

1998

Tort Reform 1997-98: Profits v. People?

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FLORIDA STATE UNIVERSITY LAW REVIEW



TORT REFORM 1997-98: PROFITS V. PEOPLE?

Kenneth D. Kranz

VOLUME 25

WINTER 1998

NUMBER 2

Recommended citation: Kenneth D. Kranz, *Tort Reform 1997-98: Profits v. People?*, 25 FLA. ST. U. L. REV. 161 (1998).

TORT REFORM 1997-98: PROFITS V. PEOPLE?

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I. INTRODUCTION.....	161
II. HISTORICAL BACKGROUND	161
III. THE POLITICS, THE PLAYERS, AND THEIR MESSAGES	165
A. The Politics	165
B. The Players and Their Messages.....	165
IV. THE PROPOSALS.....	166
A. The Early Proposals	166
B. The FAIR Bill: HB 2117	168
V. POST-SESSION ACTIVITIES	174
VI. THE FACTS: IS THERE A NEED FOR REFORM?	176
A. The Amount of Litigation in Florida	176
B. Punitive Damages.....	177
C. Florida's Business Climate.....	179
VII. CONCLUSION.....	182

I. INTRODUCTION

In 1997, the Florida Legislature saw a serious lobbying effort aimed at securing the enactment of wholesale revisions to Florida's civil justice system. These reforms, if enacted, would substantially dilute important doctrines such as Florida's dangerous instrumentality doctrine, provide more defenses to escape liability, and create higher hurdles before plaintiffs can receive certain types of damages. Championed by the business community, the reforms would limit defendants' liability at the cost of putting the safety of Florida's citizens at risk.

Part II of this Article examines both the historical and political environment that led to this effort. Part III analyzes the motivating factors behind the push for reform. Part IV addresses the proposals for reform, while Part V discusses what has happened since the end of the 1997 session. Part VI examines whether there truly is a need for tort reform. Part VII concludes that the battle over tort reform will surely continue into the 1998 legislative session.

II. HISTORICAL BACKGROUND

In the ongoing ebb and flow of the legislative process, every session sees a handful of "tort reform" bills aimed like rifle shots at

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smaller, specific issues.¹ These bills typically reduce or eliminate liability in a particular circumstance that has been the subject of a particular court decision. On a few occasions, efforts at comprehensive liability-reducing "reform" packages resulted in fundamental changes to Florida's tort law.

Like many other states, Florida experienced a tumultuous period of intensive legislative tort reform activity in the mid-1980s, especially in the areas of medical malpractice and the civil justice system.² These efforts were followed by similarly sweeping reforms in the workers' compensation area from 1989 to 1993.³ Each reform effort was precipitated by a real or perceived insurance availability and/or affordability "crisis" that tort reform advocates pointed to as justification for their proposed restrictions on individual liberties.⁴ In retrospect, however, these "crises" were at least arguably precipitated by the business practices of the insurance industry rather than abuses in the tort system.⁵

In the mid 1980s, medical malpractice was the first area to receive legislative attention. In response to a perceived medical malpractice insurance crisis, the 1985 Legislature attempted to offer relief in what was known as the Comprehensive Medical Malpractice Reform Act of 1985 (1985 Act).⁶ Before the ink dried on the 1985 Act, the Legislature enacted the much more comprehensive Tort Reform and Insurance Act of 1986 (1986 Act).⁷ The 1986 Act was conceived

1. See, e.g., Fla. HB 415 (1997), Fla. SB 1472 (1997) (protecting directors of funeral processions from liability resulting from accidents); Fla. SB 1052 (1997), Fla. HB 1949 (1997) (exempting public schools from liability for injuries arising out of public non-school use of the facilities); Fla. SB 1256 (1997), Fla. HB 855 (1997) (limiting the liability of private schools for injuries to students during non-school activities); Fla. SB 1778 (1997), Fla. HB 1691 (1997), Fla. HB 2117 (1997) (shielding car rental companies from vicarious liability); Fla. SB 2166 (1997) (limiting the medical malpractice liability of health care practitioners); Fla. SB 766 (1997), Fla. SB 1658 (1997), Fla. HB 1673 (1997) (limiting the medical malpractice liability of private teaching hospitals); Fla. SB 1264 (1997), Fla. HB 589 (1997) (limiting the liability of nursing homes for violation of their residents' rights).

2. See, e.g., Comprehensive Medical Malpractice Reform Act of 1985, ch. 85-175, 1985 Fla. Laws 1180 (amending and codified in scattered sections of FLA. STAT.); Tort Reform and Insurance Act of 1986, ch. 86-160, 1986 Fla. Laws 695 (amending and codified in scattered sections of FLA. STAT.); Florida Medical Incident Recovery Act of 1988, ch. 88-1, 1988 Fla. Laws 119 (amending and codified in scattered sections of FLA. STAT.).

3. See, e.g., Act effective July 5, 1989, ch. 89-289, 1989 Fla. Laws 1743 (amending and codified in scattered sections of FLA. STAT.); Act effective June 26, 1990, ch. 90-201, 1990 Fla. Laws 894 (amending and codified in scattered sections of FLA. STAT.); Act effective Jan. 24, 1991, ch. 91-1, 1991 Fla. Laws 21 (amending and codified in scattered sections of FLA. STAT.); Act effective Jan. 1, 1994, ch. 93-415, 1994 Fla. Laws 62 (amending and codified in scattered sections of FLA. STAT.).

4. See, e.g., Tort Reform and Insurance Act of 1986, ch. 86-160, 1986 Fla. Laws 695, 698 (amending and codified in scattered sections of FLA. STAT.).

5. See, e.g., Kenneth S. Abraham, *The Causes of the Insurance Crisis*, in *NEW DIRECTIONS IN LIABILITY* 54 (1988).

6. Ch. 85-175, 1985 Fla. Laws 1180.

7. Ch. 86-160, 1986 Fla. Laws 695.

as an effort to relieve the general liability insurance affordability and availability "crisis" perceived to exist throughout much of the business community.⁸ The 1986 Act, which gained national recognition for its far-reaching tort reforms, superseded and supplemented many of the provisions adopted specifically for medical malpractice in 1985.⁹ Additionally, it made fundamental changes to the general tort law, including nearly eliminating joint and several liability, placing caps on noneconomic and punitive damages, and imposing requirements for periodic payments and collateral source offsets.¹⁰

This was a major shift in the Florida civil justice system. Virtually every one of these changes was designed to decrease defendants' exposure to liability at the expense of injured plaintiffs. Theoretically, this shift in the system's balance would reduce liability insurance costs and alleviate the insurance availability problems.¹¹ However, the Legislature was not willing to rely upon the liability insurance industry to voluntarily put theory into practice. Instead, it threw into the mix extensive new insurance rate regulation provi-

8. One example of the insurance "crisis" of the time was the alleged inability of day care centers to obtain liability insurance.

9. Compare ch. 85-175, 1985 Fla. Laws 1180, with ch. 86-160, 1986 Fla. Laws 695.

10. See ch. 86-160, 1986 Fla. Laws 695. The 1986 Act virtually abolished the doctrine of joint and several liability for cases where the damages exceed \$25,000. See FLA. STAT. § 768.81(5) (1997). Under the hybrid scheme included in the 1986 Act, the doctrine of joint and several liability is to be applied only to a defendant's liability for economic damages and only in circumstances where the defendant's fault equals or exceeds that of the plaintiff. See *id.* Defendants can never be jointly and severally liable for noneconomic damages; their liability is limited solely to their proportional share. See *id.* The Florida Supreme Court interpreted this provision to allow apportionment of "proportional shares" among persons who are not parties to the suit, such as unknown tortfeasors, settlors, or immune tortfeasors. See *Fabre v. Marin*, 623 So. 2d 1182, 1185 (Fla. 1993).

The 1986 Act also imposed a cap of \$450,000 on noneconomic damages. See FLA. STAT. § 768.80 (1997). This cap was subsequently declared unconstitutional by the Florida Supreme Court. See *Smith v. Department of Ins.*, 507 So. 2d 1080, 1083 (Fla. 1987). Moreover, the 1986 Act limited the amount of punitive damage awards. See FLA. STAT. § 768.72-73 (1997). Under the Act, punitive damages in negligence cases are presumed excessive if they exceeded three times the compensatory damages. See *id.* Furthermore, 60% of the punitive damage awards in such cases were to go to the state. See *id.* § 768.73 (1991). In 1992, the Legislature decreased the state's share to 35%. See Act effective April 8, 1992, ch. 92-85, § 2, 1992 Fla. Laws 821, 821-22 (amending FLA. STAT. § 768.73 (1991)). In 1995, the state share came under sunset review and was not reenacted, thus retiring this provision. See Act effective July 1, 1995, ch. 92-85, § 3, 1992 Fla. Laws 821, 822. The Legislature has considered reenactment of the state share but has not yet reinstated it. See Fla. SB 708 (1995); Fla. HB 2669 (1995); Fla. SB 822 (1996); Fla. HB 773 (1996).

The 1986 Act allowed courts to order structured payments of future economic losses exceeding \$250,000 in negligence cases. See FLA. STAT. § 768.78 (1997). It also required an offset for payments to an injured person from collateral sources, requiring a reduction of an award to reflect payment by other sources of medical insurance, disability insurance, etc. See *id.* § 768.76. The 1986 provided statutory remittitur and additur provisions that list specific criteria the court must consider to reduce or increase awards. See *id.* § 768.74. Finally, the 1986 Act required all verdicts to be itemized, with a detailed break out of past and future economic and noneconomic damages. See *id.* § 768.77.

11. See ch. 86-160, 1986 Fla. Laws 695, 698.

sions, an excess insurance profits law, and a mandatory liability insurance rate rollback.¹²

Within only two years, yet another medical malpractice insurance "crisis" arose, this time highlighted by obstetricians' inability to obtain coverage for delivering babies.¹³ In response, the Legislature convened in a Special Session and quickly passed the Florida Medical Incident Recovery Act of 1988 (1988 Act).¹⁴ The 1988 Act revisited many of the provisions enacted in 1985 and 1986, and included five major reforms, including extensive immunity for providers, presuit screening requirements, arbitration, caps on damages, and a no-fault program for infants suffering brain damage at birth.¹⁵

After this furious flurry of legislative activity, the general liability and medical malpractice field remained fairly quiet over the next decade, marked primarily only by the annual legislative skirmishes over discrete issues.¹⁶ The liability insurance markets stabilized. Day

12. See *id.* at 695.

13. See FLA. STAT. § 766.301 (1997) (listing an unusual codification of legislative findings and intent).

14. Ch. 88-1, 1988 Fla. Laws 119, 119 (amending and codified in scattered sections of FLA. STAT.).

15. See *id.* The 1988 Act granted greater immunity to health care practitioners when rendering emergency care. See FLA. STAT. § 768.78 (1997). Liability may only be imposed when the practitioner breaches a "reckless disregard" standard. See *id.* The 1988 Act also imposed strict requirements for presuit investigation and screening of medical malpractice cases. See *id.* §§ 766.203-.206. These procedures included extensive requirements designed to make it more difficult and expensive to file such lawsuits. See *id.* Coupled with severe penalties against attorneys who do not comply with the specific requirements, the intended effect of these provisions was to virtually eliminate any chance of frivolous or unfounded lawsuits being brought against doctors. See *id.*

A voluntary binding arbitration provision of medical malpractice claims was also included. See *id.* §§ 766.207-.212. Furthermore, the arbitration process was tied to caps not only on noneconomic damages and attorneys' fees, but also on economic damages. See *id.* For example, wage-loss damages were limited to 80% of lost wages and loss of earning capacity. See *id.*

Moreover, the 1988 Act created the Florida Birth-Related Neurological Injury Compensation Plan, a state "no-fault" program designed to provide limited compensation for infants who suffer a brain or spinal cord injury as a result of oxygen deprivation or mechanical injury at birth, and as a result are permanently and substantially mentally and physically impaired. See *id.* §§ 766.301-.316. The exclusive remedies under the program allow reimbursement for medical care and custodial expenses not otherwise covered by insurance or other government programs, and limit any award for emotional and psychological damages to \$100,000. See *id.*

Finally, the Act completely abolished joint and several liability for teaching hospitals and the Board of Regents. See *id.* § 766.112.

16. The Legislature's attention did, however, turn to the workers' compensation area after a series of large insurance rate increases. This "workers' compensation insurance crisis" prompted the passage of four major revisions. See Act effective Oct. 1, 1989, ch. 89-289, 1989 Fla. Laws 1743 (amending and codified in scattered sections of FLA. STAT.); Act effective July 1, 1990, ch. 90-201, 1990 Fla. Laws 894 (amending and codified in scattered sections of FLA. STAT.); Act effective Jan. 24, 1991, ch. 91-1, 1991 Fla. Laws 21 (amending and codified in scattered sections of FLA. STAT.); Act effective Jan. 1, 1994, ch. 93-415, 1994 Fla. Laws 62 (amending and codified in scattered sections of FLA. STAT.). These

care centers could buy liability insurance, and obstetricians could once again deliver babies secure in their medical malpractice coverage. For the most part, the changes adopted during this period remain intact today.

III. THE POLITICS, THE PLAYERS, AND THEIR MESSAGES

A. The Politics

In the fall of 1996, a dramatic political change occurred in Florida. For the first time in this century, both houses of the Florida Legislature came under the control of the Republican party when the Florida House joined the Senate under Republican leadership.¹⁷ This change in the political balance was eagerly anticipated by the business community as an opportunity to promote business interests and to push through pro-business legislation.¹⁸ Specifically, business interests viewed the power change as a chance to revise the tort system, notwithstanding the conspicuous absence of even a hint of the traditional sine qua non of tort reform—an insurance crisis. Business interests openly showed their intentions with statements such as, “We think we have a two-year political window.”¹⁹

B. The Players and Their Messages

Soon, a coalition of business and health care groups sharing a common interest in shielding themselves from liability joined forces, forming the “Tort Reform United Effort” (TRUE).²⁰ TRUE set out to assemble its wish list and sell it to the Legislature. It focused its lobbying efforts on convincing legislators that reform was necessary to protect Florida’s businesses from “deep-pockets lawsuits” and “frivolous lawsuits and outrageous damage awards.”²¹ TRUE’s

changes, which have dramatically transformed the workers’ compensation law, chapter 440, Florida Statutes, are beyond the scope of this Article.

17. See John Kennedy & Michael Griffen, *Legislative Power Shifts to Orange*, ORLANDO SENT., Nov. 7, 1996, at A1.

18. See Mary Ellen Klas, *Delay Tactics*, FLA. TREND, July 1997, at 84-85.

19. Peter Mitchell, *In Legislative Races, Tort Reform Becomes (Finally) a Defining Issue*, WALL ST. J., Aug. 21, 1996, at F1 (interviewing Bill Herrle of the National Federation of Independent Business).

20. See Bob Keefe, *Talk of Tort Reform Heats Up*, ST. PETE. TIMES, Feb. 23, 1997, at D5. Major participants in TRUE include the Florida Chamber of Commerce, Associated Industries of Florida, the National Federation of Independent Business, the Florida Retail Federation, the Florida Medical Association, and the Florida Institute of Certified Public Accountants. See Memorandum from Tort Reform United Effort to Governor Lawton Chiles (Sept. 10 1997) (discussing civil justice reform proposals) (on file with author).

21. FLA. CHAMBER OF COM. & TRUE, *THEY JUST DON’T GET IT!* (1997) (on file with author).

claims, of course, provoked a strong response from citizen, consumer, and lawyer groups.²² The next phase of the tort reform battle began.

IV. THE PROPOSALS

A. The Early Proposals

Senate Bill 1774 was the first comprehensive reform bill to appear on the 1997 legislative scene. Sponsored by Senator John Ostalkiewicz,²³ the bill included six major provisions.²⁴ After the initial

22. Major participants included the Academy of Florida Trial Lawyers, the Coalition for Family Safety, the Coalition to Protect Florida Elders, the AARP, the Florida Consumer Action Network, the Florida State Council of Senior Citizens, and numerous others. See FLA. H. R. COMM. ON FIN. SERVS., APPEARANCE RECORD, PCB FS 97-06 (Apr. 16, 1997) (on file with comm.).

23. Repub., Windermere. Senate Bill 1774 was unveiled at a press conference on March 6, 1997, at which Senator Ostalkiewicz and Representative Bob Brooks, Repub., Winter Park, announced their intention to file the bill. Ultimately, however, Representative Brooks never filed the companion to Senate Bill 1774 in the House. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1997 REGULAR SESSION, HISTORY OF SENATE BILLS at 138, SB 1774.

24. See Fla. SB 1774 (1997). The bill would have allowed the introduction of evidence of prior similar lawsuits brought by the plaintiff. See *id.* § 1. It would have allowed the trier of fact to "consider the plaintiff's involvement . . . in determining liability." *Id.* How this ambiguous directive was expected to be implemented is unclear.

Further, the bill would have shortened the statute of limitations from four to two years for tort actions based on negligence or intentional acts, including products liability. See *id.* § 2. It also would have applied this limit to written or unwritten contract actions. See *id.* Any suit would have been required to be brought within two years from the time the incident giving rise to the action occurred, or from the time the facts giving rise to action were discovered or should have been discovered with the exercise of due diligence. See *id.* The existing two-year medical malpractice statute of limitations would not have been affected. See *id.*

Moreover, the bill would have reinstated and increased the state share of punitive damage awards to 100%, payable to the State's Public Education Capital Outlay and Debt Service Trust Fund for school construction. See *id.* § 3. Calculation of attorneys' fees based on any part of the punitive damage award would have been prohibited. See *id.*

The bill would have capped noneconomic damages at \$250,000, using a broad definition of noneconomic damages. See *id.* § 5. This was included despite the fact that the Florida Supreme Court had already held such caps to be in violation of article I, section 21 of the Florida Constitution. See *Smith v. Department of Ins.*, 507 So. 2d 1080, 1087-1089 (Fla. 1987). Additionally, the bill would have required that "all civil suits for monetary damages" be referred for nonbinding arbitration. Fla. SB 1774, § 6 (1997). Under the proposed scheme, if the arbitrator awarded damages to the plaintiff and the plaintiff proceeded with the lawsuit, then the plaintiff would have to pay the defendant's legal fees and costs if the plaintiff recovered less than the arbitrator's award. See *id.* Conversely, if the plaintiff recovered damages equal to or greater than the arbitration award, then the defendant would have to pay the plaintiff's legal fees and costs. See *id.*

Finally, the bill provided that Florida's comparative fault law, codified at section 768.81, Florida Statutes, would apply to "all civil actions," not just to specified negligence cases. *Id.* § 7. This would have broadened its application by eliminating the current exceptions for intentional torts, pollution cases, and causes of action for which the application of joint and several liability is specifically provided by chapters 403 (Environmental Protection), 498 (Land Sales Practices), 517 (Securities Transactions), 542 (Combinations Restricting Trade or Commerce), and 895 (Racketeering and Illegal Debts). See *id.* This section of the bill would have also shifted Florida from a "pure" comparative fault approach to a mod-

splash of publicity, Senate Bill 1774 faded into obscurity. It was referred to three committees: Senate Judiciary, Senate Banking and Insurance, and Senate Ways and Means.²⁵ Ultimately, it died in the Senate Judiciary Committee at the end of the session without ever receiving a hearing.²⁶

Shortly after Senate Bill 1774 was unveiled, another tort reform bill was filed by Senator John McKay.²⁷ Although substantially different in approach from the earlier Ostalkiewicz bill, Senate Bill 2148 shared the theme of liability reduction through seven major provisions.²⁸ Like its predecessor, Senate Bill 2148 ultimately died at

fied approach in which recovery by a plaintiff would be barred in any situation where the claimant was more than 50% at fault for the injury. See *id.* Finally, the bill would have eliminated all the remaining vestiges of the doctrine of joint and several liability, including in cases where joint and several liability is specifically required by other sections of the Florida Statutes. See *id.*

25. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1997 REGULAR SESSION, HISTORY OF SENATE BILLS at 138, SB 1774.

26. See *id.*

27. Repub., Bradenton. See Fla. SB 2148 (1997). No House companion was ever filed.

28. See *id.* The bill would have imposed a 12-year statute of repose in products liability cases with the statute running from the date of delivery of the product to its original purchaser. See *id.* § 1. Moreover, to claim punitive damages, a plaintiff would be required to prove by clear and convincing evidence a reasonable basis for the damages at the time a claim for punitive damages is filed. See *id.* § 2. Certiorari review would be immediately available with regard to both the trial court's procedure and the sufficiency of the evidence related to the basis for the punitive damages. See *id.* No punitive damages would be allowed if the compensatory damages sought were only for economic losses, including those resulting from fraud in the inducement. See *id.* The bill would have required that the question of liability and the amount of punitive damages be tried separately from those relating to compensatory damages. See *id.* It would have prohibited the introduction of evidence relating to punitive damages prior to a determination by the trier of fact that the defendant was liable for compensatory damages. See *id.* It would have required the same trier of fact to try both compensatory and punitive damage issues. See *id.*

Additionally, the bill would have prohibited awards of punitive damages based solely on vicarious liability. See *id.* § 3. Damages could be awarded only against a person who "knowingly participated in the conduct constituting the aggravating factor providing the basis for punitive damages." *Id.* Officers, directors, or managers of a corporation would similarly be required to have knowingly participated in or condoned the behavior before they could be held liable. See *id.* Also, the bill would have reinstated the state share of punitive damage awards and increased the state share to 75%, prior to deduction of attorneys' fees, but after the deduction of other costs of litigation. See *id.* The proceeds would go to the Public Medical Assistance Trust Fund, subject to a 40/35 split between that fund and a proposed court system funding trust, the Court Article V Trust Fund, if and when that trust fund came into being. See *id.*

The bill would have prohibited, except under certain circumstances, a punitive damage award against a defendant who established before trial that punitive damages had previously been awarded against the defendant in any action in state or federal court alleging harm from the same act or course of conduct. See *id.* It would have allowed a subsequent award of punitive damages based on the same act or course of conduct only if the court determined that the claimant could offer new and substantial evidence of previously discovered, additional wrongdoing on the part of the defendant. See *id.* Punitive damages awarded under such circumstances were to be reduced by the sum of all punitive damages previously awarded against the defendant involving the same act or course of conduct. See *id.* Provisions in the current law relating to proration of the state share of settlements, proration of partial collections of punitive damages, calculation of attorneys' fees based on

the end of the session in the Senate Judiciary Committee without having been heard.²⁹

B. The FAIR Bill: HB 2117

TRUE spokespeople lauded the Ostalkiewicz and McKay bills as “a good starting point,” but suggested that there was “much more to come.”³⁰ However, TRUE was having its own internal problems. Although TRUE’s constituent members seemed to have no problem agreeing among themselves that trial lawyers were the target, internal bickering among the diverse members, each pushing their own personally self-serving list of “reforms,” frustrated the formation of a consensus agenda.³¹ Finally, at almost the latest possible moment in the session, there appeared in the House the proposed Florida Accountability and Individual Responsibility Liability Act (FAIR).³² Unlike the two earlier bills, this bill sprang forth with a head of steam as a proposed committee bill from the House Committee on Financial Services. After a display of legislative theatrics, the Committee voted the bill out of committee, and it was subsequently introduced as House Bill 2117 under the sponsorship of the committee and its Chairman, Representative R. Z. “Sandy” Safley.³³ It thus

punitive damages, and the prohibition against informing the jury of the provisions of the section would all have been repealed. See *id.*

The bill would have extended the current statutory itemized verdict provisions in two ways. Compare *id.* § 4, with FLA. STAT. § 768.77 (1997). First, it would have applied the itemized verdict provisions to all civil actions, instead of just to negligence actions. See Fla. SB 2148 (1997). Second, it would have applied structured judgment provisions to awards of noneconomic damages in cases in which the trier of fact makes an award of future noneconomic losses in excess of \$100,000, rather than just to economic damages in cases involving economic losses in excess of \$250,000. See *id.* § 5. Further, it would have provided for the structuring of all judgments of economic and noneconomic damages at the request of either party, and eliminated the ability of the court to deny the request where manifest injustice would result to any party. See *id.* In the situation where a claimant dies prior to the termination of a structured award of noneconomic damages, the bill would terminate the liability of the defendant for any future payments. See *id.* The bill also would have imposed similar proration and periodic payment requirements on attorneys’ fees that are based on a structured award. See *id.* Termination of the defendant’s liability for payment of remaining attorneys’ fees would occur upon the death of the plaintiff, even though these fees may in part be based upon economic damages that would still be payable in a lump sum to the estate of the plaintiff. See *id.*

Finally, the bill would have repealed section 768.81(5), Florida Statutes, which provides for the application of joint and several liability to cases under \$25,000. See *id.* § 6.

29. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1997 REGULAR SESSION, HISTORY OF SENATE BILLS, at 160, SB 2148.

30. Lisa Gibbs, Tort Reform’s First Salvos, BROWARD DAILY BUS. REV., Mar. 31, 1997, at A1.

31. See Klas, *supra* note 18, at 85-86.

32. See Fla. HB 2117 (1997).

33. Repub., Clearwater.

attained the significance of being the only bill of the three reform packages to have made it out of committee.³⁴

House Bill 2117 included some of the same concepts addressed in the earlier Senate bills and added some new twists of its own. The bill first recited a number of legislative "findings," including that "there is an overpowering public necessity to eliminate perpetual liability for defective products because such perpetual liability places

34. Although the Legislature is often criticized for acting slowly, the steps by which this bill came to be introduced in a race against the legislative clock is a revealing example of how issues can be "fast-tracked," albeit at the cost of short cuts and outright irregularities in the process. April 25 was the last day for consideration of bills on second reading. See FLA. H.R. RULE 137 (1996). The bill had to make it to the floor by that date to be considered for a final vote during the last week of the session. See *id.* The first version of the bill was unveiled on April 10, 1997, as the House Financial Services Committee Proposed Committee Bill 6. See Fla. H.R. Comm. on Fin. Servs., PCB 97-06 (draft of Apr. 10, 1997). Interestingly, this committee has jurisdiction over insurance and banking matters, not the civil justice system; the civil justice system falls under the jurisdiction of the House Civil Justice and Claims Committee. On April 15, the Proposed Committee Bill was noticed for consideration by the Financial Services Committee on April 16. See Fla. H.R. Comm. on Fin. Servs., Notice of Committee Meeting (Apr. 15, 1997). Three hours before the hearing, a proposed amendment was revealed that would strike everything after the enacting clause and insert all new language. See Fla. H.R. Comm. on Fin. Servs., PCB 97-06-1bb-bi (draft of Apr. 15, 1997). At the hearing on April 16, Chairman Safley took approximately three hours of public testimony, but then allowed committee members only one minute per side to debate the bill. See Fla. H.R. Comm. on Fin. Servs., tape recording of proceedings (Apr. 16, 1997) (on file with comm.) [hereinafter Financial Services Hearing]. The amendment was adopted and the bill was voted favorably. See Fla. H.R. Comm. on Fin. Servs., Committee Bill Action Worksheet PCB FS 97-06 (Apr. 16, 1997) (on file with comm.). Representative John Rayson, Repub., Pompano Beach, made a motion to reconsider the vote by which the bill passed and leave the matter pending, which would require the bill to be carried over to another committee meeting pursuant to Florida House Rule 60. See Financial Services Hearing, *supra*. Immediately, another member made a Motion to Rise. Chairman Safley ruled that the motion to rise superseded the motion to reconsider and, thus, the motion to reconsider was not valid. See *id.* Representative Rayson protested Chairman Safley's ruling and appealed to the Speaker, who, upon a review of the meeting tapes, agreed that Rayson's motion to reconsider was valid. As a result, the bill was returned to the Financial Services Committee. On April 24, the House Financial Services met at a specially called meeting during the noon break in the House Floor Session to take up the motion to reconsider. See FLA. H. JOUR. 703 (Reg. Sess. 1997) (motion to allow special leave to meet); Fla. H.R. Comm. on Fin. Servs., Notice of Committee Meeting (filed Apr. 23, 1997). Representative Earl Ziebarth, Repub., Deland, asked to debate the Motion to Reconsider, but Chairman Safley refused, ruling that the motion was non-debatable (contrary to Florida House Rule 145). See Financial Services Hearing, *supra*. A vote was taken, the motion to reconsider failed, and the bill was reported out favorably. See Fla. H.R. Comm. on Fin. Servs., Committee Bill Action Worksheet PCB FS 97-06 (Apr. 24, 1997) (on file with comm.). Later the same day, the bill was introduced as House Bill 2117 and read the first time by publication in the House Journal. See FLA. H.R. JOUR. 876 (Reg. Sess. 1997). Subsequently, the bill was not referred to the Civil Justice and Claims Committee (the committee with substantive jurisdiction over the areas addressed by the bill) as would have been the normal practice for a bill affecting this area of the law, or to the House Economic Impact Council as required by Florida House Rule 46(a). See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1997 REGULAR SESSION, HISTORY OF HOUSE BILLS at 332-33, HB 2117. Interestingly, as one of the last items of business during the 1997 Regular Session, the Speaker ruled that the motion to reconsider was debatable, contrary to the Financial Services Committee Chairman Safley's Ruling. See FLA. H. JOUR. 2189 (Reg. Sess. 1997).

an undue burden on manufacturers, increases costs to consumers, and unreasonably restricts economic growth.”³⁵ The bill set forth nine propositions.³⁶

First, like Senate Bill 2148, House Bill 2117 would impose a twelve-year statute of repose in products liability cases.³⁷ However, under House Bill 2117, the statute would run from the date the product leaves the possession and control of the manufacturer rather than the date it was delivered to its original purchaser.³⁸

Second, the bill would substantially dilute Florida’s dangerous instrumentality doctrine.³⁹ Unlike either Senate Bill 1774 or Senate Bill 2148, the bill would limit the vicarious liability of an owner of any type of personal property for an injury caused by another person’s use of the property when the property owner has liability insurance coverage of no less than \$100,000 per person or \$300,000 per incident for bodily injury, and no less than \$50,000 for property damage, or umbrella coverage of \$500,000.⁴⁰ Notwithstanding whether or not the owner had this insurance, the owner would also have no duty whatsoever to warn a user of the property of defects in the property which are unknown to the owner or which are known, or should be known, to an ordinary user of the property.⁴¹ Thus, this draft has very negative consequences. The bill would not encourage an owner to look for defects in his property that could harm another person, and even worse, would provide no incentive to warn of known hazards. Furthermore, the way this provision is actually drafted, it deems the owner of the property not to be the legal owner, thus effectively eliminating the body of law relating to negligent entrustment.⁴²

35. Fla. HB 2117, Preamble (1997).

36. See *id.* The following discussion refers to the bill as passed with the “strike everything” amendment, not the provisions of the original Proposed Committee Bill 6.

37. See Fla. HB 2117, § 2 (1997). Current Florida law provides for a four-year statute of limitation and no statute of repose in products liability cases. See FLA. STAT. § 95.11 (1997).

38. See Fla. HB 2117, § 2 (1997).

39. See *id.* § 3. This provision would change the long-standing Florida law applicable to owners of dangerous devices, including motor vehicles. Under this principle, where the “agency or appliance . . . was ‘dangerous in itself,’ or liable to inflict serious injury to others, when operated in the customary method of use . . . public safety demands that [the owner] shall be answerable for the exercise of his servant’s judgment.” *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 725, 86 So. 629, 634 (1920) (quoting *Barmore v. Vicksburg, S & P Ry. Co.*, 38 So. 210 (Miss. 1905)).

40. See Fla. HB 2117, § 3 (1997). The curious use of insurance limits here betrays the real purpose of this provision—to immunize rental car companies from vicarious liability under the dangerous instrumentality doctrine. A similar statutory scheme was adopted for long-term car leasing situations in 1986. See FLA. STAT. § 324.021(9)(b) (1997).

41. See Fla. HB 2117, § 3 (1997).

42. See *id.*

Third, House Bill 2117 would create new defenses to personal injury and property damage claims.⁴³ Under this provision, a defendant would not be liable to an injured plaintiff if the plaintiff was under the influence of drugs or alcohol to the extent that the plaintiff's faculties were impaired, or the plaintiff had a blood or breath alcohol level of 0.08 % or more, and the plaintiff was more than 50% at fault for the injury.⁴⁴ Additionally, any person who enters the property of another without actual consent, commits a crime against a person or property of another, or enters the property of another while intoxicated or under the influence of an illegal drug, would not be able to recover for injury to person or property unless he or she could prove by clear and convincing evidence that his or her culpability was less than the person from whom recovery was sought.⁴⁵ Among this provision's deleterious effects, the imposition of the higher standard of proof—clear and convincing rather than preponderance of the evidence—forces the injured person to leap a high hurdle to prove the defendant's fault.⁴⁶ Another problem with this provision is its broad application—it does not just apply to trespassers, criminals, and substance-impaired people, but it also applies to anyone who enters a premise without "actual consent," such as a child who visits a friend.⁴⁷

Fourth, House Bill 2117 would prohibit the imposition of vicarious liability against a defendant for any harm caused by an intentional tort committed by a third party.⁴⁸

Fifth, the bill would change the standards for liability and the procedure for pleading punitive damage claims.⁴⁹ The burden required for pleading punitive damages would increase from a reasonable showing to clear and convincing evidence of a reasonable basis for recovery of the damages.⁵⁰ Immediate certiorari review of both the procedure and the sufficiency of the evidence would be avail-

43. See *id.* § 4.

44. See *id.* In essence, this would impose a 51% modified comparative fault scheme instead of pure comparative fault when drugs or alcohol are involved; i.e., if the impaired plaintiff is 51% or more at fault for the injury, he or she receives no award.

45. See *id.* § 4. This would similarly impose a modification to the current rule of pure comparative fault in the form of a "more than" rule; that is, the injured plaintiff could recover only when the defendant's fault was equal to or more than that of the plaintiff's. Note that the bill produces an absurd result in the situation where one substance-impaired person injures another substance-impaired person.

46. See *id.*

47. See *id.*

48. See *id.* § 5. This appears to be intended to abrogate the doctrine of respondeat superior to immunize an employer in situations where an employee commits an intentional tort against a third party. Groups representing senior citizen interests noted that this provision would shield a nursing home from liability for any act of abuse committed by an attendant against a resident.

49. See *id.* § 6.

50. Compare *id.* with FLA. STAT. § 768.72 (1997).

able.⁵¹ Punitive damages would be disallowed in cases involving only economic damages, except in cases of fraud.⁵² Liability for punitive damages would require a finding based upon clear and convincing evidence that the defendant was guilty of "intentional misconduct," defined as meaning that the defendant "had actual knowledge of the wrongfulness of its conduct and the high probability that injury to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in personal injury."⁵³ Upon motion by the defendant, punitive damages would have to be tried separately from compensatory damages, but by the same trier of fact.⁵⁴ Evidence relating solely to punitive damages would not be admissible until after the trier of fact determined that the defendant was liable for more than nominal compensatory damages and computed the amount of compensatory damages.⁵⁵

Sixth, the bill would extend the current punitive damages cap to three times the amount of compensatory damages for all civil actions, except contract actions.⁵⁶ Thus, by precluding contract actions, it appears the drafters may be seeking to remove the "three-times" cap when business sues over business practices.⁵⁷ The state share of punitive damage awards would be reinstated and increased to 75% of the award after deduction of attorneys' fees and costs.⁵⁸ Punitive damage awards would be allowed against a person based on vicarious liability only if "[t]he person intentionally participated in the intentional misconduct or, in the case of a corporation, the officers, directors, or managers of the corporation intentionally participated in or intentionally condoned the intentional misconduct."⁵⁹

Seventh, the bill would also limit subsequent punitive damages awards against an entity.⁶⁰ Under House Bill 2117, a defendant

51. See Fla. HB 2117, § 6 (1997).

52. See *id.*

53. *Id.* Thus, not only would the required burden of proof be increased, but conduct must be more heinous before punitive damages could be awarded. Current law allows punitive damages for "willful, wanton, or gross misconduct." FLA. STAT. § 768.73(1)(a) (1997).

54. See Fla. HB 2117, § 6 (1997).

55. See *id.*

56. See *id.* § 7.

57. Under current law, the limit applies to civil actions based on "negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty." FLA. STAT. § 768.73(1)(a) (1997). As drafted, the proposal appears intended to eliminate the "three-times" limit for contract actions, and would thus enlarge the availability of punitive damages in the area of misconduct in commercial transactions. See Fla. HB 2117, § 7 (1997).

58. See Fla. HB 2117, § 7 (1997).

59. *Id.*

60. See *id.*; cf., *W.R. Grace & Co.—Conn. v. Waters*, 638 So. 2d 502, 506 (Fla. 1994) (holding that a defendant can be subject to repeated awards of punitive damages based on the same conduct).

would have the ability to limit exposure to punitive damages by establishing before trial that “punitive damages had previously been awarded against that defendant in any state or federal court in [Florida] . . . alleging harm from the same act or course of conduct.”⁶¹ This concept is defined for purposes of a product liability action as “acts resulting in substantially the same manufacturing defects, acts resulting in substantially the same defects in design, or failure to warn of substantially the same hazards, with respect to substantially similar units of a product.”⁶² A plaintiff would be able to overcome this protective shield only by a showing of clear and convincing evidence that “the amount of prior punitive damages awarded was totally insufficient to punish that defendant’s behavior.”⁶³ Even if successful in meeting that burden, the plaintiff’s punitive damage award would then be reduced by the amount of all the earlier punitive damage awards.⁶⁴

Eighth, like Senate Bill 2148, the bill would eliminate the current exception allowing application of the doctrine of joint and several liability in cases where the total damages are less than \$25,000.⁶⁵

Finally, the bill would create a civil cause of action against convicted drug dealers for damages, costs, and attorneys’ fees incurred by a plaintiff as a result of the defendant’s illegal actions.⁶⁶ Damages would also be recoverable from the parent of a minor who is liable for the damages.⁶⁷

Ultimately, House Bill 2117 was not moved to the House Floor for a vote, in all likelihood because the Senate President, Toni Jennings,⁶⁸ sent signals that it would not be taken up in the Senate during the 1997 session.⁶⁹ After the session, both the merits of the FAIR Bill and the questionable attempt by the business community to pass it in the closing days of the session brought media criticism. The Miami Herald called it “A Too-Rushed Reform”⁷⁰ and the St. Pe-

61. Fla. HB 2117, § 7 (1997).

62. *Id.*

63. *Id.*

64. See *id.*

65. See *id.* § 8.

66. See *id.* § 9. This concept originally surfaced in separate bills in both the House and the Senate. See HB 557 (1997) (Rep. Merchant); SB 474 (1997) (Sen. Gutman); SB 764 (1997) (Sen. Crist); and SB 1208 (1997) (Sen. Lee). Senate Bill 764 and Senate Bill 474 were combined by the Senate Judiciary into a committee substitute that eventually passed both houses and was signed into law by the Governor. See Act effective May 23, 1997, ch. 97-80, 1997 Fla. Laws 477, 477 (codified at FLA. STAT. § 772.12 (1997)). This provision was probably viewed as one that would be politically damaging to vote against, and thus was added to House Bill 2117 to increase that bill’s chances of passage.

67. See HB 2117, § 9 (1997).

68. Repub., Orlando.

69. See Lucy Morgan, *Lawsuit Limiting Bill Lives, For Now*, ST. PETE. TIMES, Apr. 25, 1997, at E1.

70. Editorial, *A Too-Rushed Reform*, MIAMI HERALD, Apr. 29, 1997, at A6.

tersburg Times opined that “[f]or most residents, ‘FAIR’ might not be.”⁷¹

When the 1997 session ended with House Bill 2117 still on the House calendar, the bill did not fade away. Under a major change to the House Rules adopted in 1997, House bills now have a two-year life.⁷² Thus, House Bill 2117 did not actually die at the close of the 1997 session. When the 1998 session begins, House Bill 2117 will be right where it was, on the calendar, ready for referral to the House Civil Justice and Claims Committee, to the House Economic Impact Council, or directly to the floor for action.

V. POST-SESSION ACTIVITIES

The tort reform movement did not disappear upon adjournment sine die of the 1997 session.⁷³ In anticipation of the 1998 session, several things are happening. In the closing hours of the 1997 session, when it began to be clear that House Bill 2117 was not going anywhere, representatives from TRUE and the Academy of Florida Trial Lawyers were requested by the Speaker of the House, Dan Webster,⁷⁴ and other House leaders to form a working group.⁷⁵ This group is to examine whether some common ground can be reached between the two groups on the issues.⁷⁶ The groups were given a mandate to come back with a plan or be faced with the return of House Bill 2117 or another set of reforms,⁷⁷ a threat clearly aimed more at the trial lawyers than the business community.

At the same time, the House Civil Justice and Claims Committee, which ironically was not involved with House Bill 2117, planned to hold an extensive series of committee hearings on “Small Business and the Tort System in Florida” during the fall and winter of 1997.⁷⁸ From the schedule of meetings and topics, it appears this ambitious project is designed to educate committee members on virtually the entire tort system as it may affect small businesses in Florida.⁷⁹

71. Martin Dyckman, For Most Residents, “FAIR” Might Not Be, *ST. PETE. TIMES*, Apr. 20, 1997, at D3.

72. See FLA. H.R. RULE 96 (1996-98).

73. Furthermore, it cannot be assumed that House Bill 2117 includes all of the items on the tort reform agenda. Conspicuously absent, for example, is a medical malpractice component. See HB 2117 (1997).

74. *Repub., Ocoee*.

75. See *Klas*, *supra* note 18, at 85-86.

76. See *id.*

77. See *id.*

78. See Letter from Representative Tom Warner, Chairman, Florida House of Representatives Committee on Civil Justice & Claims, to Representative Dan Webster, Speaker, Florida House of Representatives (June 24, 1997) (on file with comm.).

79. The main topics covered during the course of the eight tentatively scheduled meetings were: The Tort System; Liability and Fault; Defenses and Limitations; Compen-

Reports indicated that Senate President Toni Jennings was considering the creation of a select committee to examine the tort system,⁸⁰ but as of the end of the 1997 session no action was taken. Reportedly, Senate President Jennings was still not convinced of the need for tort reform.⁸¹ In mid-August, however, citing concerns raised by the business community, she appointed the Senate Select Committee on Litigation Reform to consider “whether our civil litigation system is, in fact, limiting Florida’s economic development potential.”⁸² The stated goals of the Select Committee are to “separate perception from reality, . . . create a friendlier business climate, . . . [and] provide an open forum for review of the civil justice system.”⁸³ To this end, the Select Committee was charged with the following mission:

The select committee shall conduct hearings to assess the manner and extent to which the current civil litigation environment is affecting economic development and job-creation efforts in the state. The select committee shall ascertain what civil litigation reforms, if any, would enhance the economic development climate of the state while continuing to preserve the rights of citizens to seek redress through the courts.⁸⁴

The jurisdiction of the new Select Committee will include all of the major elements of the civil litigation system,⁸⁵ but it is not to delve into the areas of workers’ compensation or medical malpractice.⁸⁶ It held hearings during the fall and winter of 1997, and will report its findings and recommendations back to the Senate by January 20, 1998.⁸⁷

As yet, the Governor has not become actively involved in this fray. As pointed out by the Governor’s Chief of Staff, Linda Loomis Shelley, “This is not an issue that people talk to the governor about as he travels the state nor is it an issue people raise when he tries to recruit businesses to come to Florida.”⁸⁸

sation and Damages; Civil Litigation; Frivolous Suits or Defenses; and Streamlining and Alternative Dispute Resolution. See *id.*

80. See De’Ann Weimer, Lawmaker Offers Plan to Curb Suits, Big Injury Awards, *PALM BCH. POST*, Mar. 17, 1997, at D1.

81. See *Klas*, *supra* note 18, at 86.

82. OFFICE OF THE FLA. S. PRES., PRESIDENT TONI JENNINGS ANNOUNCES THE CREATION OF THE SELECT COMMITTEE ON LITIGATION REFORM 2 (1997) (on file with author).

83. *Id.* at 3.

84. *Id.* at 2.

85. See *id.* at 3 (including joint and several liability, statutes of limitations, non-economic damages, evidence, vicarious liability, comparative fault, punitive damages, attorneys’ fees, and non-binding arbitration).

86. See *id.* at 2.

87. See *id.* at 4.

88. *Klas*, *supra* note 18, at 86.

VI. THE FACTS: IS THERE A NEED FOR REFORM?

A. The Amount of Litigation in Florida

The proponents of tort reform have tried to create the impression that we are in the midst of a tort litigation explosion. Statistics compiled by the Florida Office of the State Courts Administrator quickly and empirically dispel this notion. The statistics speak for themselves—civil case filings have remained remarkably stable over the last ten years and negligence actions have remained but a tiny proportion of the caseload of Florida's courts.⁸⁹

In 1996, civil cases accounted for 57% of the total cases filed; criminal and juvenile cases made up the other 43%.⁹⁰ These relative percentages have remained constant for at least the last three years.⁹¹ Last year, professional malpractice cases represented only 0.4% of all civil cases filed, products liability cases 0.5%, auto negligence cases 4.6%, and all other negligence cases 2.9%.⁹² Domestic relations and probate cases accounted for 70% of all civil cases.⁹³

On the other hand, in 1996, there were over twenty times as many mortgage foreclosure cases and over ten times as many contractual indebtedness cases as there were products liability cases in Florida.⁹⁴ In fact, mortgage foreclosures and contractual indebtedness cases accounted for twice as many cases as all the types of negligence cases combined.⁹⁵

The proportion of negligence cases has remained remarkably constant relative to other types of civil cases.⁹⁶ In 1986, negligence cases comprised 8.9% of the total civil cases filed in Florida; in 1996, they

89. See KENNETH D. KRANZ, ANALYSIS OF FLORIDA CASE FILINGS: 1986-1996 1 (1997) (on file with author) (consisting of information from ALEAN MILLER, OFFICE OF THE STATE COURTS ADMINISTRATOR, FLORIDA SUPREME COURT SUMMARY REPORTING SYSTEM REPORTS (1986-1996)).

90. See *id.* at 2. Civil cases include domestic relations, probate, negligence, condominium, contractual indebtedness, mortgage foreclosure, eminent domain, and other miscellaneous civil matters. For purposes of this analysis, cases other than civil cases include criminal cases and juvenile cases (which include delinquency and dependency cases). Data was not available from the Office of the State Courts Administrator for criminal case filings. See Letter from Alean Miller, Court Statistic Consultant, Office of the State Courts Administrator, to Lynn McCartney, Assistant Director for Legislative Affairs of the Academy of Florida Trial Lawyers (Sept. 5, 1997) (on file with author). Criminal case data used for 1994 through 1996 was obtained from the Justice Council, Florida House of Representatives. See HOUSE JUSTICE COUNCIL, 1997 POST-SESSION RESOURCE BOOK 53-56 (1997).

91. See KRANZ, *supra* note 89, at 2.

92. See *id.*

93. See *id.*

94. See ALEAN MILLER, OFF. OF THE ST. CTS. ADMINISTRATOR, FLORIDA SUPREME COURT SUMMARY REPORTING SYSTEM REPORT: STATEWIDE SUMMARY 1/96 THROUGH 12/96 § II-B (1997).

95. See *id.* Negligence cases include professional malpractice, products liability, auto negligence, and other negligence.

96. See KRANZ, *supra* note 89, at 2.

accounted for 8.3%.⁹⁷ Domestic relations cases have consistently accounted for about 50% of all civil cases, while probate cases have accounted for almost 20%.⁹⁸

Although the number of cases filed has increased over the years, case filings have kept pace with the increase in Florida's population.⁹⁹ Civil case filings peaked in 1990, but for the last four years they have been at the same level as they were in 1986-1987.¹⁰⁰ In contrast, the number of negligence cases filed has slightly decreased over time.¹⁰¹ In the ten years between 1986 and 1996, there was more than an 8% decline in the number of negligence cases filed per capita in Florida.¹⁰²

Nationwide, statistics collected by the U.S. Department of Justice, Office of Justice Programs, and the National Center for State Courts dispel the myth of any kind tort explosion. Tort litigation has been stable since 1986,¹⁰³ and in relative decline since 1990.¹⁰⁴ The National Center for State Courts sums the national situation up succinctly: "The bottom line is there is no evidence of an 'explosion' in the volume of tort filings."¹⁰⁵

B. Punitive Damages

Big business loves to complain about punitive damages, but the numbers hardly show that things are "out of hand" in Florida, at least when it comes to negligence cases. Since 1986, punitive damages in negligence cases have been capped at three times compensatory damages except in very exceptional circumstances.¹⁰⁶ During the period from July 1, 1986, to July 1, 1995, the Florida Comptroller's Office kept records of punitive damage awards and collections resulting from negligence cases.¹⁰⁷ While this data does not necessarily re-

97. See *id.*

98. See *id.*

99. See *id.* at 4.

100. See *id.* at 1.

101. See *id.*

102. See *id.* at 4.

103. See STEVEN K. SMITH ET AL., U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: CIVIL JUSTICE SURVEY OF STATE COURTS, 1992; TORT CASES IN LARGE COUNTIES 2 (1995).

104. See COURT STAT. PROJECT, EXAMINING THE WORK OF STATE COURTS, 1994: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT i (1995) (a joint project of the Conference of State Court Administrators, the State Justice Institute, the Bureau of Justice Statistics, and the National Center for State Courts' Court Statistics Project).

105. BRIAN J. OSTROM & NEAL B. KAUDER, EXAMINING THE WORK OF STATE COURTS, 1995: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 26 (1996).

106. See FLA. STAT. § 768.73(1)(a) (1997). Negligence cases include civil actions based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty. See *id.*

107. See HOUSE JUSTICE COUNCIL, *supra* note 90, at 58. Records were kept as a result of the requirement that the state take a share of all punitive damage awards during this

flect all punitive damage awards because there is no information from cases other than negligence cases, they provide some indication of the low level of activity in Florida.

During this nine-year period, 177 cases were reported as involving punitive damage awards out of a total of approximately 350,000 tort cases disposed of during the same period.¹⁰⁸ Put another way, punitive damages were awarded in only one case out of each 1723 negligence cases disposed of from 1986 to 1995. The state received payment toward its share of punitive damages in only 64 of the 177 cases (36.2%).¹⁰⁹ The remaining 113 (63.8%) were either uncollectible or are still to be collected.¹¹⁰ Since the state took a pro rata share of partially collectible awards, it can be assumed that in 36.2% of the cases overall, there was some, but not necessarily all, of the award collected.

Total collections by the state averaged less than \$975,000 per year.¹¹¹ Based on this number, it can be roughly estimated that total awards that should have gone to the state averaged approximately \$1.9 million per year.¹¹² Overall, collection of punitive damage awards thus amounted to only 13.2 cents of each dollar awarded.¹¹³ Cases other than asbestos products liability cases accounted for only 29% of the total amount collected.¹¹⁴

Similarly, national studies show that punitive damages are infrequently awarded. For example, one survey found that juries awarded

period of time. See FLA. STAT. § 768.73 (1995). The state share was 60% from July 1, 1986, to April 7, 1992, and 35% from April 8, 1992 to July 1, 1995. The Florida Standard Jury Instructions offer some insight into the types of conduct that warrant awards of punitive damages:

(1) the conduct causing . . . [the injury] to the claimant was so gross and flagrant as to show a reckless disregard of human life or of the safety of the person exposed to the effects of such conduct; or (2) the conduct showed such an entire lack of care that the defendant must have been consciously indifferent to the consequences; or (3) the conduct showed such an entire lack of care that the defendant must have wantonly or recklessly disregarded the safety and welfare of the public; or (4) the conduct showed such reckless indifference to the rights of others as to be equivalent to an intentional violation of those rights.

Florida Standard Jury Instruction in Civil Cases § PD(a)(2) (1997).

108. See HOUSE JUSTICE COUNCIL, *supra* note 90, at 58. Of these 350,000 tort cases, 305,106 involved negligence. See KRANZ, *supra* note 89, at 1.

109. See HOUSE JUSTICE COUNCIL, *supra* note 90, at 58.

110. See *id.*

111. See *id.* (finding that the state collected \$8,771,006 in punitive damage awards over nine years).

112. This calculation of \$1.9 million is a very rough calculation because it necessarily assumes an even distribution of awards over time. The state share is based upon 60% of awards for the first six years and 35% for the last three years. At this point, the actual distribution of awards over time is not definitively known.

113. See HOUSE JUSTICE COUNCIL, *supra* note 90, at 58 (based on total reported awards of \$129.9 million for the nine-year period).

114. See *id.*

punitive damages to plaintiffs in only 4% of tort cases.¹¹⁵ Of the total punitive damages awarded in all jury cases in a nationwide survey, only 34.1% were awarded in tort cases.¹¹⁶ The vast majority of punitive damages were awarded in contract disputes and real property cases.¹¹⁷

One particularly startling finding in another study is that between 1965 and mid-1995, the total number of punitive damage awards in product liability cases nationwide was only 379, fewer than thirteen cases per year including all the asbestos cases.¹¹⁸ In most of these cases, the defendant made a clear calculation that it would be more profitable to sell a product with a known safety flaw and pay liability costs than to fix the hazard and sell a safe product.¹¹⁹ Most of the cases involved catastrophic injuries or death, and 70% of the cases involved corporate failure to warn about a known product danger.¹²⁰

A recent study looked at punitive damage awards in financial injury cases, such as disputes arising from insurance or employment contracts or from unfair business damages.¹²¹ Researchers found that these cases accounted for almost half of all punitive damage awards.¹²² They further found that punitive damages are awarded in these cases at a rate more than three times that for civil cases overall.¹²³ Moreover, punitive damages accounted for more than half of all the damages awarded in financial injury cases.¹²⁴

C. Florida's Business Climate

The only evidence suggesting that Florida's civil justice system is a hindrance to existing or new businesses comes from self-serving polls and surveys conducted of businesses by business interests for

115. See CAROL J. DEFRANCES ET AL., U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: CIVIL JUSTICE SURVEY OF STATE COURTS, 1992; CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 8, tbl. 8 (1995).

116. See *id.* (finding that of the total amount of \$267,879,000 awarded in punitive damages for all jury cases, only \$91,477,000 were awarded in tort cases).

117. See *id.*

118. See RALPH NADAR & WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA 281 (1996) (citing a study by Professors Michael Rustad and Thomas Koenig). The data was updated subsequently and presented in testimony to Congress in May 1995. See *id.* n.74.

119. See *id.* at 281.

120. See *id.* at 280-81.

121. See Rand Institute for Civil Justice, Punitive Damage Awards in Financial Injury Jury Verdicts (visited Sept. 16, 1997) <<http://www.rand.org/publications/RB/RB9028>>.

122. See *id.*

123. See *id.*

124. See *id.*

the sole purpose of promoting the business tort reform agenda.¹²⁵ Information from other sources paints a somewhat different picture.

The state's official keeper of labor market statistics recently said:

Florida's nonagricultural employment growth rate of 3.9 percent was faster than the U.S. rate of 2.1 percent over the past year. . . . Compared to the ten most populous states, Florida created the second greatest number of jobs over the year and had the fastest job growth rate. . . . California is the only state to create more jobs than Florida over the year. However, California has more than twice the population base of Florida.¹²⁶

The Miami Herald reported: "[Florida] is leading the nation in job creation, for instance. The number of jobs in the state has grown 3.9 percent annually for the last four years, or roughly double the national figure. There are 800,000 more jobs in Florida than in 1992."¹²⁷ Florida Trend's annual supplement, *TopRank Florida 1997*, published the *Top 10 Things to Know About Florida*, which paints an excellent picture of Florida's economy and portrays Florida as a great place to do business.¹²⁸ The Wall Street Journal reported that, "[a] survey by the National Association of Business Brokers shows that interest in buying businesses in the state is at an all-time high."¹²⁹

Florida is far and away the national leader in new business incorporations, with 86,037 in 1992 and 88,048 in 1993.¹³⁰ This is more than double the number for California (36,973 and 40,072), and Texas (34,011 and 34,907).¹³¹ Florida's "Gross State Product" grew at the torrid annual pace of 7% from 1986 to 1992.¹³² This is the eighth highest rate in the country, and well above the national average of 5.9%.¹³³ Job growth increased at a 2.4% annual clip between 1986 and 1995, ranking Florida twelfth and well above the national aver-

125. See, e.g., MASON DIXON & HANK FISHKIND, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SURVEY OF FLORIDA BUSINESS (1997) (presented at the FAIR Press Conference on April 15, 1997). The survey polled Florida small business owners and executives about their views on the tort system after they had been bombarded with TRUE propaganda for months.

126. FLORIDA DEPT. OF LAB. AND EMPLOY. SEC. & BUREAU OF LAB. MKT. INFO., FLORIDA LABOR MARKET TRENDS 3 (1997).

127. Gregg Fields, *Booming Economy Buys Clinton's Florida Campaign*, MIAMI HERALD, Sept. 16, 1996, at A1.

128. See *Top 10 Things to Know about Florida*, TOPRANK, 1997, at 170.

129. Jacqueline Bueno, *All I Want for Christmas is a Business in Florida*, WALL ST. J., Dec. 4, 1996, at F2.

130. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996 543 tbl. 844 (1996).

131. See *id.*

132. See KENNETH D. KRANZ, ANALYSIS OF GROSS STATE PRODUCTION, JOB GROWTH, PAYROLL, AND POPULATION (1997) (based on information obtained from the U.S. Dep't of Com., Bureau of Economic Analysis) (on file with author).

133. See *id.*

age of 1.8% annual growth.¹³⁴ In all, there were more than 1.5 million new jobs created in Florida since 1986.¹³⁵ Payroll (total aggregate wages) grew at a respectable 6.6% per year,¹³⁶ ranking Florida tenth and above the national average of 5.5%.¹³⁷

These statistics do not show a state in economic trouble. Nevertheless, TRUE contends that Florida's economy could be improved by reforming Florida's tort system. In support, they have presented an unpublished study that attempts to use an econometric model to relate the influence of legal reforms both to productivity (measured by output per worker) and to employment.¹³⁸

Even taking this study at face value without questioning the validity and reliability of the authors' assumptions, methodology, and data, and thus their results and conclusions, it cannot rationally be used to justify further tort reform in Florida. For example, one major flaw that limits its usefulness as a basis for setting policy is that it looks only at monetary issues.¹³⁹ Even the authors acknowledged that their analysis does not take into account any social or human factors, or "issues of fairness and justice."¹⁴⁰ They also acknowledged the need for liability and stated that "[w]ithout liability and a means to enforce it, economies lack efficient incentives, predictability and fairness."¹⁴¹

Because the study makes no evaluation of the impact of one reform versus another, the study cannot be used to justify enactment of a specific reform. Similarly, it cannot be used to justify the revision of a reform previously enacted; for example, a lower cap on punitive damages or elimination of the limited applicability of joint and several liability. In fact, regarding revisions of existing law, it seems that a more plausible argument is that, for purposes of the effects demonstrated by the study, Florida has already benefited from these reforms.

The bottom line, however, is that Florida has already adopted all of the tested liability-reducing reforms,¹⁴² although a general cap on

134. See *id.*

135. See *id.*

136. See *id.*

137. See *id.*

138. See THOMAS J. CAMPBELL ET AL., *LIABILITY REFORMS' CAUSES AND ECONOMIC IMPACTS* (1994). The study also attempts to relate differing state characteristics to the probability that a state will adopt liability reforms. This aspect of the study will not be discussed here.

139. See *id.* at 38-39.

140. *Id.* at 39.

141. *Id.* at 11.

142. See FLA. STAT. § 768.73(1)(a) (1997) (limiting punitive damages in certain cases); *id.* § 768.74 (providing for a remittitur and additur); *id.* § 768.77 (providing for itemized verdicts); *id.* § 768.81 (comparative fault).

noneconomic damages was declared unconstitutional.¹⁴³ It has adopted one of the two tested liability-increasing reforms—comparative negligence.¹⁴⁴ Florida would thus seem to have already implemented the “portfolio of reforms” necessary to achieve a “consistent impact” on the state’s economy.

VII. CONCLUSION

Despite all of the fanfare regarding the alleged need for tort reform in Florida, there is no liability insurance crisis.¹⁴⁵ Nor has there been an increase in tort cases.¹⁴⁶ Systems already exist to control frivolous lawsuits, damage awards, and attorneys’ fees.¹⁴⁷ Florida’s economy is booming, and big business itself is the primary source of many problems in the civil justice system.¹⁴⁸ Without empirical evidence justifying a need for reform, big business, including the tobacco industry, has embarked on a massive propaganda campaign designed to set the stage to “strip away many of the fundamental protections provided to Florida’s families by the civil justice system.”¹⁴⁹ Big business is trying to manipulate the system to “shield those who injure others with the products they sell,” to make “access to our courts harder for Florida’s citizens with serious injuries,” and, as a result, is endangering “the safety of Florida’s families and . . . [leaving] Florida’s citizens and small businesses at the mercy of large corporations.”¹⁵⁰

The comprehensive liability-reducing tort reform proposals set forth during the 1997 session are the most far-reaching since the massive tort reform efforts of the mid-1980s. The battle line has been drawn. On one side, business is contending that it needs tort reform in the form of liability reduction to bolster Florida’s economy. On the other side, citizens, consumers, and trial lawyers are contending that there is no evidence, economic or otherwise, supporting a need for these types of proposals, and that big business is opportunistically trying to shield itself from liability for its wrongful acts at the expense of the safety of Florida’s citizens.

The 1997 session saw the opening skirmishes of a war in which the stakes are enormous, both politically and for the future of Florida’s citizens. The battles that will decide Florida’s future will most

143. See *Smith v. Department of Ins.*, 507 So. 2d 1080, 1083 (Fla. 1987).

144. See *id.* § 768.81.

145. See Keefe, *supra* note 20, at D5 (interviewing Scott Carruthers of the Academy of Florida Trial Lawyers).

146. See *id.*

147. See *id.*

148. See *id.*

149. ACADEMY OF FLORIDA TRIAL LAWYERS, *IN THE PURSUIT OF TRUTH* i (1997) (on file with author).

150. *Id.*

likely be fought in 1998. Hopefully, the Florida Legislature will not forsake the long-term protection afforded to Florida's citizens by a strong civil justice system for a short-term economic gain to selected Florida businesses.