was returned. Because R.C. 2317.45 simply required *consideration* of collateral source payments while the jury was deliberating, there was no reason to assume that a jury would impermissibly make deductions for collateral source payments that addressed elements of alleged damages not actually found by the jury.

[36] As explained in the OACTA Amicus Brief at 4-9, the entire premise for the collateral source rule is based on a "paradox" that has lost any vitality it once might have had.

person or property that is the subject of the claim upon which the action is based," R.C. 2315.20(A) (Appx. 60), and allows the plaintiff to "introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to receive the benefits of which the defendant has introduced evidence." R.C. 2315.20(B) (Appx. 60). Petitioner's argument that R.C. 2315.20 is unconstitutional rests on the assumption that juries will be instructed by trial courts to consider collateral source evidence in a manner that is inconsistent with *Sheward.* Nothing in the text of R.C. 2315.20 justifies that assumption. This Court should confirm that R.C. 2315.20 is not unconstitutional on its face. See *Buchman v. Bd. of Educ. of Wayne Trace Local Sch. Dist.* (1995), 73 Ohio St.3d 260, 269 (finding collateral source statute constitutional where it "does not foreclose a construction requiring that a collateral benefit be matched to a component of the jury's verdict before it can be deducted").

D. Certified Question No. 3

Ohio Revised Code Section 2315.21 does not violate the Ohio Constitution.

Petitioner's Brief wholly fails to distinguish the cap on punitive damages that is the subject of the third certified question before this Court, from the cap on noneconomic damages that is the subject of the first certified question. Perhaps that is because Petitioner's own counsel has acknowledged in briefs before the U.S. Supreme Court that state legislatures may limit or even bar punitive damage awards. See PLAC Amicus Br. at 13. Whatever the reason for Petitioner's omission, it is clear that R.C. 2315.21 merits its own analysis.

R.C. 2315.21 provides for the bifurcation of proceedings relating to compensatory and punitive damages (R.C. 2315.21(B), Appx. 61-62), and places a limit, or "cap," on the amount of a punitive damages judgment (R.C. 2315.21(D), Appx. 62-64). Petitioner does not challenge bifurcation.[37]

With certain exceptions not applicable here,[38] the punitive damage cap has three main provisions. First, as a general rule, the court shall not enter judgment for any punitive damages exceeding two times the amount of compensatory damages. R.C. 2315.21(D)(2)(a) (Appx. 62-63). Second, if the defendant is a "small employer" (defined as employing less than 100 persons or, if a manufacturer, less than 500 persons) (R.C. 2315(A)(5), Appx. 61) or an individual, the punitive damage judgment shall not exceed the lesser of two times compensatory damages or ten percent of the employer's net work, up to a maximum of $350,000. R.C. 2315(D)(2)(b) (Appx. 63). Third, no punitive damages shall be awarded more than once for the same act or course of conduct (once the maximum award has been collected) unless plaintiff offers evidence of new and previously undiscovered behavior meriting a punitive damage award, or that prior awards were "totally insufficient to punish or deter." R.C. 2315.21(D)(5) (Appx. 63-64).

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[37] The constitutionality of that provision is nevertheless addressed in the OACTA Amicus Brief at 20-27.

[38] The caps do not apply to tort actions against the state, to tort actions governed by another statute, or to defendants with culpable mental states described in R.C. 2901.22. R.C. 2315.21(D)(6), 2315.21(E) (Appx. 64-65).

1. Neither *Zoppo* nor *Sheward* provides any basis for a finding that R.C. 2315.21 is unconstitutional on its face.

The only sections of Petitioner's Brief addressing the punitive damage cap are pages 17-19 and a single paragraph on page 37. Pages 17-19 primarily rely on *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, which struck down a statute that "shift[ed] punitive damage determinations from jury *to judge*" (Pet. Br. at 17, emphasis added). Unlike the statute at issue in *Zoppo*, R.C. 2315.21 does not vest discretion in judges to set punitive damage awards. Instead, it requires judges, as the sole arbiter of the law, to apply a uniform, statutory cap after the jury has issued its award. The General Assembly heeded this Court's instruction in *Zoppo*.

Petitioner's reliance on *Roberts v. Mason* (1859), 10 Ohio St. 277 and *Saberton v. Greenwald* (1946), 146 Ohio St. 414, is equally misplaced. While both cases acknowledge that punitive damages are a "settled" feature of the common law, both do so in the context of confirming that any "alteration" of punitive damages must come from acts of the legislature – not courts. *Roberts*, 10 Ohio St. at 280; *Saberton*, 146 Ohio St. at 424. That is what occurred in the enactment of Senate Bill 80.

The more modern jurisprudence cited by Petitioners – *Sheward* and *Dardinger v. Anthem Blue Cross & Blue Shield* (2002), 98 Ohio St.3d 77 – offer nothing more. *Sheward*, as discussed earlier, invalidated H.B. 350 in its entirety, based on the majority's conclusion that "[t]he General Assembly has circumvented our mandates, while attempting to establish itself as the final arbiter of its own legislation." 86 Ohio St.3d at 492. *Sheward*'s disapproval of punitive damage caps is based wholly upon *Zoppo*, which

analyzed a statute that invested judges with the discretion to set punitive damage awards. Such dicta has no application to R.C. 2315.21.

The majority in *Dardinger* not only remitted an excessive punitive damage award, but also invested trial courts with the discretion to divert a portion of the remitted punitive damage award to a non-profit institution unrelated to the litigation. 98 Ohio St.3d at 104-105, ¶ 188-190. In support of diversion, *Dardinger* cites, with approval, statutes of other states mandating such diversions. Id. at ¶ 188. Thus, *Dardinger*, which issued three years after *Sheward*, implicitly acknowledges that legislatures have the power to enact statutes that *divert* nonexcessive punitive damage awards to entities unrelated to the case in litigation. Such legislative authority necessarily includes the power to *limit* punitive damages.

2. Petitioner's attack on the General Assembly's fact-finding is poorly aimed and without merit.

At page 37 and footnote 33 of her Brief, Petitioner characterizes the General Assembly's findings that limits on punitive damage awards will aid economic development as "specious," because out-of-state businesses will allegedly benefit from the caps. Petitioner's invocation of "choice of law principles" again confuses legislative fact-finding with courtroom fact-finding. Moreover, even if it had wanted to, the General Assembly could not have limited the application of the noneconomic damages cap to only businesses resident in Ohio. The dormant Commerce Clause of the United States Constitution forbids "a State from 'jeopardizing the welfare of the Nation as a whole' by 'plac[ing] burdens on the flow of commerce across its borders that commerce wholly

within those borders would not bear.'" *Amer. Trucking Assn., Inc. v. Michigan Public Serv. Comm'n* (2005), 545 U.S. 429, 433, quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.* (1995), 514 U.S. 175, 180.

The General Assembly concluded that a punitive damages cap is "urgently needed to restore balance, fairness, and predictability to the civil justice system." (Appx. 117, § 3(A)(4)(a).) Among other things, this conclusion was based on testimony before the General Assembly, the experience of other states, and the finding that the absence of a punitive damages cap "has resulted in occasional multiple awards of punitive or exemplary damages that have no rational connection to the wrongful actions or omissions of the tortfeasor." (Appx. 118, § 3(A)(4)(b)(ii), (d).)[39] The General Assembly's conclusion that a punitive damages cap was necessary was also based on recent United States Supreme Court precedent interpreting the Due Process Clause of the United States Constitution:

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[39] Commentators agree. See Jeffries, A Comment on the Constitutionality of Punitive Damages (1986), 72 Va.L.Rev. 139, 144-45, n.21-26 (discussing excessive awards from jurisdictions around the country); Owens, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products (1982), 49 U.Chi.L.Rev. 1, 1-5, n.1-28 (discussing increase in size of judgments from a high of $250,000 by 1976 to millions of dollars over next several years); Klugheit, "Where the Rubber Meets the Road": Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation (2002), 52 Syracuse L.Rev. 803, 807 ("Prior to 1987, for instance, there had never been a punitive damage award in excess of a billion dollars; since then there have been at least nine."); Murphy, Punitive Damages, Explanatory Verdicts, and the Hard Look (2001), 76 Wash. L.Rev. 995, 997-998 (discussing "[t]he multi-billion dollar punitive damages hit parade"); Viscusi, The Blockbuster Punitive Damage Awards (2004), 53 Emory L.J. 1405, 1409 (stating that there were 64 awards equal to or in excess of $100 million from 1985 to April 2004).

> According to the United States Supreme Court, "few awards exceeding a single digit ratio between punitive damages and compensatory damages *** will satisfy due process."

(Appx. 118, § 3(A)(4)(c) (citation omitted).)

Far from being arbitrary, the General Assembly's decision to impose a punitive damages cap represented a rational response to the increasing concern demonstrated by the United States Supreme Court with the arbitrary nature of state punitive damage awards – concerns rooted in the Due Process Clause of the Fourteenth Amendment, and thus binding on the states. *BMW of North Am., Inc. v. Gore* (1996), 517 U.S. 559, 568. The concern recognized by the Court in *BMW* led to *State Farm Mut. Ins. v. Campbell* (2003), 538 U.S. 408, which recognized that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." Id. at 417. It fortified this abstract principle by establishing a single-digit ratio punitive damages can rarely exceed, consistent with due process. Id. at 425.

The arbitrary nature of punitive damage awards under the common law is supported not only by United States Supreme Court precedent, but also a recent comprehensive study presenting the results of controlled experiments with more than 600 mock juries. See Sunstein, et al., Punitive Damages: How Juries Decide (2002). That study found that the dollar amount of a jury's punitive damages award was "erratic and unpredictable," that award amounts were influenced by the amount of money requested by the plaintiff's lawyer (jurors who received the higher request in a controlled study

awarded 2.5 times as much as those getting the lower request), and that jurors had a great degree of difficulty following instructions.[40] Id. at 22-24.

In light of developing Due Process Clause jurisprudence, and states' obligation to follow that jurisprudence under the Supremacy Clause (U.S. Const. Art. VI), the General Assembly could rationally conclude that R.C. 2315.21's cap on punitive damages was an appropriate method of addressing the U.S. Supreme Court's concern with arbitrary punitive damage awards. Petitioner's "evidence" consists entirely of law review articles and studies purporting to show that punitive damage awards are infrequent. (Pet. Br. at 41, n. 40.) At most, these studies (none of which involve a comprehensive review of punitive damage awards in Ohio) establish that the frequency of punitive damage awards is "debatable." The General Assembly's primary motivation in enacting a punitive damages cap, however, was not the frequency of punitive damages awards, but "occasional multiple awards of punitive or exemplary damages that have no rational connection to the wrongful actions or omissions of the tortfeasor." (Appx. 118, § 3(A)(4)(b)(ii).). See, also, Appendix B to PLAC Amicus Brief, surveying state and national punitive damage awards. The alleged frequency of punitive damage awards is, of course, irrelevant to the issue of whether "occasional multiple awards" exist that "have no rational connection to the wrongful actions" at issue. Petitioner cannot meet her

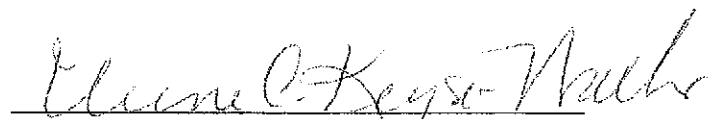
[40] In response to the question, "[d]o jurors reliably use explicit instructions for setting punitive damages awards based on the probability of detection," the study found: "Less than 20% of jurors correctly calculated the award according to the instructions. When the plaintiff's lawyer suggested an award amount, the number of correct awards was cut to 10% as jurors ignored the instructions and focused on the lawyer's suggestion." Id. at 24.

heavy burden of demonstrating no reasonably conceivable state of facts provides a rational basis for the noneconomic damages cap imposed by R.C. 2315.21.

IV. CONCLUSION

Because the General Assembly has the power, duty and resources to evaluate the fairness of the state's tort system, and to enact laws for the improvement and continuing development of a fair, efficient and consistent civil justice system, this Court should answer "no" to each of the three certified questions.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing **Brief of Appellees (Respondents) Johnson & Johnson, Ortho-McNeil Pharmaceutical, Inc. and Johnson & Johnson Pharmaceutical Research and Development, LLC** has been served this 15th day of December, 2006, by U.S. Mail, postage prepaid, upon the following:

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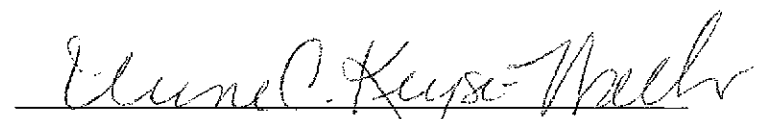

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Tillinghast -Towers Perrin

U.S. Tort Costs: 2002 Update

Trends and Findings on the Costs of the U.S. Tort System

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Executive Summary

Key Findings

The cost of the U.S. tort system grew by 14.3% in 2001, the highest single-year percentage increase since 1986. As indicated in the table below, the growth in tort costs experienced in 2001 is in stark contrast to the moderate rate of growth experienced in the past decade and is more akin to the double-digit growth rates experienced in the decades of the 1950s, 1970s and 1980s.

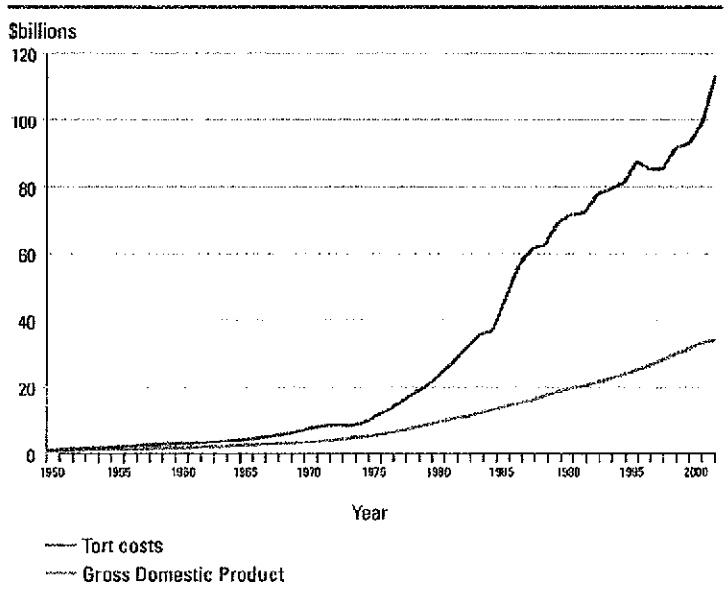
Years	Average Annual Increase in Tort System Costs
1951-1960	11.6%
1961-1970	9.8%
1971-1980	12.0%
1981-1990	11.7%
1991-2000	3.3%
2001	14.3%
50 years (1951-2001)	9.7%

At current levels, U.S. tort costs are equivalent to a 5% tax on wages. The U.S. tort system cost $205 billion in 2001, or $721 per U.S. citizen. This compares to $12 per citizen in 1950.

Over the last 50 years, tort costs in the U.S. have increased more than 100-fold. In contrast, overall economic growth (as measured by GDP) has grown by a factor of 34 and the population has grown by a factor of less than two.

When viewed as a method of compensating injured parties, the U.S. tort system is highly inefficient, returning less than 50 cents on the dollar to the people it is designed to help and returning only 22 cents to compensate for actual economic loss. Inefficiency in the system has increased over time; when our Tort Cost Study was first conducted in 1985, 25 cents on the dollar was returned to injured parties for their actual economic loss.

The 14.3% rate of growth in tort costs in 2001 greatly exceeded overall economic growth of 2.6%. During the past 50 years, growth in tort costs has exceeded growth in GDP by an average of two to three percentage points, with the largest disparity having been nearly 6% in the 1950s. In the 1990s this trend reversed itself, with GDP growth exceeding the growth in tort costs. This change reflected a period of steady economic growth and low inflation without significant growth in tort costs. As of 2001, U.S. tort costs accounted for slightly more than 2% of GDP, after five consecutive years of levels below 2%.



Since 1975 (the first year in this study for which medical malpractice costs are separately identified), the increase in medical malpractice costs has outpaced increases in overall U.S. tort costs. Medical malpractice costs have risen an average of 11.6% per year, in contrast to an average annual increase of 9.4% per year in overall tort costs.

Future Implications

Does the sudden surge in tort costs in 2001 signal the start of another period of high tort cost growth in the U.S., or does it represent merely a one-year anomaly?

The most notable event contributing to the rise in tort costs in 2001 was a significant upward reassessment of liabilities associated with asbestos claims, whose numbers have continued to mushroom. We estimate that this reassessment accounts for $6 billion of the increase in 2001 tort costs over 2000 levels. Absent these costs, the increase in U.S. tort system costs between 2000 and 2001 would have been approximately 11%, still well above the increases seen in the past decade and well in excess of overall economic growth in 2001. This increase in tort costs, following more than a decade of moderate increases, should not be surprising in light of news reports during the past few years citing:

- increases in class action lawsuits and large claim awards
- jury awards of record amounts in medical malpractice cases
- an increase in the number and size of shareholder lawsuits against boards of directors of publicly traded companies, reflecting poor stock performance and possibly further exacerbated by recent corporate accounting scandals and general consumer mistrust of U.S. corporations
- an increase in medical cost inflation, leading to higher costs of personal injury claims.

These trends continued in 2002, with no sign of abatement in the near future. Thus, while it is impossible to accurately predict future increases in tort costs, it does not seem unreasonable to assume that, absent sweeping structural changes to the U.S. tort system, annual increases will be in the 7% to 11% range for the next several years. At this rate of increase, tort costs could approach $1,000 per U.S. citizen by 2005 — representing a new quadruple-digit benchmark.

The implications of a return to a period of higher growth in tort system costs may be gleaned by recalling what occurred during the last period of large tort cost increases in the 1980s, namely:

- continued increases in insurance prices as companies respond to new information suggesting higher underlying costs than initially assumed in the pricing of their products
- a shift away from insurance and toward self-insurance as corporations attempt to gain more control over their costs
- more insurer insolvencies and/or business curtailment in response to poor profitability
- increased pressure to enact tort reform and/or asbestos reform.

U.S. tort costs continue to grow faster than overall economic growth. While the exact causes of this growth are unclear, it is possible that a sense of entitlement (the so-called litigious society), coupled with a mistrust of corporations fueled by recent scandals, may be major contributors to the cost increases. Whatever the causes, the rapid increases suggest a continued need for public scrutiny and debate about the cost and relative benefits of the U.S. tort system.

A Word About This Study

U.S. Tort Costs: 2002 Update is an update of previous studies published by Tillinghast–Towers Perrin in 1985, 1989, 1992 and 1995. The most recent study, incorporating U.S. results through 2000, was published in February 2002.

Tillinghast presented the results of the original study to the American Insurance Association in the fall of 1985. The study was expanded in 1989 for the Actuarial Centennial Celebration, marking the 100th anniversary of the actuarial profession in North America, and was presented at a panel on liability insurance. Subsequently, Tillinghast testified on its findings before the U.S. Congress Joint Economic Committee.

The results of the earlier studies have been widely quoted by both proponents and opponents of tort reform, suggesting that the studies' straightforward analyses of the tort system's cost and trends have proved to be not only informative, but also objective and unbiased.

Introduction

This edition of *U.S. Tort Costs: 2002 Update* is similar to previous studies published in 1985, 1989, 1992, 1995 and February 2002. This analysis tracks the cost of the U.S. tort system from 1950 to 2001 and compares the growth of tort costs to increases in various U.S. economic indicators.

The costs and relative benefits of the U.S. tort system have come under considerable public scrutiny and debate. Proponents of "tort reform" cite the high cost of the system as one reason for change. It is not surprising, then, that the Tillinghast studies have themselves attracted increasing interest and attention and have served as the basic data source for numerous articles in business and popular periodicals.

This update confirms a prediction made in the February 2002 study, namely, that the 13-year downward trend in the ratio of U.S. tort costs to GDP that began in the late 1980s ended abruptly in the year 2000. The growth in tort costs in 2001 was the largest since 1986, while GDP growth was modest.

As with the previous studies, this study's purpose is to provide a straightforward, objective analysis of cost and trends, and not to support any particular point of view.

Summary of Key Findings

- Including insured and self-insured costs, the U.S. tort system cost $205 billion in 2001.
- Tort costs increased 14.3% in 2001, the highest percentage increase in tort costs since 1986.
- U.S. tort costs accounted for 2.04% of gross domestic product (GDP) in 2001. This signals the end of a 13-year decline in the ratio of tort costs to GDP* in the U.S.
- Tort costs were $721 per U.S. citizen in 2001. This compares to a cost of $12 per citizen in 1950 (or $87 when adjusted for inflation). When viewed as a method of compensating claimants, the U.S. tort system is highly inefficient, returning less than 50 cents on the dollar to the people it is designed to help — and returning only 22 cents of the tort cost dollar to compensate for actual economic losses.
- The tort system has both indirect cost and indirect benefits that are not measured by this study. We do not attempt to measure or to judge the relative utility of these factors, but rather to provide a reasonable and consistent measurement of total direct tort costs over a long period of time.
- We expect the 2002 ratio of tort costs to GDP to increase to 2.15%. We expect the ratio to grow to 2.21% in 2003, based on a forecasted 9% increase in tort costs.

*Throughout this report, unadjusted, or nominal, GDP is used. Most news releases on GDP rely on inflation-adjusted, or real, GDP.

Change in Tort Costs From 2000

Total insured and self-insured tort costs in the U.S. are estimated at $205.4 billion for 2001. This is an increase of $26 billion, or 14.3%, from the estimated $179.7 billion of tort costs in 2000. The $26 billion increase is the largest in U.S. history; the 14.3% increase is the largest since 1986.

Of the $26 billion increase, roughly $6 billion is attributable to a significant upward reassessment of estimated future payments associated with asbestos claims. In addition, 2001 saw an increase in the number and size of shareholder lawsuits against boards of directors of publicly held companies. This increase may be partially due to corporate accounting scandals and to poor stock performance after a number of years of unprecedented growth. It is also interesting to note that personal auto liability costs, unaffected by any particular newsworthy events, experienced the largest increase in costs since 1990. This may reflect an increase in medical cost inflation, leading in turn to higher costs for personal injury claims.

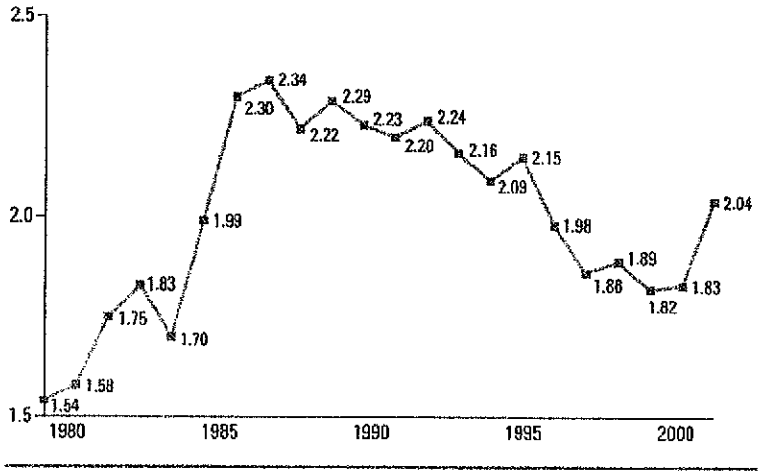
Tort Costs Relative to GDP

Over the last 50 years, tort costs in the U.S. have increased by over 100-fold — from less than $2 billion in 1950 to $205 billion in 2001. Tort cost growth has far outstripped U.S. economic growth as measured by GDP, which increased by a factor of 34 during that time.

	$billions		
	U.S. Tort Costs	U.S. GDP	Tort Cost as % of GDP
1950	$ 1.8	$ 294	0.61%
1960	5.4	527	1.03%
1970	13.9	1,040	1.33%
1980	43.0	2,796	1.54%
1990	129.6	5,803	2.23%
2000	179.7	9,825	1.83%
2001	205.4	10,082	2.04%

When we focus on the last 20 years, a different perspective emerges. Relative to GDP, tort costs appear to have peaked in 1987. The ratio of tort costs to GDP decreased significantly from 1995 (2.15%) to 1999 (1.82%). The 2000 ratio of 1.83% was little changed from the 1999 ratio, but the ratio jumped considerably in 2001.

U.S. Tort Costs as % of GDP – 1980-2001



The 1990s were a decade of substantial economic growth coupled with a low rate of inflation. Against this backdrop, it is not surprising that the rate of GDP growth in the decade exceeded the rate of tort cost growth.

The slowdown in economic growth in 2001, coupled with significant increases in tort costs, caused the surge in the ratio of tort cost growth to GDP in 2001. This suggests that the ratio bottomed out in the 1999-2000 period. We believe that 2001 will be the start of a multiyear period of increasing tort costs relative to GDP.

Tort Costs Relative to Population

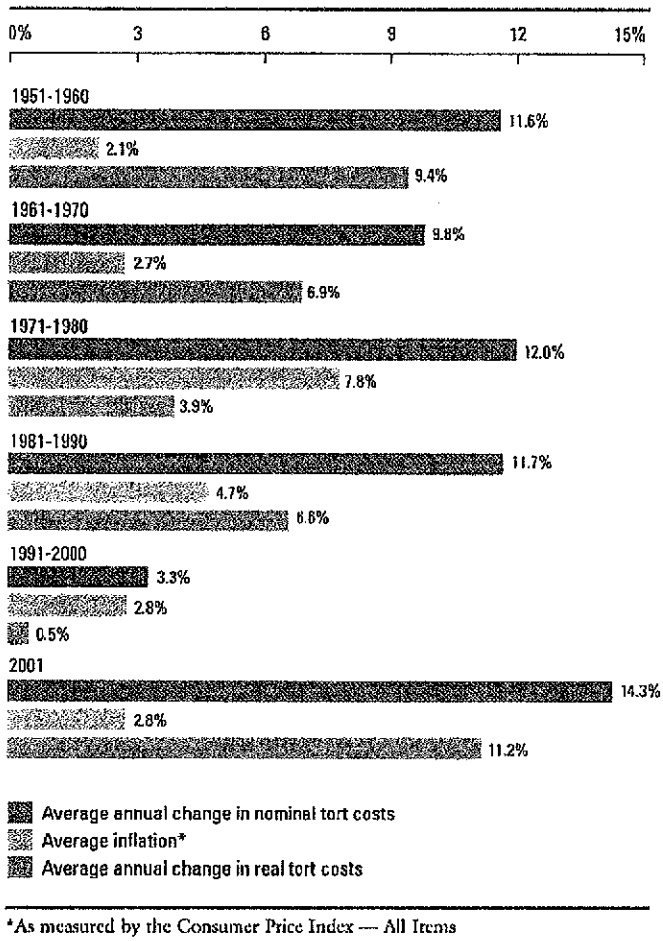
Growth in U.S. tort costs since 1950 has far exceeded the U.S. population growth. Tort cost per citizen has risen by a factor of 61 from 1950 ($12 per citizen, or $87 when adjusted for inflation) to 2001 ($721 per citizen). Clearly, only some of this increase is due to inflation. Even after adjusting for changes in the consumer price index, the tort cost per citizen has risen by a factor of more than eight since 1950.

	U.S. Population (millions)	U.S. Tort Costs ($billions)	Tort Cost per Citizen	Inflation-Adjusted* Tort Cost per Citizen
1950	152	$ 1.8	$ 12	$ 87
1960	181	5.4	30	180
1970	205	13.9	68	309
1980	228	43.0	189	406
1990	249	129.6	520	704
2000	281	179.7	638	657
2001	285	205.4	721	721

*Restated in year-2001 dollars

Change in Tort Costs Relative to Inflation

The growth in U.S. tort costs since 1950 can only be partly explained by inflation. As shown below, the change in tort costs far exceeded inflation from 1950 through 1990, with the 1950s showing the biggest difference.



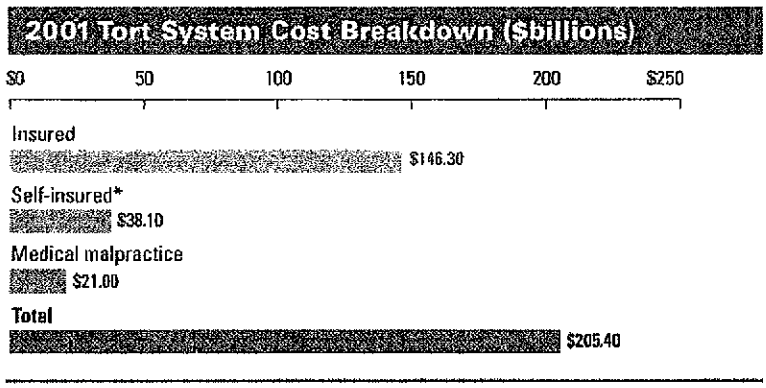
*As measured by the Consumer Price Index — All Items

One would expect the change in tort costs to exceed inflation due to increases in population. However, as shown in Appendix 1, U.S. population growth averaged only 1.2% per year from 1950 to 2001. Moreover, as shown on page 7, U.S. tort costs increased relative to inflation and population from 1950 to 1990. Costs fell on an inflation-adjusted per-person basis from 1990 to 2000, but increased in 2001.

Components of Tort Costs

Total Tort Cost Dollars in 2001

The $205.4 billion cost of the U.S. tort system in 2001 is broken down as follows:



*Excluding medical malpractice

Insured Component

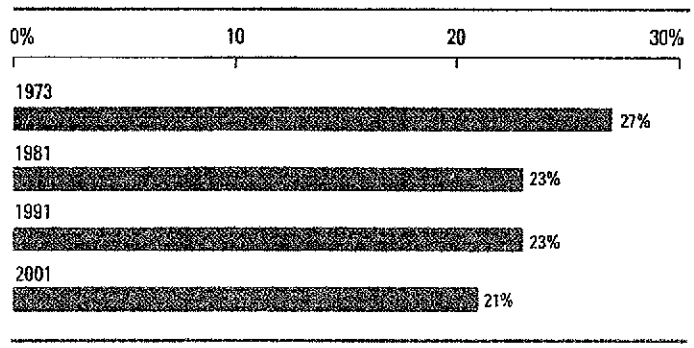
Insured cost estimates are derived from composite financial data (excluding medical malpractice) for the U.S. insurance industry as compiled and published by A.M. Best.* These data are considered highly reliable in that they are subject to audit and are reviewed by state regulatory agencies. Moreover, while certain product lines have changed over time, more than 60 years of consistent data are available.

The insurance costs included are:

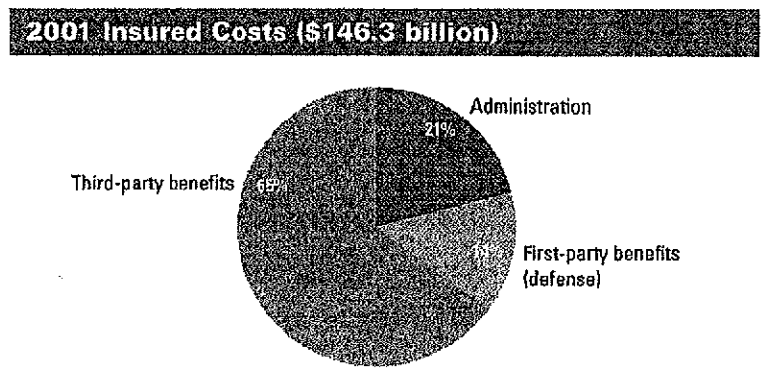
- benefits paid to third parties (or their attorneys) alleging injury or damages caused by insured persons or companies
- benefits paid to first-party insureds in the form of claim handling and legal defense costs
- insurance company administrative costs, or overhead.

*Insurance purchased directly from a non-U.S. insurance company would not be included in the "insured component" of this study. Rather, such business would be considered in our estimates of self-insured tort costs.

Some users of our previous surveys have questioned our decision to include insurance company overhead costs in the total. We take no position regarding the efficiency of this administrative system. Nevertheless, these are real costs, directly associated with administering the settlement of tort claims, and these costs are consistently defined and measurable over time. Although the inclusion of this administrative component obviously increases our definition of absolute cost, it actually dampens the rate of increase because administrative costs have generally declined as a percentage of the total, as follows:



The breakdown of insured costs for 2001 is shown below:



Self-Insured Component

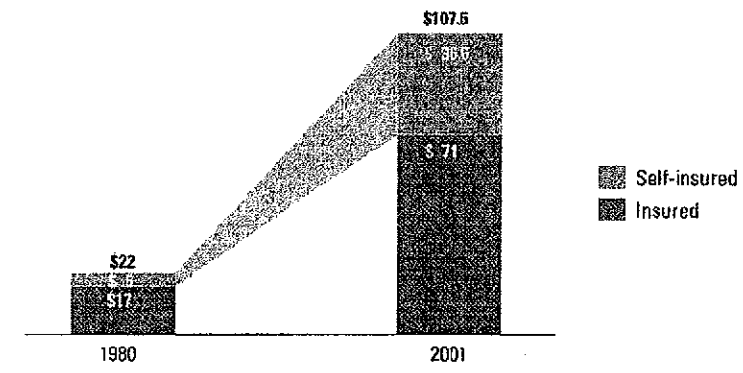
The second component of the $205.4 billion cost total is the self-insured component (excluding medical malpractice). No consistent data set exists for this component, but several specialized studies have been published. The information that we reviewed for commercial lines included Conning and Company's periodic reports on the alternative risk market as well as various studies published by Tillinghast.

We estimate that 2% of personal insurance coverage cost and 34% of total commercial insurance coverage cost (up from less than 20% prior to 1980) are self-insured (see Appendix 4).

Our estimate of self-insured costs is approximately $36.6 billion for commercial risks in 2001. This has been calculated to include tort costs paid by various forms of self-insurance such as large deductibles, captives and risk retention groups. However, our estimate does not capture certain extraordinary costs such as those resulting from the 1998 settlement between tobacco manufacturers and various state attorneys general for health care cost reimbursement.

As shown in the chart below, the growth in self-insured commercial lines tort costs has exceeded the growth in insured tort costs. Given rate increases for commercial insurance in 2001 that appear to have continued in 2002, we would expect the portion of self-insured commercial lines tort costs to continue to grow.

Commercial Lines Tort Cost ($billions)

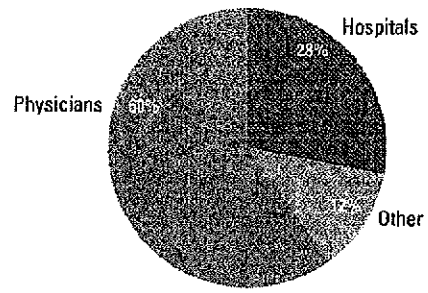


Medical Malpractice Component

Our estimate of medical malpractice cost is not based on A.M. Best insurance industry data, but rather on Tillinghast–Towers Perrin's internal database of state-by-state medical malpractice cost. We have broken this cost out because the definition of insured versus self-insured costs has changed significantly over the last 30 years. Many group captives started in the mid-1970s as "self-insurance" alternatives to the commercial insurance market have become fully licensed insurance companies, and they are now included in insurance industry data. As of 2001, less than half of the $21 billion total medical malpractice cost is reported by Best.

Our approach to quantifying medical malpractice costs is by type of provider, as shown below (see also Appendix 5).

2001 Medical Malpractice Cost Breakdown by Category of Provider



The tort costs attributable to medical malpractice have been aggregated since 1975. Since then, medical malpractice tort costs have grown at an annual rate of 11.6%, versus 9.4% for all U.S. tort costs.

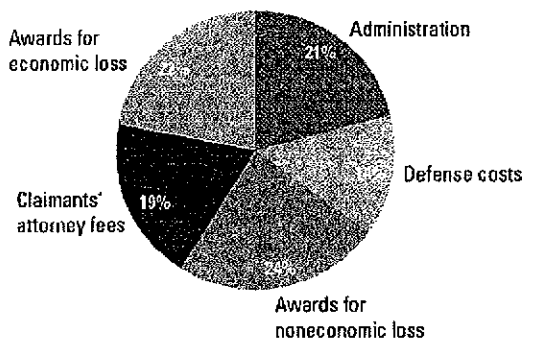
What's Included?

We have defined insured tort cost to include first-party benefits (the cost of legal defense and claims handling), benefits paid to third parties (claimants and plaintiffs) or their attorneys, and an administrative, or overhead, component. Our definition includes such costs associated with all claims, not just those that reach the courthouse.

The tort system provides both direct and indirect benefits. The direct benefits include compensation to victims for their economic losses, including damaged property, lost wages and medical expenses. No consistent historical database exists to measure these components of the tort system. However, we do know that of the total benefits paid to third parties (65% of tort costs), one portion compensates for economic losses, one portion compensates for noneconomic losses (such as pain and suffering, loss of consortium, etc.) and a third portion goes to plaintiffs' attorneys.

There have been several studies of this split, but they typically have been limited to a particular state, coverage or exposure. Our best estimate of the breakdown of insured cost is illustrated in the chart below.

Where Tort Cost Goes



If viewed as a mechanism for compensating victims for their economic losses, the tort system is extremely inefficient, returning only 22 cents of the tort cost dollar for that purpose. Of course, the tort system also provides compensation for victims' pain and suffering and other noneconomic losses. However, even including these benefits, the system is less than 50% efficient.

What's Not Included?

Our definition of tort cost is largely governed by traditional liability insurance coverages. (We previously noted the exclusion of tobacco settlements.) There are gray areas where awards and settlements are typically, but not always, excluded (e.g., certain types of contract and shareholder litigation, and punitive damages, which are included in the insurance contract in certain states and not in others). The costs reflected in this study are consistent with those reported by the insurance companies themselves. Therefore, while certain of these costs may be included in the tort cost totals, we are unable to account for them separately.

We have not included costs incurred by federal and state court systems in administering actual suits. Reliable estimates of these costs do exist, but not back to 1950. Estimates by the Institute of Civil Justice (Rand Corporation) put these costs at less than 1% of the other costs involved. We do not believe the omission of these costs significantly understates our cost index or in any material way distorts long-term trends.

We have also omitted certain indirect costs, such as those associated with litigation avoidance. Indirect costs can range from unnecessary and duplicative medical tests ordered by doctors as a defense against possible malpractice allegations to the disappearance of certain products or entire industries from the marketplace because of high product liability cost.

The tort system also provides indirect benefits that are not measured in this study. Such benefits include a systematic resolution of disputes, thereby reducing conflict, possibly including violence. The tort system may also act as a deterrent to unsafe practices and products. From this perspective, compensation for pain and suffering can be seen as beneficial to society as a whole.

Looking Ahead

Several factors contributed to the resurgence of tort costs in 2001, including:

- an increase in losses associated with asbestos
- an increase in the number and size of shareholder lawsuits against the boards of directors of publicly held companies
- an increase in medical cost inflation, leading to higher costs of personal injury claims.

These trends continued in 2002 as well and show no signs of abating in the near future. We expect total tort costs to increase approximately 9% in 2002, to $223.9 billion. We expect GDP to increase by 3.5% in 2002. Consequently, the 2002 ratio of tort costs to GDP is anticipated to increase to 2.15%.

Looking ahead, we anticipate growth in U.S. tort costs to range from 7% to 11% in 2003, with a midpoint of 9%. We expect similar increases in 2004 and 2005. We also anticipate GDP growth to increase to 6% per year. These assumptions yield projected tort costs, GDP and tort-to-GDP ratios as shown below:

	$billions		
	Tort Costs	GDP	Tort Cost as % of GDP
2000	$179.7	$ 9,825	1.83%
2001	205.4	10,082	2.04%
2002 (est.)	223.9	10,435	2.15%
2003 (est.)	244.1	11,061	2.21%
2004 (est.)	266.0	11,725	2.27%
2005 (est.)	290.0	12,428	2.33%

The 9% growth in tort costs forecasted for the 2003-2005 period assumes no material impact on losses arising from tort reforms that may be implemented in the 2003-2005 period.

Our premise of a three-point gap in the growth rates of tort costs and GDP during the 2003-2005 period is consistent with the long-run history of 1951-2001, which shows a gap of 2.5 points. When the gap is measured through 1995 only, it widens to 3.1 points.

We feel the 1996-2000 period is not reflective of current trends. For example, health care cost increases were more contained during that period, both in absolute terms and relative to core CPI. From 1996 to 2000, medical care inflation was less than one point higher than the core CPI. This slowed trend appears to have ended; the 2001 CPI for medical care grew nearly two points more than core CPI. This two-point gap is more consistent with the long-term trend. Results for 2002, through October, show a three-point gap.

The chart below shows the long-term history and our predictions for the 2003-2005 period for CPI, medical care CPI, GDP and tort costs.

	CPI	Medical Care CPI	Nominal GDP	Tort Costs
1951-1995	4.2%	6.1%	7.4%	10.5%
1996-2000	2.5%	3.4%	5.8%	2.5%
2001	2.8%	4.6%	2.6%	15.4%
2002 (est.)	1.6%*	4.6%*	3.5%*	9.0%
2003-2005 (est.)	3.0%	5.0%	6.0%	9.0%

*Estimated based on results through October 2002

There are certainly factors beyond health care costs that influence tort costs. The comparison of health care costs to tort costs is merely used to show differences in trends observed in the late 1990s with those observed over a longer time horizon.

Appendices

Appendix 1 U.S. Data (1950-2001)

Appendix 2 Summary of All Tort System Costs (1950-2001)

Appendix 3 Insured Costs

Appendix 4 Self-Insured Costs

Appendix 5 Medical Malpractice Costs

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Appendix 1a

Cost of the U.S. Tort System — 1950-2001

Year	U.S. Population (millions)	U.S. Civilian Workforce (millions)	CPI (all items)	CPI (medical care)	Gross Domestic Product ($billions)	Tort System Costs ($billions)	Tort Costs as % of GDP
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1950	152	62.2	0.241	0.151	$ 294	$ 1.8	0.61%
1951	155	62.0	0.260	0.159	---	2.3	---
1952	158	62.1	0.265	0.167	---	2.7	---
1953	160	63.0	0.267	0.173	---	3.0	---
1954	163	63.6	0.269	0.178	---	3.1	---
1955	166	65.0	0.268	0.182	415	3.4	0.82
1956	169	66.6	0.272	0.189	---	3.9	---
1957	172	66.9	0.281	0.197	---	4.5	---
1958	175	67.6	0.289	0.206	---	4.9	---
1959	178	68.4	0.291	0.215	---	5.2	---
1960	181	69.6	0.296	0.223	527	5.4	1.03
1961	184	70.5	0.299	0.229	---	5.7	---
1962	187	70.6	0.302	0.235	---	6.0	---
1963	189	71.8	0.306	0.241	---	6.6	---
1964	192	73.1	0.310	0.246	---	7.3	---
1965	194	74.5	0.315	0.252	720	7.9	1.10
1966	197	75.8	0.324	0.263	---	8.7	---
1967	199	77.3	0.334	0.282	---	9.6	---
1968	201	78.7	0.348	0.299	---	10.6	---
1969	203	80.7	0.367	0.319	---	12.0	---
1970	205	82.8	0.388	0.340	1,040	13.9	1.33
1971	208	84.4	0.405	0.361	1,129	15.0	1.33
1972	210	87.0	0.418	0.373	1,240	15.7	1.26
1973	212	89.4	0.444	0.386	1,386	15.2	1.10
1974	214	91.9	0.493	0.424	1,501	16.5	1.10
1975	216	93.8	0.538	0.475	1,635	20.1	1.23
1976	218	96.2	0.569	0.520	1,824	23.4	1.28
1977	220	99.0	0.606	0.570	2,031	28.0	1.38
1978	223	102.3	0.652	0.618	2,296	32.8	1.43
1979	225	105.0	0.726	0.675	2,566	37.0	1.44
1980	228	106.9	0.824	0.749	2,796	43.0	1.54
1981	230	108.7	0.909	0.829	3,131	49.6	1.58
1982	232	110.2	0.965	0.925	3,259	57.0	1.75
1983	234	111.6	0.996	1.006	3,535	64.6	1.83
1984	236	113.5	1.039	1.068	3,933	66.9	1.70
1985	239	115.5	1.076	1.135	4,213	83.8	1.99
1986	241	117.8	1.096	1.220	4,453	102.4	2.30
1987	243	119.9	1.136	1.301	4,743	111.1	2.34
1988	245	121.7	1.183	1.386	5,108	113.6	2.22
1989	247	123.9	1.240	1.493	5,489	125.7	2.29
1990	249	124.8	1.307	1.628	5,803	129.6	2.23
1991	252	125.3	1.362	1.770	5,986	131.4	2.20
1992	255	126.9	1.403	1.901	6,319	141.3	2.24
1993	258	128.4	1.445	2.014	6,642	143.7	2.16
1994	260	131.4	1.482	2.110	7,054	147.5	2.09
1995	263	132.0	1.524	2.205	7,401	158.8	2.15
1996	265	134.6	1.569	2.282	7,813	154.8	1.98
1997	268	136.7	1.605	2.346	8,318	154.6	1.86
1998	270	138.3	1.630	2.421	8,782	166.4	1.89
1999	273	139.9	1.665	2.506	9,269	169.0	1.82
2000	281	141.3	1.722	2.608	9,825	179.7	1.83
2001	285	141.9	1.771	2.728	$10,082	$205.4	2.04%

Notes

(2) From U.S. Census Bureau

(3), (4), (5) From U.S. Department of Labor, Bureau of Labor Statistics

(6) From U.S. Department of Commerce, Bureau of Economic Analysis

(7) From Appendix 2, column (5).

(8) (7)/(6)

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Appendix 1b

Cost of the U.S. Tort System — 1950-2001

Average Annual Changes by Groups of Years

Year	U.S. Population (millions)	U.S. Civilian Workforce (millions)	CPI (all items)	CPI (medical care)	Gross Domestic Product ($billions)	Tort System Costs ($billions)	Tort Costs as % of GDP
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1951-2001	1.2%	1.6%	4.0%	5.8%	7.2%	9.7%	2.4%
1951-1960	1.7	1.1	2.1	4.0	6.0	11.6	5.3
1961-1970	1.3	1.8	2.7	4.3	7.0	9.8	2.6
1971-1980	1.1	2.6	7.8	8.2	10.4	12.0	1.4
1981-1990	0.9	1.6	4.7	8.1	7.6	11.7	3.8
1991-2000	1.2	1.3	2.8	4.8	5.4	3.3	-2.0
2001	1.2	0.4	2.8	4.6	2.6	14.3	11.4
1951-1995	1.2	1.7	4.2	6.1	7.4	10.5	2.8
1996-2000	1.4%	1.4%	2.5%	3.4%	5.8%	2.5%	-3.2%

Notes
Based on figures in Appendix 1a

Appendix 3

Liability Insured Cost

Year	Earned Premium	Loss & LAE Ratio	Expense Ratio	Combined Ratio	Liability Insured Cost
(1)	(2)	(3)	(4)	(5)	(6)
1950	$ 1,752,857	64.3%	34.0%	98.3%	$ 1,723,059
1951	2,083,720	71.1	33.4	104.5	2,177,633
1952	2,515,153	69.3	32.4	101.7	2,557,353
1953	2,981,588	63.2	31.6	94.9	2,828,158
1954	3,155,435	61.4	32.1	93.5	2,950,051
1955	3,337,773	64.9	32.5	97.4	3,250,829
1956	3,619,255	70.1	32.7	102.8	3,719,824
1957	4,035,199	74.0	32.4	106.4	4,293,067
1958	4,442,649	72.6	31.4	104.1	4,624,008
1959	4,951,128	69.9	30.6	100.4	4,971,526
1960	5,276,984	67.7	30.6	98.3	5,186,101
1961	5,504,507	67.1	30.9	98.0	5,394,567
1962	5,819,378	67.3	30.8	98.0	5,704,594
1963	6,224,657	70.5	30.7	101.2	6,299,547
1964	6,688,473	73.4	30.1	103.5	6,924,227
1965	7,379,531	73.5	29.1	102.6	7,570,265
1966	8,187,339	73.4	28.3	101.7	8,322,529
1967	8,947,529	74.1	28.1	102.3	9,150,869
1968	9,768,188	75.6	27.8	103.4	10,102,273
1969	10,957,402	76.9	27.2	104.2	11,413,351
1970	12,715,930	77.5	26.4	103.9	13,208,732
1971	14,273,904	74.1	26.1	100.2	14,304,768
1972	15,144,973	71.8	26.8	98.6	14,933,112
1973	14,360,195	74.8	27.0	101.8	14,621,296
1974	14,908,953	78.5	27.7	106.2	15,837,813
1975	16,500,824	81.5	27.0	108.6	17,914,909
1976	20,090,047	77.3	25.7	103.0	20,687,521
1977	24,973,118	71.4	25.0	96.4	24,073,405
1978	28,692,720	70.5	25.8	96.2	27,616,588
1979	31,088,697	73.1	26.4	99.5	30,934,883
1980	32,194,946	78.7	27.1	105.8	34,057,943
1981	32,838,195	90.7	27.8	118.6	38,929,780
1982	34,170,095	101.5	28.6	130.0	44,438,093
1983	36,235,619	109.2	28.6	137.8	49,946,628
1984	39,843,449	101.1	27.4	128.5	51,208,738
1985	50,372,373	102.9	25.1	128.0	64,455,656
1986	68,516,069	90.7	23.3	114.1	78,167,587
1987	78,337,490	84.8	23.9	108.6	85,112,183
1988	81,771,490	83.7	24.5	108.2	88,462,814
1989	83,745,030	89.7	26.1	115.9	97,030,370
1990	87,971,533	89.1	25.2	114.4	100,602,676
1991	89,311,786	87.0	26.1	113.1	101,016,143
1992	92,659,338	89.9	25.2	115.1	106,652,899
1993	96,562,526	87.6	24.8	112.4	108,560,517
1994	101,730,356	85.7	24.4	110.1	112,042,831
1995	105,299,103	87.6	24.9	112.5	118,478,058
1996	108,378,052	81.7	24.8	106.4	115,362,594
1997	110,525,049	77.4	25.4	102.7	113,561,713
1998	113,325,370	81.2	25.9	107.2	121,428,366
1999	111,429,324	83.7	26.5	110.3	122,863,786
2000	113,599,472	87.4	26.6	114.0	129,528,854
2001	$124,498,080	92.5%	25.0%	117.5%	$146,267,595

Notes
(2), (6) All values in 000s
All data reflect direct revenues and costs from "Best's Aggregates and Averages"
Prior to 1975, Medical Malpractice is included; for 1975-2001 it is excluded.
(6) (2) x (5)

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Appendix 4

Cost of the U.S. Tort System

Comparisons of Personal Lines to Commercial Lines Costs and Impact of Self-Insurance

	Personal Lines			Commercial Lines			
Year	Insured	Self (Un) Insured	Total	Insured	Self (Un) Insured	Total	Self (Un) Insured
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1973	$ 8,521,899	2.0%	$ 8,695,815	$ 6,099,397	6.0%	$ 6,488,720	$ 563,240
1974	8,921,581	2.0	9,103,654	6,916,232	6.0	7,357,694	623,535
1975	10,336,734	2.0	10,547,688	7,578,176	9.0	8,327,665	960,444
1976	11,609,756	2.0	11,846,690	9,077,764	10.0	10,086,405	1,245,574
1977	12,902,054	2.0	13,165,362	11,171,351	14.0	12,989,943	2,081,899
1978	14,381,293	2.0	14,674,789	13,235,295	16.0	15,756,304	2,814,504
1979	15,985,767	2.0	16,312,007	14,949,116	16.0	17,796,566	3,173,691
1980	17,084,039	2.0	17,432,692	16,973,905	23.0	22,044,032	5,416,781
1981	18,892,570	2.0	19,278,133	20,037,210	23.0	26,022,350	6,370,703
1982	20,828,903	2.0	21,253,983	23,609,190	23.0	30,661,285	7,477,175
1983	22,945,067	2.0	23,413,333	27,001,563	23.0	35,066,965	8,533,669
1984	25,615,607	2.0	26,138,375	25,593,130	25.0	34,124,174	9,053,811
1985	29,695,287	2.0	30,301,313	34,760,369	26.0	46,973,472	12,019,129
1986	34,460,827	2.0	35,164,110	43,706,759	28.0	60,703,833	17,700,355
1987	38,092,590	2.0	38,869,990	47,019,592	28.0	65,304,989	19,062,797
1988	41,783,652	2.0	42,636,380	46,679,161	27.0	63,944,056	18,117,623
1989	46,424,500	2.0	47,371,939	50,605,970	28.0	70,285,931	20,627,499
1990	50,967,722	2.0	52,007,879	49,834,954	28.0	68,937,436	20,342,640
1991	52,338,179	2.0	53,406,306	48,677,963	29.0	68,560,512	20,950,674
1992	55,274,662	2.0	56,402,716	51,378,237	31.0	74,461,213	24,211,030
1993	56,164,851	2.0	57,311,072	52,395,666	30.0	74,850,952	23,601,507
1994	58,857,222	2.0	60,058,389	53,185,609	29.0	74,909,308	22,924,867
1995	60,222,560	2.0	61,451,592	58,255,497	30.5	83,820,860	26,794,394
1996	61,414,886	2.0	62,668,251	53,947,707	30.5	77,622,601	24,928,258
1997	62,097,411	2.0	63,364,705	51,464,302	31.5	75,130,367	24,933,360
1998	64,995,727	2.0	66,322,170	56,432,539	32.0	82,989,175	27,892,980
1999	66,807,453	2.0	68,170,870	56,056,333	32.0	82,435,784	27,742,868
2000	70,866,341	2.0	72,312,592	58,662,514	33.0	87,555,990	30,339,729
2001	$75,245,057	2.0%	$76,780,671	$71,022,538	34.0%	$107,609,906	$38,122,981

Notes
All values in 000s
(2), (5) From "Best's Aggregates and Averages" (excludes Medical Malpractice)
(3) Based on internal Tillinghast interviews
(4) (2) / [1.0 - (3)]
(6) Based on various studies published by Tillinghast and Conning and Company
(7) (5) / [1.0 - (6)]
(8) [(4) - (2)] + [(7) - (5)]

Appendix 5

Medical Malpractice Tort Costs

Year	Loss and LAE Costs				UW Expense Ratio	Total Cost
	Hospital	Physicians	Other	Total		
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1975	$ 431,295	$ 526,255	$ 86,179	$ 1,043,729	13.6%	$ 1,207,935
1976	536,046	635,651	109,671	1,281,367	13.0	1,473,438
1977	655,857	820,691	143,733	1,620,281	14.0	1,883,906
1978	798,413	1,018,936	183,984	2,001,333	14.2	2,333,373
1979	986,951	1,273,884	238,037	2,498,871	12.2	2,845,024
1980	1,201,618	1,623,391	309,335	3,134,344	11.0	3,521,673
1981	1,444,598	1,954,352	387,068	3,786,019	11.0	4,253,390
1982	1,794,892	2,313,503	486,573	4,594,969	10.4	5,127,669
1983	2,102,377	2,733,138	595,596	5,431,111	10.8	6,088,688
1984	2,229,526	3,063,070	677,971	5,970,568	10.1	6,642,205
1985	2,188,006	3,160,955	685,192	6,034,153	8.0	6,555,428
1986	2,262,752	2,995,117	673,523	5,931,392	9.1	6,524,532
1987	2,341,454	3,133,703	701,357	6,176,515	10.8	6,927,943
1988	2,386,797	3,165,040	711,180	6,263,017	10.5	6,994,292
1989	2,508,767	3,513,026	771,380	6,793,173	15.7	8,057,020
1990	2,678,230	3,864,158	838,067	7,380,455	15.2	8,704,495
1991	2,752,049	4,296,635	902,923	7,951,606	15.8	9,448,491
1992	3,012,438	5,006,678	1,027,233	9,046,350	13.3	10,432,893
1993	3,156,714	5,404,734	1,096,705	9,658,153	16.0	11,495,182
1994	3,289,229	5,793,081	1,163,426	10,245,736	18.3	12,534,994
1995	3,443,943	6,384,556	1,271,602	11,100,101	18.1	13,558,984
1996	3,582,983	6,994,025	1,382,128	11,959,135	17.5	14,497,630
1997	3,858,486	7,551,287	1,505,857	12,915,630	19.6	16,066,919
1998	4,105,995	8,204,416	1,640,970	13,951,381	18.2	17,061,754
1999	4,417,857	9,083,029	1,817,656	15,318,542	16.8	18,414,531
2000	4,672,328	10,099,337	2,008,631	16,780,296	15.2	19,792,534
2001	$5,092,837	$11,008,277	$2,189,408	$18,290,523	13.0%	$21,025,033

Notes
All values in 000s
(2), (3), (4) From internal Tillinghast study
(5) (2) + (3) + (4)
(6) From "Best's Aggregates and Averages"; the ratio of underwriting expenses to all losses and expenses combined
(7) (5) / [1.0 - (6)]