Where There's Smoke, Is There Fire?: An Empirical Analysis of the Tort "Crisis" in Illinois

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WHERE THERE'S SMOKE, IS THERE FIRE?
AN EMPIRICAL ANALYSIS OF THE TORT "CRISIS" IN ILLINOIS

It is well and good to opine or theorize about a subject, as human-kind is wont to do, but when moral posturing is replaced by an honest assessment of the data, the result is often a new, surprising insight.¹

INTRODUCTION

The Illinois tort system is in a state of crisis—that is what everyone says, anyway. In the past, such alarmist cries would have provoked our elders to ask us whether, if everyone else jumped off a cliff, we would follow. Where along the way did we become so susceptible to rhetoric and so enthralled with “conventional wisdom”? The phrase “conventional wisdom” was coined by economist John Kenneth Galbraith to describe the prevailing attitudes or ideas that inform our perceptions of society and politics, as well as the authoritative weight attributed to those perceptions.² Galbraith’s conclusion was that we tend to “associate truth with convenience,”³ and will often assimilate only information that “most closely accords with [our] self-interest and personal well-being or promises best to avoid awkward effort.”⁴ With regard to social behavior, Galbraith found that accurately assimilating new ideas and information is too “complex, and to comprehend their character is mentally tiring.”⁵ As a result, “we adhere, as though to a raft, to those ideas which represent our [previous] understanding.”⁶ In short, conventional wisdom is often incorrect and relies almost exclusively on the opinions of others. But it persists because it fits our established value systems, and because people desire consistency among their beliefs.

This Comment does not examine the origins of conventional wisdom or its roots in the theory of cognitive dissonance. Rather, this Comment examines the conventional wisdom prevailing today, espe-

3. Id. at 7.
4. Id.
5. Id.
6. Id.
cially in political and legal circles, that the tort system in Illinois is in crisis and in need of serious reform. This Comment objectively analyzes the underlying data concerning tort claims, jury verdicts, and awards to determine if the situation is really as bleak as some experts would have us believe, or if we are simply indulging an internalized belief. This Comment will not limit its reach to specific types of claims, such as medical malpractice, as some papers in this area of law have done. Rather, this Comment focuses on the Illinois tort system as a whole and, more specifically, the two counties that seem to be at the center of the tort reform debate: Madison County and St. Clair County. In fact, these counties were labeled the American Tort Reform Association’s (ATRA) top two “Judicial Hellholes” in 2004, with Madison County taking the top spot in 2003 as well.

This Comment made no predictions as to what the data or analysis would reveal about the actual condition of the tort system in the heart of Illinois. The data indicate, however, that reports of our system’s demise have been greatly exaggerated. This sample suggests the following: (1) jurisdictions are not as filled with “junk” suits as some assert; (2) plaintiffs are no more likely to succeed in these counties than plaintiffs nationally; and (3) punitive and noneconomic damages in these jurisdictions are neither as prevalent nor as sizeable as some believe. It also suggests, however, that there is some validity to the claim that jury awards are inconsistent, prompting some to bring suits in the hope of a settlement or of hitting the verdict jackpot.

7. See infra note 9 and accompanying text.
10. See Am. Tort Reform Ass’n, Judicial Hellholes 2004, at 7 (2004), available at http://www.atra.org/reports/hellholes/2004/hellholes2004.pdf [hereinafter ATRA, Judicial Hellholes 2004]. The ATRA describes “Judicial Hellholes” as “places where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants.” Id. at 4. The stated purpose of the report, according to ATRA, is to place “[t]he focus . . . squarely on the conduct of judges who do not apply the law evenhandedly to all litigants and do not conduct trials in a fair and balanced manner.” Id. at 5.
11. See infra notes 75–83 and accompanying text.
12. See infra notes 84–104, 150–165 and accompanying text.
13. See infra notes 105–121 and accompanying text.
14. See infra notes 122–149 and accompanying text.
THE ILLINOIS TORT "CRISIS"

Part II of this Comment provides a background of the tort system generally and examines each side of the debate concerning our tort system's crisis. Part III analyzes the data and the inferences, if any, that can reasonably be drawn from them. Part IV discusses the impact of the study and suggests some changes to the Illinois tort system. Finally, Part V offers some preliminary conclusions based on the data, as well as some suggestions for future research, discussion, and procedure.

II. BACKGROUND

This Part discusses the structure and purposes of our modern tort system, as well as common forms of damages. It next explains the methodology used to compile, analyze, and test the data that form the subject of this Comment. This Part also examines national polling on the issue, providing both a context for what is currently being said and a partial explanation for why some messages seem to be resonating more effectively with the public than others. This Part concludes with some of the salient comments from analysts on both sides of the issue regarding the alleged crisis in Madison County and St. Clair County.

A. The Structure of the Tort System

Any analysis of a structure must begin with a look at its foundation. Most scholars will agree that the tort system has two primary goals: "(1) to compensate persons who are injured through the negligence of others and (2) to deter future negligent behavior," both in the specific defendant and in others. This Comment is primarily concerned with the compensatory goal of the tort system, within which the law generally recognizes two subdivisions. The first, labeled "economic" damages, can be loosely described as any loss that comes with a "price tag" or is easily calculable. Losses considered "economic" include

15. See infra notes 19–73 and accompanying text.
16. See infra notes 74–165 and accompanying text.
17. See infra notes 166–231 and accompanying text.
19. See infra notes 23–33 and accompanying text.
20. See infra notes 34–40 and accompanying text.
21. See infra notes 41–45 and accompanying text.
22. See infra notes 46–73 and accompanying text.
23. Vidmar, Tort System Report, supra note 8, at 8 (emphasis added). For a concrete application of this maxim in practice, see Kalavity v. United States, 584 F.2d 809, 810–811 (6th Cir. 1978) (noting that a parachutist drowned on account of the negligence of an air traffic controller and contemplating the different purposes of tort damages).
past lost wages due to injury and medical bills, as well as future lost wages and medical expenses. These damages are generally easier to calculate, but that is not to say that they are not litigated contentiously. This is especially true for future damages, because estimating them is more speculative than calculating a damage award from medical bills or time already lost from a job.

The complimentary piece of the compensatory scheme is collectively labeled "noneconomic" damages. These damages are more difficult to quantify, because there is no underlying bill, record, or pay stub on which to base them. Noneconomic losses include "pain and suffering." Though pain and suffering damages are the most discussed type of noneconomic awards, other lesser-known damage categories include "disfigurement, loss of companionship or loss of consortium; loss of moral guidance; loss of sexual gratification, and survival pain." As Professor Neil Vidmar points out, however, the line between economic and noneconomic damages is often blurred, because so many noneconomic injuries can have dramatic economic repercussions. Although mindful of this problem, this Comment distinguishes between economic and noneconomic damages because it is the latter that has raised the ire of politicians and advocacy groups. Where possible, this Comment specifies what portions of the awards are noneconomic when reporting the jury awards and analyzing their effect.

25. Id.; see also BLACK'S LAW DICTIONARY 552 (8th ed. 2004).
26. VIDMAR, TORT SYSTEM REPORT, supra note 8, at 9.
27. For an interesting discussion on both sides of the issue of pain and suffering damage awards, see Kevin J. Gfell, Note, The Constitutional and Economic Implications of a National Cap on Non-economic Damages in Medical Malpractice Actions, 37 IND. L. REV. 773, 778-81 (2004).
28. See infra notes 180-182.
30. VIDMAR, TORT SYSTEM REPORT, supra note 8, at 9. Vidmar eloquently illustrates this point: In practical fact many of the legally-recognized categories of "non-economic" damages have economic consequences. For example, if someone's face is horribly disfigured it will probably cause social stigma and personal pain, but the injury may well have economic implications such as the person's ability to obtain a well-paying job .... Id.
32. When jury decisions and awards are reported in the Southwestern Illinois Jury Verdict Reporter, the awards are listed as a total and, if there is a breakdown beyond that (for specific injuries, or for noneconomic or punitive damages), those pieces are listed parenthetically after
In our current tort system, the difficult and controversial task of determining the level of awards—or whether to give an award at all—is left in the hands of the jury, which acts as the arbiter of society's collective conscience. While respecting the crucial role that juries play in our system of jurisprudence, this Comment analyzes their decisions in the aggregate to see whether there is any substance to the charge that juries are not performing their duties adequately.

B. Methodology

It would be helpful, before wading into the numbers, to explain the methods used to compile, analyze, and test the data. It has been said that "there are three types of lies: lies, damned lies, and statistics." While statistics and numbers can be used in misleading ways, the research that follows strives to be straightforward in explanation and transparent in method. The analytical methods and constructs used do not necessitate much handling of the data or require sophisticated interpretation.

the total award. When a noneconomic damage award was given as part of the total, this was recorded separately in the data analyzed for this Comment. If no such breakdown was given in the record then only the total was recorded.

33. The jury, over the course of centuries, has evolved from a qualified grouping drawn from society's elite that relied on their knowledge of the parties (and the disputed matter) in the English system, to a neutral factfinder in our current system, drawn from the laity and charged with rendering a decision outside the construct of the juror's personal knowledge or biases. See Stephan Landsman, The Civil Jury in America: Scenes from an Unappreciated History, 44 Hastings L.J. 579, 582-92, 617-18 (1993).

34. Raj Devasagayam, Professor of Int'l Bus., St. Norbert Coll., Introductory Lecture on Business Statistics (Sept. 27, 2001). The phrase originated with Leonard Henry Courtney in a piece written near the turn of the twentieth century for the London periodical the National Review, in which he argued in favor of proportional representation of the electorate in the British House of Commons. See Leonard Courtney, To My Fellow-Disciples at Saratoga Springs, 26 Nat'l Rev. 21, 25 (1895).

35. This study is short on mathematical operation. Rather, the inferences made here can be found through the simple aggregation of decisions by year, judge, or type of claim. Calculations were kept to a minimum as a means of strengthening the arguments; performing a set of complicated statistical techniques might yield some interesting results, but it would also make this analysis subject to charges of statistical manipulation.

There are also a few caveats that need to be discussed. A study is only as good as the data and analytical techniques upon which it is based. While the results here are fair, reliable, and provide an intriguing case study, the set of cases used is not an exhaustive list of decisions. The Verdict Reporter captures cases from 1992 until the present, so this is only a twelve- to thirteen-year sample of the data as of this writing in the Fall of 2005. Next, Westlaw notes that while its reporter covers nearly all the decisions rendered from the included jurisdictions over that time period, it does not include every decision. Third, this data set only includes data on cases where a claim was actually filed. A significant number of cases never reach this point because they are settled. See infra note 128 and accompanying text. Therefore, assertions made about jury verdicts' role in increased settlements will remain unanswered after this study. Finally, the Bureau of Justice Statistics' study, Tort Trials and Verdicts in Large Counties, 2001, is used as a proxy for
The data this Comment relies upon consists of (1) jury verdicts and awards from the *Southwestern Illinois Jury Verdict Reporter* (Verdict Reporter), (2) appellate court decisions, (3) information on the five- and ten-year Treasury Bond rates, used to assess the correlation between insurance companies' premiums and their investment income, and (4) a Bureau of Justice Statistics report. The case decisions listed in the Verdict Reporter were gathered and compiled, capturing the relevant information about each case. A spreadsheet listed the case name, the year of the decision, the type of claim, the name of the presiding judge, the county of the trial, whether the case was in federal or state court, whether the case was against a corporate defendant, the total award given, and a breakdown of the award into economic, noneconomic, and punitive damages where available. Additionally, if the parties settled the case after a claim was filed, the settlement was noted, along with the amount of the settlement, if available. With this data set, it was possible to determine, in the aggregate, whether certain types of cases were susceptible to larger awards, whether certain courts tended to give more generous awards than others, and whether federal and state courts handled claims differently. This method allows one to isolate trends in the decisions not easily perceived when one looks at a single case.

Though an in-depth statistical analysis is not required here, an explanation of the statistical concepts employed is warranted. It is important to note that the data is not "national" data. This study, while capturing data from many of the busiest jurisdictions in the United States, does not capture them all. It is a useful reference in comparing plaintiffs' relative successes against some kind of meaningful national average, but it is not a true national average.


39. This Comment attempts to ensure that the analysis remains clear, to the extent possible, of statistical or economic jargon. However, there is one concept that is a central piece of the analysis that follows: statistical correlation. Statistical correlation addresses the magnitude and "direction" of the relationship between two variables, usually expressed as a decimal, with the range of eligible values between -1 and +1. See *Levitt & Dubner*, supra note 1, at 10; see also JEFFREY M. WOOLRIDGE, *INTRODUCTORY ECONOMETRICS: A MODERN APPROACH* 681–82 (2000). The greater the magnitude, the stronger the relationship. *Id.* The direction is expressed by a positive or negative correlation percentage (the "correlation coefficient"), indicating whether the relationship is inverse or "direct." *Id.* An inverse relationship exists where, as one set of variables increases, the other generally decreases, and vice versa. *Id.* A direct relationship is one where the variables seem to move in the same direction together. *Id.* An oft-cited exam-
important in reading the analysis not to confuse correlation with causation. Correlation is useful to show the existence and relative strength of a relationship between two variables, but it does not indicate whether one variable caused the other.\textsuperscript{40} It is important to bear in mind that correlations show the existence of a relationship, and can allow inferences into cause, but do not show causation empirically.

C. A Survey of the Battlefield

A March 2005 Harris Poll indicated that 34% to 41% of Americans favored President Bush’s plans for tort reform in the United States.\textsuperscript{41} The responses broke sharply along party lines, with 69% of Republicans approving of reform and only 22% of Democrats and 39% of self-described Independents favoring such measures. The results of this poll offer a useful snapshot of where the country stood on the issue of tort reform at that time.

This is not simply an abstract or ideological debate; it is an important and politically divisive issue. One member of Congress placed the cost of tort litigation at $233 billion in 2002, a figure greater than the entire economy of Greece.\textsuperscript{42} Both political parties spent roughly...
$4.5 million in the first six months of 2005 on tort reform-related advertisements. This is more than was spent on Alberto Gonzalez's nomination for Attorney General, John Bolton's heavily contested nomination for U.N. Ambassador, and the heated debate over filibustering President Bush's judicial nominees. In fact, it represents about half of what groups have spent on issues related to Social Security over the same period. More important than the sheer number of advertisements, however, is the veracity of what is being said and how it has shaped our conventional wisdom on the subject of tort reform.

D. On Message

Fashioning an effective message starts from the top down. President George W. Bush, during his first term in office and throughout the campaign for his second term, consistently repeated that the tort system in this country was broken and that the juries and plaintiffs' attorneys responsible needed to be checked. The message was important enough that it was included in the President's State of the Union Address in 2001, 2003, 2004, and 2005. The President
even came to Illinois in January 2005 to demonstrate his concern, delivering a speech from inside the “Judicial Hellhole” of Madison County.\textsuperscript{51} He began by rallying the supporters, including many physicians from local hospitals, and repeated what had become his mantra: “Many of the costs that we’re talking about don’t start in an examining room or an operating room. They start in a courtroom.”\textsuperscript{52}

The President’s message, however, has not been based on the theoretical or the abstract. He has tried to bring the message home to those in the audience: “Because junk lawsuits are so unpredictable, they drive up insurance costs for all doctors . . . . [Y]ou’re paying for junk lawsuits every time you go to see your doctor. That’s the effect of all the lawsuits. It affects your wallet.”\textsuperscript{53} The end result is the utter destruction of the health system in Illinois as we know it: “[Physicians must] give up medicine entirely, or to [sic] move to another place . . . .”\textsuperscript{54} Either choice, the President continued, leaves those in need with fewer options: “In 2003, almost half of all American hospitals lost physicians or reduced services because of medical liability concerns. . . . Over the past two years, the liability crisis has forced out about 160 physicians in Madison and St. Clair Counties alone.”\textsuperscript{55}

The President set the tone for the debate, and he used a symbolic pulpit to frame the discussion.\textsuperscript{56} He was not the only one, however, carrying the banner of tort reform in Illinois and around the nation. ATRA, the group that coined the phrase “Judicial Hellhole,” plays a significant role in the dissemination of tort reform information and ideas throughout the country.\textsuperscript{57} The group describes “Judicial Hel-
loholes” as “places where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants.” 58 The 2004 report from ATRA was particularly critical of Illinois, listing Madison County and St. Clair County, respectively, as numbers one and two on their list of the worst jurisdictions in the United States. 59 The report was quick to point out what they considered unfair tactics: “In Madison County, Illinois, for example, judges are known for scheduling numerous cases against a defendant to start on the same day or only giving defendants a week or so notice of when a trial is to begin.” 60 ATRA also makes several inferences about the cases being filed: “Records also showed that 85% of medical malpractice claims closed in St. Clair County between 1999 and 2003 resulted in no payment to the plaintiff, demonstrating that many of the accusations against doctors are unfounded.” 61 The assumption is that any claim that results in no award is a meritless one—a recurring theme among those pushing for tort reform. Their prognosis is similar to that of the President: “This year, seventy-nine physicians left or are planning to leave Madison County, and most blame their departures on rising medical malpractice insurance costs.” 62

The U.S. Department of Health and Human Services (HHS) recently entered the fray on tort reform as well. In its 2002 report, HHS assigned underhanded motives to damage claims, arguing that “compensation for intangible losses, such as pain and suffering, loss of consortium, hedonic (loss of the enjoyment of life) damages, and various other theories... are imaginatively created by lawyers to increase the amount awarded.” 63 The result of this legal ingenuity, the report continues, is a diversion of insurance funds from the hands of the injured to the pockets of the trial lawyers: “[O]nly 28% of what they pay for insurance coverage actually goes to patients; 72% is spent on legal, administrative, and related costs.” 64

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59. Id. at 7.
60. Id. at 9.
61. Id. at 19 (citation omitted).
62. Id. at 16.
64. Id. at 11.
The fact that these statements come from an administrative body to which we entrust many of our most intimate health and safety issues\textsuperscript{65} certainly weighs heavily on the minds of their audience. Furthermore, unlike ATRA, the HHS report comes with a stamp of approval from the government, which adds to the perceived legitimacy of the claims. Administrative bodies like HHS are usually thought to be independent of the political arena; their statements are invested with an air of objectivity and are not readily discounted by listeners.

Secretary of the Treasury John Snow discussed his own views on the subject of tort reform while addressing ATRA’s annual membership meeting.\textsuperscript{66} His remarks took trial lawyers and the entire tort system to task, blaming them for hurting individuals and small businesses, and even for increasing the effective tax burden borne by the citizens of this country.\textsuperscript{67} The Secretary pressed further, striking at those he believed responsible: “[Some personal injury lawyers] are taking in billions of dollars in profits each year. Some individuals in this industry are known to collect fees of $30,000 an hour.”\textsuperscript{68} The Secretary even drew an analogy between attorneys and the infamous corporate criminals who ran Enron and WorldCom.\textsuperscript{69} This is by no means an exhaustive accounting of the criticisms volleyed at the tort system or those who work in it; they are, however, representative of the general climate.

This is not to say that these are the only voices speaking out on the issue. Some oppose the reform measures suggested by the President and others.\textsuperscript{70} None of these voices, however, carry the same weight.

\textsuperscript{65} Among the responsibilities of HHS are the safety of our medication and food supply, immunization services, the prevention of domestic violence, and medical preparedness in case of emergency. For a full description of HHS activities, see U.S. Dep’t of Health & Human Servs., What We Do, http://www.hhs.gov/about/whatwedo.html (last visited June 10, 2007).

\textsuperscript{66} See Press Release, supra note 31.

\textsuperscript{67} Specifically, Secretary Snow stated that “there are few things that create a greater disincentive to job creation than an atmosphere where little stands between every business owner, every manager, ever[y] doctor and professional of almost any kind . . . and the next frivolous lawsuit.” \textit{Id.} (alterations in original). As for the effective tax, which he labeled a “tort tax,” the Secretary argued, “We know that the current tort system is costing America well over $200 billion each year . . . that’s a tort tax—paid in the form of lower wages, higher product prices, and reduced investments—of $809 for every individual.” \textit{Id.} (alteration in original).

\textsuperscript{68} \textit{Id.}

\textsuperscript{69} \textit{Id.} (“The lack of personal ethics and responsibility, the excesses of greed, is similar to what we saw when corporate scandals erupted two years ago . . . ”).

\textsuperscript{70} Most of the commentary on the other side has acknowledged the existence of a problem, but not in the civil justice system. Rather, much of the attention has been given to the insurance premiums charged to doctors for medical malpractice and to the insurance industry in general. \textit{See, e.g.}, Scott E. Harrington, \textit{Tort Liability, Insurance Rates, and the Insurance Cycle}, in \textsc{Brookings-Wharton Papers on Financial Services} 2004, at 97 (Robert E. Litan & Richard Herring eds., 2004) (discussing the insurance underwriting cycle and its correlation to premium
with the average American as the President, the Secretary of the Treasury, or HHS. The President’s message was clear: “frivolous lawsuits” are costing people money, taking away their jobs, and threatening to leave them without access to doctors. Of course, most of the evidence concerning premiums or the physician exodus is anecdotal.\textsuperscript{71} But it is not hard to see how this idea has become a part of our national consciousness, and why some have begun to feel as though Madison County and St. Clair County are unfair places in need of serious reform. And, since the descriptions sound like things we have already heard about trial attorneys, the idea is readily assimilated in people’s minds and slowly converted to fact.

According to the 2005 Harris Poll, the voices on the other side have not been as effective as the media onslaught.\textsuperscript{72} This, of course, says little about which side is correct. In reality, both sides are incorrect on different points, as the data will show. But the poll results do show that President Bush and the other proponents of tort reform have

\begin{itemize}
  \item levels. The contention of many who oppose tort reform measures is that insurance companies, like most businesses, are susceptible to business cycles and that underperforming returns from the invested premiums have caused losses, which insurers then seek to recover through rate hikes. See, e.g., Patricia M. Danzon et al., \textit{The Crisis in Medical Malpractice Insurance}, in \textit{Brookings-Wharton Papers on Financial Services} 2004, supra, at 55 (concluding that high payouts have not contributed to the premium increases, and citing evidence that medical malpractice insurers did not set aside sufficient reserves to weather the market declines of the late 1990s as an explanation for rising premiums); see also \textit{Vidmar, Tort System Report}, supra note 8, at 2 ("The end result, these groups claim, is that when economic fluctuations in the business cycle squeeze income, the insurers raise their rates and blame plaintiff lawyers and juries." (citing Joseph Treaster & Joel Brinkley, \textit{Behind Those Medical Malpractice Rate Hikes}, \textit{Chi. Daily Bull.}, Feb. 22, 2005, at 1)). Still others oppose the reform measures, and damage caps specifically, because evidence suggests that the effect of such caps would fall disproportionately on women, children, and the elderly, whose losses are more likely to be classified as noneconomic. See, e.g., Lucinda M. Finley, \textit{The Hidden Victims of Tort Reform: Women, Children, and the Elderly}, 53 \textit{Emory L.J.} 1263, 1280-82 (2004) (arguing that women, children, and minorities tend to suffer injuries that are classified as noneconomic).
  \item 71. See Press Release, supra note 9. The President, for example, pointed to specific individuals he felt were affected:
    \begin{itemize}
      \item Dr. Chris Heffner is with us. He’s a neurosurgeon from Belleville Memorial and St. Elizabeth Hospitals. Raise your hand, Doc. He is one of only two neurosurgeons still practicing south of Springfield, Illinois. . . .
      \item A few years ago, Chris decided that closing his head trauma part of his practice was the only way he could afford to stay in this area.
    \end{itemize}
  \end{itemize}

\textit{Id.} The President continued:

\begin{itemize}
  \item Dr. Greg Gabliani is with us. He’s from Alton, and he is a cardiologist. He was raised in Quincy and he moved to Madison County in 2001, even though his colleagues warned him about the medical liability crisis here. In three years, his premiums have risen from $12,500 to $60,000 a year—three quick years. Last year he had to stop performing certain procedures to bring his costs under control. He said, “You either have to change the nature of your practice or you have to leave.”
\end{itemize}

\textit{Id.}

\textit{72. See supra note 41 and accompanying text.}
been much more effective in staying on message and delivering it to the people.\textsuperscript{73} According to this account, the end of the tort system as we know it may be near. The only problem is that the President’s message is not supported by the data.

III. Analysis

It would be impossible to discuss and assess the validity of every statement made about the tort crisis—or lack thereof—in Illinois. Instead, the many assertions have been grouped under general categories of criticism of the tort system in Madison County and St. Clair County to facilitate a more manageable discussion. Each of the following sections begins with a common statement or observation about the tort system and then conducts a full examination of the assertion’s accuracy.\textsuperscript{74}

A. Madison County and St. Clair County Courts Are Full of “Junk Lawsuits”

This is a common criticism of not only the tort system in Illinois, but of our civil justice system generally. It is, however, an inherently qualitative criticism and difficult to test without careful definition. The veracity of this statement depends on one’s definition of “junk” in a legal context. It also raises difficulty because people’s opinions vary with regard to how many lawsuits are “too many.” That said, working through the data provides some objective measure by which to reach one’s own evaluation of the statement above.

According to the sample in the Verdict Reporter, there were 238 tort-related verdicts in Madison County, St. Clair County, and the Southern District of Illinois between 1992 and October 2005.\textsuperscript{75} This is the equivalent of roughly 20 verdicts per year over the sample period. Comparatively, according to the Bureau of Justice Statistics, the county of Suffolk, Massachusetts (a county of similar population to that of the combined Madison and St. Clair population) had 79 and 41 tort cases decided in 1996 and 2001, respectively.\textsuperscript{76} Moreover, the

\textsuperscript{73} Id.

\textsuperscript{74} Again, when the Madison and St. Clair data is compared to “national” data, the Bureau of Justice Statistics’ Tort Trials and Verdicts in Large Counties, 2001 is being used as a proxy to estimate the national average. See supra note 35.

\textsuperscript{75} Winters, Decision Compilation, supra note 38.

bulk of the cases in Madison County and St. Clair County came near the beginning of the sample, with the levels of claims falling significantly in recent years. In 1992 and 1993, there were 39 and 38 verdicts, respectively.77 Compare that to 1998 (6), 1999 (13), 2000 (11), 2001 (4), 2002 (6), and 2003 (3).78 This discussion only addresses those contained in the Verdict Reporter sample, but the low number of actual cases and the precipitous decline in their occurrence are telling.

The "junk" portion of this observation seems to address a broader claim that many of the tort claims being filed in Madison County and St. Clair County are frivolous. A "frivolous lawsuit" is defined as a "lawsuit having no legal basis, often filed to harass or extort money from the defendant."79 This definition, however, is often perverted in political speech to equate frivolous claims with those that simply do not receive an award.80 This is an error of transposed logic.

Further, of the 238 total verdicts in this sample, judges or juries in 93 cases (39%) found enough merit in the claim to actually find for the plaintiff and award damages.81 This is somewhat lower than, but still comparable to, the 52% success rate for tort plaintiffs nationally in 2001.82 Also, the research did not uncover any instance in which an attorney who brought an unsuccessful tort suit subsequently faced a successful Rule 11 proceeding under the Federal Rules of Civil Procedure (or its Illinois equivalent) for filing a nonmeritorious claim.83

77. See Winters, Decision Compilation, supra note 38.
78. Id.
80. ATRA, Judicial Hellholes 2004, supra note 10, at 19.
81. See Winters, Decision Compilation, supra note 38.
82. See Cohen, supra note 37, at 4 tbl.3. According to the Bureau of Justice Statistics, the success rate for plaintiffs nationally was 52% in both 1992 and 2001. Id.
83. Rule 11(b) of the Federal Rules of Civil Procedure allows sanctions against one who violates one of the representations embodied in pleadings to the court:

[A]n attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .
Thus, Madison County and St. Clair County are not litigating as many cases as similarly sized jurisdictions, nor are the courts seemingly overwhelmed by “junk” lawsuits, unless one considers all unsuccessful claims to be frivolous.

**B. The Courts in Madison County and St. Clair County Are Tilted in Favor of Plaintiffs**

As discussed above, plaintiffs in these counties won only 93 of the 238 cases (39%) in the sample, while defendants won 61% of the time. The plaintiffs’ success rate is lower than the national rate of 52% cited in the 2001 Bureau of Justice Statistics study. While the aggregate view is helpful, it does not explain the whole story. To determine whether a jurisdiction is actually biased, it is instructive to consider how different courts handled similar claims over time, and then to compare the results to nationwide data.

In personal injury cases stemming from nonfatal auto accidents, there were a total of 45 claims brought in Madison County and St. Clair County. Plaintiffs won 10 of these, a 28% success rate. Nationally, however, plaintiffs won about 61% of auto accident cases, a rate more than twice that of plaintiffs in Madison County and St. Clair County. Turning to the hotly debated issue of medical malpractice claims, a similar story emerges. There were 44 claims of medical negligence or malpractice filed over the thirteen-year sample, or roughly 3 claims per year for all of Madison County, St. Clair County, and the

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84. See Winters, Decision Compilation, supra note 38.
85. See Cohen, supra note 37, at 4 tbl.3.
86. See Winters, Decision Compilation, supra note 38.
87. Id.
88. See Cohen, supra note 37, at 4 tbl.3.
Southern District of Illinois.89 Of these, plaintiffs won 13 (one verdict per year), a plaintiff success rate of 29%.90 This is only marginally higher than the national success rate for medical malpractice claims of roughly 27%,91 suggesting that judges and juries in Southern Illinois are no more plaintiff-friendly than those across the country.

Another sharply criticized area of tort law has been products liability.92 These cases have become the topic of discussion around dinner tables and water coolers, while providing fodder for the debate about meritless lawsuits and greater consumer or user protection.93 In the Verdict Reporter sample here, products liability claims were filed for defects found in a range of products, from car transmissions94 to toothpaste.95 A total of 44 cases were filed in this sample, with the plaintiffs prevailing in 21 cases, a 47% success rate.96 Nationally, plaintiffs fair about the same, winning 44% of claims filed.97

There is one area of products liability, however, where plaintiffs do exceedingly well: asbestos claims. Nationally, plaintiffs in asbestos

89. See Winters, Decision Compilation, supra note 38.
90. Id.
91. See Cohen, supra note 37, at 4 tbl.3.
92. See supra note 50.
93. See Liebeck v. McDonald's Rests., CV-93-02419, 1995 WL 360309 (D.N.M. Aug. 18, 1994). This is the infamous case where Stella Liebeck sued McDonald's Corporation after spilling a cup of hot coffee on herself. Ms. Liebeck was awarded $200,000 in compensatory damages (reduced to $160,000 upon finding her 20% at fault) and $2.7 million in punitive damages (which was later reduced to $480,000). Id. at *1. Many Americans were outraged by the verdict. See Andrea Gerlin, A Matter of Degree: How a Jury Decided That a Coffee Spill Is Worth $2.9 Million, WALL ST. J., Sept. 1, 1994, at A1. And why shouldn't they be? This woman was just made a millionaire! The jurors themselves may have been just as outraged had they not been in court for the presentation of evidence. "While removing the lid to add cream and sugar," the coffee spilled onto Ms. Liebeck's lap, "causing third-degree burns of the groin, inner thighs, and buttocks." Id. Ms. Liebeck spent "seven days in the hospital," underwent skin grafts to repair the damage, and had to receive excruciating debridement surgery (removal of the damaged layers of skin from the body). Id. However, after all of that, Ms. Liebeck, who had never filed a suit in her life, still would not have done so if McDonald's would not have "dismissed her request for compensation for pain and medical bills with an offer of $800." Id. The punitive damages were the result of evidence showing that, "in the past decade McDonald's had received at least 700 reports" of people burning themselves, often severely, demonstrating that the company was aware of the serious risk but made a decision not to alter its operations. Id. In addition, other evidence showed that coffee brewed at 195° to 205°, as McDonald's brewed it, "takes less than three seconds to produce a third-degree burn." Id. On these facts, it took the jury only four hours to reach a decision, ultimately awarding $2.7 million in punitive damages (the equivalent of two days' worth of McDonald's coffee sales). Gerlin, supra.
96. See Winters, Decision Compilation, supra note 38.
97. Cohen, supra note 37, at 4 tbl.3.
claims win upwards of 60% of the time. There were a total of 8 asbestos claims in this sample, with the plaintiffs winning 7 (87.5%). This is significantly higher than the national average, but the percentage may be misleading given the relatively small sample size. Of these 8 claims, 5 were filed the same year against a single company, with the company being found liable in each instance. In any case, asbestos litigation in Madison County, St. Clair County, and the Southern District of Illinois seems to be becoming far less frequent, as there were only 2 asbestos cases captured in the last decade of the sample.

Almost the entirety of the remaining case load in the sample is simple negligence claims. The majority of these cases involve premises liability claims either by individuals or by workers who sued for injuries resulting from unsafe working conditions. Out of a total of 79 cases, plaintiffs won 34, a 43% success rate. The most analogous category in the Bureau of Justice Statistics study is the category titled "Premises Liability"; nationally, plaintiffs win approximately 42% of these cases.

The next step is to determine what it all means. The claim has been made that the system is slanted against defendants in Madison County and St. Clair County. But this is a dubious statement, since plaintiffs prevail in only 39% of the cases. That said, the jurisdictions could still be considered unfair if the Madison and St. Clair court decisions were more plaintiff-friendly than other parts of the country. The Madison and St. Clair courts, however, were within a few percentage points of the respective national averages for each sort of claim, at least based on the Bureau of Justice Statistics in 2001. There were only two types of claims where the results were not comparable: automobile accidents and asbestos claims. As stated earlier, however, the asbestos claims in Southern Illinois can be largely attributed to one

98. Id.
102. See Winters, Decision Compilation, supra note 38.
103. Cohen, supra note 37, at 4 tbl.3.
104. See supra notes 57-62 and accompanying text.
year and one defendant. As for automobile accidents, the data showed that plaintiffs nationally were more than twice as likely to prevail as those in the two biggest "Judicial Hellholes" in the country, Madison County and St. Clair County. Consequently, the claims of systemic imbalance in the Madison and St. Clair courts find little empirical support in the data.

C. Noneconomic and Punitive Damages Are Out of Control and Have Artificially Increased Awards

The HHS has gone so far as to claim that noneconomic damages, such as pain and suffering or loss of consortium, "are imaginatively created by lawyers to increase the amount awarded."105 Steven Stanek, a freelance writer with ties to pro-reform publications and institutions such as the Health Care News and the Heartland Institute, has extended this idea even further, claiming that "non-economic damages . . . now make up more than 90 percent of the money awarded by Illinois juries in malpractice cases."106 These criticisms all stem from a concern over awarding damages for injuries that are not readily quantifiable. Different people may rationally hold different opinions on the proper goals of the tort system or theories of compensation. But only the data concerning these awards in Illinois can determine if there is an objective basis for concern.

Again, noneconomic damages are those that are not based on quantifiable items; they include pain and suffering, loss of consortium, and disfigurement.107 Additionally, when noneconomic damages are spoken of in the context of this research, any punitive damages that may have been awarded are not included in the figures. In this sample, the 238 cases yielded total damage awards of $200,800,874, while noneconomic damages constituted $42,062,540 (20.9%) of that total.108 Clearly, Stanek’s claim has little if any basis in the data. But just because noneconomic damages do not account for most of the total awards does not mean that, within certain claims, they are not being awarded unduly.

105. See Office of the Assistant Sec’y for Planning & Evaluation, Health Care Crisis, supra note 63, at 8.
107. See supra notes 23–30 and accompanying text.
108. See Winters, Decision Compilation, supra note 38. In the sample, 41 of the 238 cases provided for noneconomic damages in their award breakdowns. Noneconomic damages were not estimated or inferred in the absence of an explicit statement in the case decision.
As for punitive damages, the story at first blush seems similar to that of noneconomic damages.\textsuperscript{109} Of the $200,800,874 total damages awarded, $43,976,751 (21.9\%) came by way of punitive damages.\textsuperscript{110} This percentage, however, is somewhat misleading. Overall, punitive damages in the data set were exceedingly rare, with only 10 cases (4\%) awarding them.\textsuperscript{111} This is lower than, but still comparable to, the national average of 5\% of tort plaintiffs that receive punitive damages.\textsuperscript{112}

It should be further noted that of the $43,976,751 in punitive damages awarded, $39,500,000 (90\% of the punitive damages) came from 5 asbestos verdicts,\textsuperscript{113} including one for $25,000,000.\textsuperscript{114} In that case, the plaintiff developed mesothelioma from handling asbestos as directed by his employer for fifteen years; the defendant company knew of the dangers associated with handling the product but failed to warn anyone or provide safer alternatives.\textsuperscript{115} Excluding this single award, which can be safely labeled as an outlier even for asbestos cases, punitive damages account for less than 11\% of damages awarded.\textsuperscript{116}

With regard to the actual punitive damage award figures, the median award given by Madison and St. Clair courts is $2,500,000.\textsuperscript{117} Nationally, the median punitive damage award is precisely one-hundredth of that value, $25,000.\textsuperscript{118} Again, however, viewing the awards in the aggregate can be misleading because of the small number of punitive damage awards given and the inflationary effect of the asbestos verdicts mentioned above. When the asbestos verdicts are removed, the median award in Madison County and St. Clair County plunges to $456,231.\textsuperscript{119} Given the extreme rarity of punitive awards

\textsuperscript{109} See Catherine M. Sharkey, \textit{Punitive Damages as Societal Damages}, 113 \textit{Yale L.J.} 347, 356–57 (2003) ("[C]ourts and academic commentators on the whole do agree that there are two prevailing justifications for punitive damages: punishment (or retribution) and deterrence.").

\textsuperscript{110} See Winters, Decision Compilation, \textit{supra} note 38.

\textsuperscript{111} Id.

\textsuperscript{112} Cohen, \textit{supra} note 37, at 1.


\textsuperscript{114} See Hutcheson, 2000 WL 33957080.

\textsuperscript{115} Id.

\textsuperscript{116} See Winters, Decision Compilation, \textit{supra} note 38.

\textsuperscript{117} Id.

\textsuperscript{118} Cohen, \textit{supra} note 37, at 1.

\textsuperscript{119} See Winters, Decision Compilation, \textit{supra} note 38.
generally, and their prevalence in only very specific types of claims, the data do not appear to support a conclusion that punitive damages are a menace to the economy or our tort system. Indeed, there have been entire years that passed in Madison County and St. Clair County without any punitive damages awarded. The claim that such damages are out of control does not comport with the data. Though the median in southern Illinois is above national levels, courts have been relatively restrained in awarding exemplary damages, limiting them to cases where the requisite malice or recklessness has been found.

D. Lawyers Bring Lawsuits in the Hope of Winning the Verdict “Lottery”

Supporters of tort reform argue that the system encourages attorneys to roll the dice and file suit because, over the course of several cases, the chances of winning a large verdict are high. Given some of the headlines that grace our local newspapers after a large or surprising jury award, this does not seem like an unreasonable position to take. After analyzing the data, it may be true that the tort system, especially in Illinois, is somewhat erratic in the remedies it provides to plaintiffs. Though this is a relatively small sample, the empirical findings suggest an inherent unpredictability among awards handed down by the courts that this Comment examined.

As a matter of theory, the relative consistency of jury awards can be difficult to test objectively; there are often jury awards that seem to be larger than the facts would or should support. Fortunately, however, standard deviation provides a way to empirically test the consistency of a set of data points relative to an average or “mean” value. Simply

120. No punitive damages were awarded in Madison County, St. Clair County, or the Southern District of Illinois in 1992, 1996, 1998, 2002, 2004, or 2005. Id.

121. These are some of the elements usually listed as prerequisites for allowing a punitive damage award. See, e.g., BLACK'S LAW DICTIONARY, supra note 25, at 418–19. In the Verdict Reporter sample, the award of punitive damages was generally precipitated by the finding of malice or recklessness. See, e.g., Hrysko v. Stein Steel Mill Serv., No. 02-L-850 (Ill. Cir. Madison County Ct. June 18, 2003), 2003 WL 23871439 (finding recklessness in servicing a truck in the middle of a county highway without the use of hazard lights, flares, or reflectors); Penberthy & Walpole v. Price, No. 90-L-999, 1994 WL 16007225 (Ill. Cir. St. Clair County Ct. Sept. 15, 1994) (finding recklessness in a driver operating a motor vehicle while having a blood alcohol level of 0.217, or two and a half times the legal limit, who crossed the center line and struck an oncoming vehicle); Anderson v. Lessie Bates Day Care Ctr., No. 90-L-1355, 1994 WL 16007227 (Ill. Cir. St. Clair County Ct. June 3, 1994) (awarding punitive damages to a child molested by a day care center employee after the employee was negligently rehired following prior complaints of sexual abuse involving children).

122. See supra note 9 and accompanying text.

stated, standard deviation tells us how spread out the values of a data set are.\textsuperscript{124} A large standard deviation indicates that the data points (here, award values) are widely spread out around the mean, while a small standard deviation indicates that the data points are closely clustered around the mean, suggesting a more uniform set of observations.\textsuperscript{125} This idea can be applied to analyze the predictability of jury awards for a particular type of claim. If the set of awards has a small standard deviation, the awards for injuries on those claims are more clustered around some average and, thus, are more predictable. If the standard deviation is high, then the awards vary widely around some average value and are necessarily less predictable.

The standard deviation also allows us to determine what number of the observations fall within one, two, three, or more standard deviations from the mean.\textsuperscript{126} Assuming a "standard normal distribution" of observations (characterized by a mean value of zero and a standard deviation of one), we are able to say that 68.2\% of observations in a given sample lie within one standard deviation from the mean and 95.46\% are within two standard deviations.\textsuperscript{127} The predictability of awards is an important consideration for potential litigants and for tort reform more generally; it also offers a possible explanation for the rising number of settlements.\textsuperscript{128} If an individual evaluates the predictability of awards and can only be roughly 70\% sure that, if he were to lose his case, an award would fall within a relatively large range, he would more likely settle the case than take a chance in court. Conversely, a smaller standard deviation means relatively more predictable awards and a greater ability for litigants on both sides to

\begin{itemize}
  \item \textsuperscript{125} Id. at 42–43.
  \item \textsuperscript{126} Id.
  \item \textsuperscript{127} Id. at 44. A caveat is appropriate here. A "standard normal distribution" is a bell-shaped curve characterized by a mean value of zero and a standard deviation of one as stated in the text. Id. From a practical standpoint, however, juries can never award a negative amount, so to the extent that there can never be negative values captured in the data set, we are ceasing to describe a normal distribution. Given enough observations, we would expect a normal distribution, but both the geographical and temporal scope of this analysis make this a relatively limited sample. That said, the assumption of a normal distribution is essential to make full use of the statistical tools. Thus, while the awards are all necessarily positive, these concepts are still the most useful in communicating the variability of awards and no statistical harm has been done in making this assumption.
  \item \textsuperscript{128} See David Rosenberg \& Steven Shavell, A Simple Proposal to Halve Litigation Costs, 91 Va. L. Rev. 1721, 1725 n.6 (2005) ("Recent data on state courts show that about 96\% of civil cases are resolved without trial.").
\end{itemize}
accurately evaluate the possible risks and benefits of trying the case.\textsuperscript{129}

This Comment next considers the range of awards given for each type of claim in order to judge the relative consistency of the system as it relates to that claim.\textsuperscript{130} A few words of caution, however, are warranted. First, this portion of the analysis will focus solely on awards in Madison County, St. Clair County, and the Southern District of Illinois. No national data will be analyzed here. Second, the awards have been adjusted for inflation in order to give a depiction of the award ranges uninfluenced by extraneous effects.\textsuperscript{131} Third, no two cases are precisely alike, so we would naturally expect to see some variability in the awards provided. Finally, the dispersions are being assessed in relatively broad categories (e.g., auto accidents causing injury), meaning that cases with potentially very different facts are being compared for the purposes of this analysis. Thus, while the analysis provides some insights, a larger set of observations may produce different results.

With regard to auto accidents resulting in injury but not death, the mean award provided was $1,141,676, with a standard deviation of $851,831 after adjusting for inflation.\textsuperscript{132} As a result we are only able to say that 68\% of the results lie between $289,844 and $1,993,507.\textsuperscript{133}

\textsuperscript{129} This is especially true if the standard deviation is looked at in conjunction with the plaintiff success rate for a particular type of claim. In this way, both parties can look at the probability of a plaintiff victory and subsequent award. A simple example may be helpful. Suppose a sample of observations had a mean value of eight and a standard deviation of two. We are then able to say that about 68\% of the observations, without even looking at a single one but based solely on this information, are between six and ten. We are also able to say with certainty that about 95\% of the observations are between four and twelve. Thus, in interpreting damage awards, we are able to better predict the range in which the observations fall. This provides a useful tool to determine how consistent the system has been in the past, as well as some insight into where we may expect to see awards in the future (though the standard deviation is not set up to empirically predict future results).

\textsuperscript{130} The calculation of the standard deviation of a "population" of data is as follows:

$$\sigma = \sqrt{\frac{1}{N} \sum_{i=1}^{N} (x_i - \bar{x})^2},$$

where $N = \text{Number of Observations}$.

\textsuperscript{131} The values here have been adjusted for inflation using the Consumer Price Index (CPI) as the measure of inflation. The CPI uses a "basket" of consumer goods and measures the changing cost of that basket over time to gauge the relative buying power of money.

\textsuperscript{132} See Winters, Decision Compilation, \textit{supra} note 38.

\textsuperscript{133} These values were derived by taking the mean value of $1,141,676 \pm$ the standard deviation of $851,831$, indicating how far one standard deviation could take us above and below the mean. The second standard deviation would take us an additional $851,831$ away from the mean value both positively and negatively. Thus, two standard deviations from the mean, between which roughly 95\% of the values fall, would land at -$561,897.
The remaining 32% will fall somewhere outside this range. To capture 95% of the results, we would need to broaden the award range to $0 and $2,845,338.\textsuperscript{134} This is a broad range and suggests some unpredictability in the verdicts. The circumstances of the accidents, the people involved, and the injuries sustained could vary substantially from case to case, accounting for much of the variation. That said, individual drivers or companies that send an employee out on the road may at least assess their potential risk based on the unpredictability of awards and the probability of a plaintiff victory (28.6\%).\textsuperscript{135}

This result is further accentuated when examining auto accidents that result in the death of the victim. In those cases, the mean award handed down in Madison County and St. Clair County was $3,973,755, with a standard deviation of $3,550,556.\textsuperscript{136} These cases are inherently more unpredictable because the award will depend largely on who the victim is.\textsuperscript{137} That said, the range of damages here is still startling. According to these numbers, a wrongful death automobile case is statistically as likely to award $423,198 as $7,524,311.\textsuperscript{138} These results may also help explain why many of these cases tend to be settled out of court rather than through litigation.

Medical malpractice also depends largely on factual circumstances and the identity of the victim. As a result, the range of verdicts handed down is large. The mean award given was $3,357,847, with a standard deviation of $5,867,008.\textsuperscript{139} The broad range is in part due to Coleman v. Touchette Regional Hospital, where the cervix of a mother in labor failed to dilate beyond two centimeters.\textsuperscript{140} The doctor attempted to use vacuum suction on the baby’s head fifteen times despite the manufacturer’s recommendation of no more than three.\textsuperscript{141} A cesarean section was not performed in a timely fashion and the infant suffered severe brain damage, which would require around-the-clock nursing care for the rest of her life.\textsuperscript{142} The total award in that

\textsuperscript{134} The standard deviation would suggest that the 95% range should actually be -$561,897 and $2,845,338. However, no jury is going to charge a plaintiff money, so the effective lower end of the range is no award at all, or $0.

\textsuperscript{135} See Winters, Decision Compilation, supra note 38.

\textsuperscript{136} Id.

\textsuperscript{137} The economic loss caused by the death of a forty-five-year-old CEO of a Fortune 500 company making $2,500,000 per year with three young children at home would likely be much higher than for a man making $38,000 per year as a school teacher.

\textsuperscript{138} These numbers are again calculated by taking the mean value of $3,973,755 ± the standard deviation of $3,550,556.

\textsuperscript{139} See Winters, Decision Compilation, supra note 38.


\textsuperscript{141} Id.

\textsuperscript{142} Id.
case, most of it for future medical expenses, was over $19,000,000.143 Keep this result in mind in assessing the range of medical malpractice awards. The mean and standard deviation above indicate that 68% of the damages awards for medical malpractice will fall between $0 and $9,224,856. If the Coleman case were removed from the sample, the mean award in medical malpractice cases would fall to $1,990,376, with a standard deviation of $3,321,348.144 This is a much tighter clustering, and thus a more predictable range, than originally suggested.

The last broad category of claims to analyze is products liability. Above, this Comment made the distinction within products liability between asbestos claims and others.145 Plaintiffs are vastly more successful in asbestos suits than in others, thus making an overall products liability analysis misleading. In analyzing the variability of awards, this distinction is no longer needed; awards in asbestos and all other products liability claims disperse similarly around their respective means.146 The mean award for products liability cases generally was $4,904,889, with a standard deviation of $8,546,816.147 This indicates that 68% of the awards fall between $0 and $13,451,705. It is worth mentioning, however, that products liability cases are relatively rare; the sample contained only 21 such claims for the entire thirteen-year span.148

In summation, though this analysis was inhibited by a small data set, the results support the claim that awards are somewhat unpredictable. But in many of the cases involving huge damage awards, which influence both the mean and the predictability calculations, the result cannot be said to have been wholly unwarranted.149 This analysis also shows empirically what many in the legal community already know: individual facts matter. Each one of the cases provides a set of cir-

143. Id.
144. See Winters, Decision Compilation, supra note 38.
145. See supra notes 92–100 and accompanying text.
146. In the interest of completeness, the following are the respective standards of deviation for asbestos claims and all other products liability claims. For asbestos cases, the mean award was $9,956,520, with a standard deviation of $13,200,115. This suggests that 68.2% of the awards fall between $0 and $23,156,635. For the rest of the claims, the mean award was $2,379,073 with a standard deviation of $3,369,017. The 68.2% demarcation in this case is $0 to $5,748,091. Each case presents a significant range, especially in asbestos cases, where the injuries can be life threatening and the incident medical care can be significant.
147. See Winters, Decision Compilation, supra note 38.
148. See id.
cumstances that are unique in some way. Comparing damage awards across cases is difficult, but it provides a new insight.

These calculations are a useful first look at damage predictability. Comparisons to other jurisdictions, once available, may provide needed context. This Comment, by necessity, looks at these claims in a relatively general way, within a relatively small data set. A national data set may allow one to parse the claims further and compare groups of nearly identical fact patterns in search of a more refined analysis. There is an argument to be made about the relative unpredictability of these awards in Madison County and St. Clair County, but only time—and more data—will tell if the argument is sound.

E. The Judges Are the Problem and Have No Interest in Changing the System Because They Are Elected with Award Money

ATRA asserts that the tort system in Madison County and St. Clair County is in disrepair due to corruption and a close-knit relationship between judges and plaintiffs’ attorneys.150 Of course, ATRA is not without its own biases, but a claim of preferential treatment in return for campaign contributions is not far-fetched, nor would it be the first time a quid pro quo exchange of this type existed in elected government.151 Fortunately, the judicial alignment of Southern Illinois’ courts makes an empirical test readily available.

To test the veracity of ATRA’s claim, we need to compare the actions of elected judges to a control group dealing with the same people or similar circumstances. Theoretically, only the judges of the Madison and St. Clair state courts should be susceptible to electoral influence. Federal court judges, meanwhile, provide a good control subsample. They are appointed to the bench with lifetime tenure and are not subject to reelection by the local voters.152 To test ATRA’s claim of influence, the decisions and awards given by the state courts need to be compared to the federal decisions from the Southern Dis-

150. See ATRA, JUDICIAL HELLHOLES 2004, supra note 10, at 8 (“Question: What makes jurisdictions ‘Judicial Hellholes’? Answer: The judges.”); id. at 9 (“Trial lawyer contributions make up a disproportionate amount of donations to locally-elected judges. . . . There is a revolving door among jurists, plaintiffs’ lawyers, and government officials.”). Of course, ATRA also claimed that there were 953 asbestos claims filed in Madison County alone in 2003, while the Verdict Reporter records show only eight that made it to trial in Madison County, St. Clair County, and the Southern District of Illinois, for the entire thirteen-year sample. Id. at 16.

151. See Anne E. Kornblut, Lobbyist’s Role in Hiring Aids Is Investigated, N.Y. TIMES, Dec. 2, 2005, at Al (“[P]rosecutors investigating Jack Abramoff, the Republican lobbyist, are examining whether he brokered lucrative jobs for Congressional aides at powerful lobbying firms in exchange for legislative favors . . . .”); see also Carl Hulse, Political Donations, Bribery and the Portrayal of a Nexus, N.Y. TIMES, Nov. 25, 2005, at A28.

district of Illinois on similar claims to see if there is a discrepancy of treatment. To be sure, there are reasons why similar claims may turn out differently in each court. Federal procedural and evidentiary rules, as well as factual disparities between cases, may lead to different results. Still, this analysis will provide a reasonable means by which to determine whether ATRA has a basis for its allegations.

Bearing in mind that the federal courts handle a comparatively small part of the case load, the results are still telling. With regard to auto accidents causing injury, the Southern District rendered 20% of its decisions for the plaintiff. Comparatively, the state courts found for the plaintiff in these cases 22.5% of the time, a statistical tie considering the relatively small number of federal observations. In auto accident wrongful death cases, the Southern District found for plaintiffs in 67% of the cases, while the state courts only found for plaintiffs 47% of the time.

With regard to medical malpractice, the federal courts rendered plaintiffs' verdicts only 20% of the time. It is worth noting, however, that the Southern District was responsible for the $19,253,549 verdict in the Coleman case discussed earlier. As for the state courts' treatment of these cases, state judges found for the plaintiffs 31% of the time. But the total value of the entire body of state court medical malpractice awards in the sample totals only $19,500,000, nearly the same as the federal court's single decision in Coleman. This consistency carries over into the area of products liability. In products liability cases, the Southern District rendered decisions for the plaintiffs in 47% of its cases. Similarly, the state courts found for plaintiffs in 48% of their products liability cases, another statistical dead heat. The last type of claim to be addressed is the simple negligence claim. In negligence suits, the Southern District decided in favor of the plaintiffs 38% of the time. Comparatively, the

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153. The federal court for the Southern District of Illinois rendered 40 of the 283 decisions in the Verdict Reporter sample, or a total of 14% of the caseload. Nevertheless, they provide a needed control group.
154. See Winters, Decision Compilation, supra note 38.
155. Id.
156. Id.
157. See id.
159. See Winters, Decision Compilation, supra note 38.
160. Id.
161. Id.
162. Id.
state courts found in the plaintiffs' favor in 43% of negligence claims.\[163\]

Simply put, in none of the different types of claims, including the hotly debated medical malpractice and products liability areas, did the state courts perform differently in any significant way from their counterparts on the federal bench. In fact, it was a federal court that rendered the largest medical malpractice award in the sample.\[164\] The results indicate that there is little basis for the accusation that the state court judges of Madison County and St. Clair County are beholden to the plaintiffs' attorneys. As with many smaller jurisdictions in the country, the attorneys and judges are likely to know each other, and many of the judges likely receive campaign contributions from plaintiffs' attorneys. But the data here suggest that the judges objectively preside over the cases before them, rendering decisions in nearly identical proportion to judges on the federal bench who do not face the voters and receive no political funding. It is critical to remember that juries decide most of the tort cases. Nationally, juries decided over 90% of the tort cases that came before both the state and federal courts.\[165\] Thus, the final decisions are still largely in the hands of the best arbiters of our collective conscience.

IV. LOOKING BACK, LOOKING AHEAD

Without regard for the empirical data presented above, which the vast majority of people have not seen, many have subscribed to the idea that Congress should pass caps on damage awards as a way of reining in judges, plaintiffs' attorneys, and the cost of health care.\[166\] On the surface, this seems like an obvious solution, but it reflects a simplistic assessment of a challenge that in reality is much more nuanced. Many scholars and observers feel that the problem of rising insurance premiums, for instance, does not follow from litigation expenses; rather, it stems from the industry's attempts to achieve stable returns in the face of reduced investment income.\[167\] This Part evaluates the validity of such assertions. It then discusses the advantages, disadvantages, and possible constitutional pitfalls of the proposals by

\[163\] Id.
\[164\] See supra notes 140–143 and accompanying text.
\[165\] Cohen, supra note 37, at 2 tbl.1.
\[167\] See infra notes 171–178 and accompanying text.
the President and Congress\textsuperscript{168} to enact caps on noneconomic damages.\textsuperscript{169} Finally, this Part analyzes some alternatives to caps in the medical malpractice arena, which can improve patient safety, protect doctors, and help preserve our democracy's balance of power and equality of protection for all.\textsuperscript{170}

A. What Has Enron Done with My Doctor?

A fiery political advisor once tacked up a sign in the headquarters of his political protégé proclaiming, "It's the economy, stupid," in the hopes of keeping then-Governor Bill Clinton on message during the 1992 Presidential race.\textsuperscript{171} In the case of tort reform, the sentiment is no less true. The cyclical nature of the economy and financial markets continues to be a significant factor in the tort reform debate, though they would appear unrelated at first blush. Many scholars believe there is a causal relation between the performance of our national financial markets and premiums charged by insurance companies, which have invested as much as 80\% of their reserves in the markets.\textsuperscript{172} A review of the relevant data will allow the reader to come to his or her own conclusion.

The Enron question posed above seems preposterous, but it gives rise to an interesting discussion: How much of an effect do the financial markets really have on insurance premiums? The data sample that will be used here to analyze this question was originally compiled by A.M. Best & Co.,\textsuperscript{173} a leader in insurance industry data, news, and company ratings. The sample captures the total dollar amount of premiums written in Illinois between 1976 and 2000, as well as the amount paid out to satisfy claims and the amount paid out per practicing doctor in Illinois, adjusted for inflation.\textsuperscript{174} Startling discoveries can be made about the relationship between insurance and the econ-


\textsuperscript{169} See infra notes 180–207 and accompanying text.

\textsuperscript{170} See infra notes 208–231 and accompanying text.

\textsuperscript{171} Edwin J. Feulner, "It's the Economy, Stupid," Circa 1996 (May 16, 1996). The operative quoted was the famous Democratic political advisor James Carville of Louisiana.


\textsuperscript{174} A copy of the data set is on file with the \textit{DePaul Law Review}. However, the data set has also been made available online by the group Americans for Insurance Reform, see \textit{Am. FOR
The economy simply by looking at the correlation between the movement of bond interest rates,\textsuperscript{175} which make up a considerable percentage of insurance company investments, and the premiums the companies in turn charge their customers.

For example, the data indicate that the insurance premiums charged to doctors in Illinois between 1976 and 2000 shared a negative correlation of 72\% with the interest yields from the five-year treasury bonds.\textsuperscript{176} When interest rates on these bonds are falling, and the income derived from that interest is also falling, the insurance companies in Illinois tend to increase their premiums. The relationship between the ten-year treasury bonds and insurance premiums plays out similarly, enjoying a negative 73\% correlation.\textsuperscript{177} Again, in almost all cases where the income on these investments was falling due to falling interest rates, the insurance companies were increasing their premiums on Illinois doctors at the same time.\textsuperscript{178}

\textsuperscript{175} The bond rates referred to in the text are the ten-year U.S. treasury bond, the five-year U.S. treasury bond, and Moody's "Aaa" rated corporate bonds. U.S. Treasury bonds are highly secure loans to the government. For a more complete discussion of U.S. Treasury securities, including those discussed here, see U.S. Treasury, Individual—Treasury Notes, http://www.treasurydirect.gov/indiv/products/prod_notes_glance.htm (last visited June 10, 2007). They provide virtually no default risk (since they are secured by the U.S. government) and are thus a very safe, low-yield investment. See \textit{id.} (suggesting that U.S. Treasury securities may be used to finance one's education or retirement). The famed corporate rating system utilized by Moody's assigns a particular rating, Aaa to C (highest to lowest), based on "the possibility that a financial obligation will not be honored as promised." For a full discussion of Moody's rating system, see Moody's in Asia—Rating System, http://www.moodysasia.com/mdcsPage.aspx?template=rating_definitions&mdcslId=9 (last visited June 10, 2007). Such ratings reflect both "the likelihood of default and any financial loss suffered in the event of default." \textit{Id.} Moody's Aaa rated corporate bonds are the highest rated and "are judged to be of the highest quality, with minimal credit risk." \textit{Id.}

\textsuperscript{176} Adam G. Winters, Financial Data and Insurance Premium Compilation (Oct. 6, 2005) [hereinafter Winters, T-Bond and Premium Compilation] [data compilation of treasury and corporate bond data, as well as Illinois insurance premium data from both the Federal Reserve Bank of St. Louis "Fred®" database and the A.M. Best insurance study, on file with the DePaul Law Review]. Additionally, each of the data series were individually retrieved from the Federal Reserve Bank of St. Louis, which maintains over 3000 series of economic and fiscal data in their Fred® database. For the corporate bond data, see Moody's Seasoned Aaa Corporate Bond Yield, http://research.stlouisfed.org/fred2/data/AAA.txt (last visited June 10, 2007). For the treasury bond data sets, see St. Louis Fed: Economic Data—FRED®, \textit{supra} note 36.

\textsuperscript{177} Winters, T-Bond and Premium Compilation, \textit{supra} note 176.

\textsuperscript{178} Correlation does not empirically show causation, nor does it capture what the true motives were for the premium increases. It is also important to note that this is not a regression analysis. As such, these results do not tell us that the changes in premiums are caused, three-quarters of the time, by changes in the respective T-Bond rates. It only tells us that in most cases the rates and premiums move opposite one another. \textit{See supra} notes 39–40 and accompanying text.
This is not to say, however, that claims paid by insurance companies have nothing to do with the changes in premiums. In fact, the data indicate that, between 1976 and 2000, the premiums charged by Illinois insurers and the losses paid out by those insurers shared a positive 93% correlation.179 This means that when insurance companies were made to pay out more in claims, they almost always raised their premiums correspondingly. Thus, claims or “losses” provide a partial explanation for many of the fluctuations in premiums, but they do not tell the whole story, as indicated by the relationship between premiums and the cycle of interest rates. These results suggest that premiums are not solely a function of losses paid out on claims but are derived as part of a more nuanced process involving claims, investment income, and the prospects for future interest rate fluctuations.

B. Would Proposed Damage Caps Be Effective or Even Constitutional if Implemented?

In the rush to correct the perceived tort crisis, proponents of measures such as damage caps often fail to evaluate whether such measures, though politically expedient, would be effective, fair, or even constitutional. Scholars, observers, and practitioners have all dedicated significant amounts of time and effort to this subject.180 It is relevant here because damage caps and other similar measures are often the proposed solution to concerns about noneconomic damages, medical malpractice, judicial fairness, and so on. However intuitive damage caps may seem, they suffer from a lack of effectiveness in achieving regularity in damage awards, and their constitutionality and fairness are shaky at best. The following discussion centers around medical malpractice damage caps, though the analysis can be extrapolated to tort cases generally.

1. Effectiveness

Much of the empirical evidence on tort damage caps indicates that they often struggle to rein in jury awards and do little in the way of controlling insurance premiums. For example, California, Colorado, and Montana, which all have $250,000 caps on noneconomic damages, have seen their median payment for noneconomic damages increase

179. See Winters, T-Bond and Premium Compilation, supra note 176.
180. See, e.g., Finley, supra note 70; Nathanson, supra note 172; E. Farish Percy, Checking up on the Medical Malpractice Liability Insurance Crisis in Mississippi: Are Additional Tort Reforms the Cure?, 73 Miss. L.J. 1001 (2004); Catherine M. Sharkey, Unintended Consequences of Medical Malpractice Damages Caps, 80 N.Y.U. L. REV. 391 (2005); Gfell, supra note 27; Van Grack, supra note 168.
53%, 31%, and 169%, respectively, between 1997 and 2003. In fact, some research indicates that such well-publicized or long-standing caps may distort the jury process and artificially increase awards for otherwise minor injuries.

The other major argument in favor of damage caps is that they give insurers, especially medical malpractice insurers, the loss protection necessary to hold premiums level, if not decrease them. But Professor Marc Galanter recognized that the evidence does not “support the perceived deleterious effects of the present civil litigation system”; the only effect is reduced payments to those injured and increased profits for their insurers. Vidmar has noticed that many of the arguments in favor of damage caps “have no empirical basis and were based on unsubstantiated perceptions or unreliable data.” As an example, Vidmar cited a case study from Indiana, where damage caps were put into effect in 1975, finding that the number of claims filed per year had actually increased since the inception of the caps. Vidmar went on to assert “that he [was] aware of no reliable evidence in the formal studies which indicate that a limit on noneconomic damages corresponds to a significant impact on the cost or availability of health care or that noneconomic damages and the costs of liability insurance are directly linked.” Consistent with Galanter’s and Vidmar’s assertions, Farmers Insurance Group decided to stop writing policies in several states in late 2003, most of those being states that had long-standing caps on damages: Hawaii, Idaho, Missouri, and even California.

Other empirical evidence also seems to support the claim that damage caps are little more than cosmetic remedies. For example, in a hearing before the House Subcommittee on Health, it was revealed that the five states with the highest medical malpractice insurance premiums—Florida, Michigan, Nevada, Ohio, and West Virginia—are all

181. Percy, supra note 180, at 1080–81 & tbl.11.
182. Sharkey, supra note 180, at 423–26 (citing a behavioral study conducted by Michael Saks, which indicated that having an established cap influenced jurors to use that amount as an “anchor” or starting point in awarding damages, resulting in an “upward effect on awards” that should otherwise have been well below the $250,000 cap limit).
184. Id. (relying on Vidmar’s statement).
186. Best, 689 N.E.2d at 1068.
states that have implemented damage caps.\textsuperscript{188} In contrast, the state with the lowest premiums in the nation, Oklahoma, does not have any cap on damages.\textsuperscript{189} Furthermore, "between 1991 and 2002 the median annual medical malpractice insurance premiums rose 35.9\% in states that did not cap damages, compared to a 48.2\% increase in states where damages are capped."\textsuperscript{190} In fact, only eight states saw medical malpractice premiums hold steady or decline over that time period;\textsuperscript{191} six of them do not have damage caps.\textsuperscript{192} On the whole, "[i]nsurers in states with caps raised their premiums at a significantly faster pace than those in states without caps" and are more likely to have "premiums exceeding the national median than those in states without caps."\textsuperscript{193} Thus, the empirical analysis indicates that damage caps do little to affect the movement of insurance premiums.

2. \textit{Constitutionality}

The other question is whether the imposition of damage caps would pass constitutional muster.\textsuperscript{194} The first claim often made is that damage caps violate a party's right to a trial by jury under the Seventh Amendment.\textsuperscript{195} The idea is that the damages are an issue of fact for the jury; caps violate an individual's right to a trial by jury by effec-


\textsuperscript{189} \textit{Id.}


\textsuperscript{191} \textit{Id.} at 25.

\textsuperscript{192} \textit{Id.}

\textsuperscript{193} \textit{Id.} (internal quotation marks omitted) (citing Martin D. Weiss et al., Medical Malpractice Caps: The Impact of Non-economic Damage Caps on Physician Premiums, Claims Payout Levels, and Availability of Coverage 8 (2003), http://www.weissratings.com/MedicalMalpractice.pdf). The caps are relatively ineffective in curbing premium increases. In 2003, Florida Governor Jeb Bush pushed a medical malpractice bill through the Florida legislature, promising that the damage caps imposed by the "bill would 'reduce ever-increasing insurance premiums for Florida's physicians.'" Julie Kay, Surprise Hikes Despite Legislation That Promised to Rein in Physicians' Insurance Premiums, Three Firms File for Big Rate Increases, MIAMI DAILY BUS. REV., Nov. 20, 2003. The accounting firm of Deloitte and Touche was hired to project the results of these caps, which they concluded would be a precipitous drop in insurance premiums of nearly 8\%. \textit{Id.} This was not what happened, however. In November of 2003, just three months after the passage of the bill, three insurance carriers requested permission from the Florida Office of Insurance Regulation to raise their rates yet again. \textit{Id.}

\textsuperscript{194} See, e.g., Gfell, supra note 27, at 783–99.

\textsuperscript{195} U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .").
tively taking the determination out of the jury’s hands. The Illinois Tort “Crisis”

State courts that have invalidated damage caps on these grounds have generally looked at the scope of the jury’s function at the time of its state constitution’s passage; they found that the determination of damages was within that scope at the time of passage, therefore making a legislative attempt to remove that power unconstitutional.

The other major constitutional argument offered against damage caps is that they violate the Equal Protection Clause of the Fourteenth Amendment and similar provisions of state constitutions. The assertions made under these provisions are generally based on one of two grounds:

(1) differential treatment of plaintiffs in medical malpractice cases versus plaintiffs in other personal injury cases (who can obtain full recovery), and (2) plaintiffs severely injured through medical malpractice who have large non-economic damages versus those with small or non-existent non-economic damages from medical malpractice (who can obtain full recovery).

The outcome of a court’s analysis of a particular situation will be the result of a multifaceted approach, weighing “the nature of the rights involved, . . . the interest of the state in promulgating the legislation[,] [and] the relation between the differential treatment and the goal meant to be obtained.”

Some have argued that these caps discriminate against women and children, who generally have fewer recoverable “economic” damages such as wages, but must be awarded noneconomic damages to be fully compensated. Economic damages awarded to compensate for wage loss provide the most benefit to higher wage earners. Women (who on average earn less than men) and children (who often have no such damages at all) will receive less for similar injuries. Moreover, in projecting economic damages based on future wage losses, attorneys and judges often use wage data that has built-in gender and racial bi-


197. Gfell, supra note 27, at 784 (citing Lakin v. Senco Prods., Inc., 987 P.2d 463, 468–75 (Or. 1999)).

198. U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); see also ILL. CONST. art. I, § 2 (“No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.”).

199. Gfell, supra note 27, at 790.

200. Id. at 791.

201. Finley, supra note 70, at 1280–82.

202. Id. at 1281.
ases, essentially assuming that current "wage disparities will remain ensconced in the future." This makes noneconomic damages relatively more important to women, children, and minorities. Thus, a cap that limits recovery for only noneconomic injuries may have a disproportionate impact on these groups, giving rise to constitutional challenges.

Further, some medical malpractice injuries are suffered disproportionately by women, including difficulties involved in pregnancy or child birth. Those injuries affect women in primarily noneconomic terms, such as "emotional distress and grief . . . impaired relationships, or impaired physical capacities, such as reproduction, that are not directly involved in market based wage earning activity." Such considerations are deemed "worthless" in the market. As a result, these injuries can only be compensated by noneconomic damages, which will be capped, indexed, and limited under most plans. If not equal protection, then simple fairness demands that measures are not taken which could create such unfortunate byproducts.

3. Alternative Measures

While many agree on the need to improve patient safety, stabilize insurance premiums, and protect physicians, damage caps rest on shaky practical and constitutional grounds, so it is appropriate to discuss some alternatives that can accomplish these goals. The first set of alternatives deals with the parties to a suit and the litigation affect on insurance premiums. It has been suggested that we adopt a practice similar to that employed in Great Britain, where the loser in a lawsuit pays the attorney's fees of the prevailing party. The costs of litigation, especially in the area of medical malpractice, can be incredibly high. The idea is that forcing a losing plaintiff (or their attorneys) to pay the opposition's legal fees would compel plaintiffs' attorneys to reject cases that appear meritless. Of course, transferring additional risks of litigation onto attorneys may lead them to be cautious in selecting cases; some meritorious claims could go unheard and without remedy.

203. Id. at 1280.
204. Id. at 1280–82.
205. Id.
206. Id. at 1281.
207. Finley, supra note 70, at 1281.
208. See, e.g., Gfell, supra note 27, at 806–07.
209. Id. at 806.
A second proposal involves the creation of award "schedules," which are legislatively created ranges of appropriate awards for different types of injury. Like damage caps, these ranges would allow parties to a lawsuit to more effectively calculate the risks of litigation. It is alleged that such schedules would allow insurance companies to account for risk by defining what their exposure to liability may be when insuring a particular doctor in a particular practice. Moreover, when combined with insurance data on the incidence of malpractice in certain specialties or practice areas, firms would be better able to assess their risks, invest accordingly, and maintain more stable premium levels. The counterargument here flows from the variability of awards given in Madison County and St. Clair County. Rigid boundaries, however intuitively appealing, may not fully account for the wide variability of fact patterns within even relatively specific types of claims, or the unique characteristics of individuals who are injured. For example, a schedule that limited damages for head trauma due to negligent operation of a motor vehicle to between $250,000 and $500,000 may be sufficient if the person sustaining injury is elderly or even an adult. If the injured person is a child who will require medical care for the next fifty or sixty years, this sum may be grossly inadequate. Such schedules, if established, would need the built-in flexibility to adapt to changing fact patterns in similar cases. Also, to the extent that these boundaries prevent awards that judges or juries truly feel are justified, the schedules invade provinces traditionally reserved to them.

Other alternatives focus reform not on the courts or even the doctors, but rather on the companies ultimately charging the premiums and writing the policies. It has been suggested that rather than tort reform, we need insurance reform. Companies will not willingly give up profits that it appears the market will bear; it is up to external regulation of the kind we see in the utilities markets to ensure the access to and affordability of insurance coverage. In offering this suggestion, some rely on the words of the Supreme Court in German Alliance Insurance Co. v. Lewis. In Lewis, Justice Joseph McKenna, relying on several lower court and state supreme court decisions,

210. Id. at 808.
211. Id.
212. Id.
213. Id.
214. See supra notes 132–149 and accompanying text.
215. See McAfee, supra note 187, at 183–84; Vine, supra note 190.
216. McAfee, supra note 187, at 183 (citing German Alliance Ins. Co. v. Lewis, 233 U.S. 389 (1914)).
stated that it is "the conception of the lawmaking bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation."\(^{217}\) This is so, the Court continued, because so much of the country's wealth is protected by the insurance mechanism, making it clearly of a public interest.\(^{218}\)

Insurance reformers instruct us to look no further than California, a state hailed by those who favor damage caps for its aggressive tort reform measures and its passage of the Medical Injury Compensation Reform Act (MICRA) in 1976.\(^{219}\) The legislation placed a hard cap of $250,000 on noneconomic damages.\(^{220}\) Insurance reformers would point out, however, that the caps did little to slow down premiums, which actually increased by 16% in some instances and as much as 337% in others.\(^{221}\) After several years of this trend, voters in California cast their ballots to approve Proposition 103,\(^{222}\) which required (1) "every insurer [to] reduce its charges to levels which are at least 20% less than the charges for the same coverage which were in effect on November 8, 1987";\(^{223}\) (2) a temporary freeze of rate increases;\(^{224}\) and (3) that all future premium increases needed prior approval by the state's Department of Insurance.\(^{225}\) In response to the passage of Proposition 103, insurance premiums in California immediately fell by over 20% (due to the requirement in the statute) and have since risen only in proportion to inflation.\(^{226}\) The disadvantage of this approach is that it puts the government in charge of deciding reasonable premiums and profit levels for an industry where investments are derived in the free market and risks are not capped. Also, as we saw above, premiums seem to move in relation to losses paid.\(^{227}\) A simple cap on

\(^{217}\) German Alliance Ins. Co., 233 U.S. at 412.

\(^{218}\) Id. at 413.


\(^{220}\) Cal. Civ. Code § 3333.2(b) (McKinney 1997).

\(^{221}\) GAO, Six State Case Studies, supra note 219, at 26.

\(^{222}\) Cal. Ins. Code § 1861.01 (McKinney 2005).

\(^{223}\) Id.

\(^{224}\) Id.

\(^{225}\) Id.


\(^{227}\) See supra note 179 and accompanying text.
premiums may not be a complete solution, though it seems to have been effective in California thus far.228

The last alternative would provide increased protections for doctors, hospitals, and researchers to study and seek corrections for past medical errors to improve patient safety. But it would also shield the doctors and institutions involved from having the information used against them in litigation. Specifically, it has been suggested that the State of Illinois establish a systemic errors reporting system under the authority of the Illinois Medical Studies Act.229 This could provide a safe harbor in which errors could be analyzed openly with the ultimate goal of greater patient safety and physician competency.230 The thought is that "absent the statutory peer-review privilege, physicians would be reluctant to sit on peer-review committees and engage in frank evaluations of their colleagues."231 Only if we provide the medical community the requisite space and protection can patient safety be addressed directly, as opposed to the indirect means of assessing penalties through litigation.

This Comment proposes a blended approach. It is apparent from the data that damage caps alone would do little to rein in awards or premiums, and would have the deleterious effect of falling disproportionately on women, children, and the elderly.232 The data from California, however, suggest that a form of insurance regulation would have the desired effect of slowing down the massive premium increases we have experienced in the last several years without a corre-

228. A provision similar to California's Proposition 103 was passed recently in Illinois, but with some potentially significant differences. See 215 ILL. COMP. STAT. ANN. 5/155.18 (West 2000 & Supp. 2007) (insurance regulation); 735 ILL. COMP. STAT. ANN. 5/2-1706.5 (West 2005) (setting the damage cap for noneconomic damages at $500,000). The statute further specifies that "[t]he burden is on the company to justify the rate or proposed rate at the public hearing." 215 ILL. COMP. STAT. ANN. 5/155.18. The damage cap portion of the new statute limits noneconomic damages to $500,000. Id. § 5/2-1706.5. The most noteworthy difference from the California statutes is that the Illinois statute is "non-severable." This means that, unlike in California, if either the damage cap provision or the insurance regulatory provision were deemed unconstitutional, then both provisions would be invalidated. Id. This could be significant as the Illinois Supreme Court has recently invalidated a similar damage cap on constitutional grounds. See Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997) (holding unconstitutional Public Act 89-7, which limited the recovery of noneconomic damages to $500,000). It is unclear what sort of effect this has or will have on awards and insurance rates in Illinois, but if California is any indication, this could provide a good first step in the effort to rein in insurance premiums.


230. Id.

231. Id. at 3 (citing Roach v. Springfield Clinic, 623 N.E.2d 246, 251 (Ill. 1993)).

232. See supra notes 181–193, 201-207 and accompanying text.
sponding negative effect on the accessibility of health care. The other serious concerns are both the future protection of the individuals injured and the doctors we look to for help in emergencies. Thus, this Comment proposes the passage of comprehensive insurance rate regulation, as Illinois has recently done. But the regulation should recognize that insurance companies operate in free markets and bear risks which are not indexed and capped. It should also include an expansive “safe harbor” provision so that doctors, researchers, and hospitals could conduct an open self-evaluation and improve patient safety without the concomitant fear that the information will be used against them in litigation.

V. Conclusion

You cannot believe everything that you hear. Many groups and individuals, from ATRA to President Bush, have criticized our justice system, telling us it is broken, unfair, and costly to innocent Americans. Others have told us that the judges in Madison County and St. Clair County are to blame, even accusing them of being in the pockets of trial lawyers. The data indicate that there is some truth to the assertion that the system is imperfect. But the data also tell us that, while the systems in Madison County and St. Clair County may not be perfect, they are no different from other jurisdictions. Plaintiffs here do not perform appreciably better than plaintiffs nationally, and state courts decide cases nearly identically to their federal counterparts.

There is still much work to be done in this area; this was only one sample and only a starting point. Future research, including a larger database of Illinois decisions and a fuller national sample, could allow the comparison of awards between cases with much closer fact patterns than was available here. The use of regression analysis could move beyond inferences drawn from correlations to being able to statistically show the influence of investment income and claims paid on insurance premiums. A closer look into the effectiveness and constitutionality of damage caps is certainly warranted, as is an evaluation of each of the alternatives offered alongside of them. Any and all of this work could be incredibly valuable.

Though one may criticize the relative variance of awards, much of that can be explained by the divergence of factual situations that confront judges and juries on a daily basis. Some contend that caps will be the answer. It is perfectly intuitive to see a problem in rising insur-

233. See supra notes 215–228 and accompanying text.
234. See supra note 228.
ance premiums, believe what is said about the tort system’s responsibility for it, and conclude that capping the latter will stop the former. But before declaring “mission accomplished” in solving this problem, consider the following. The latest ATRA study lists its top “hellhole” for 2005 as the jurisdiction of Rio Grande Valley in President Bush’s home state of Texas, a leader in the enactment of damage caps; and moved to the top of ATRA’s “watch list” was California, the first state to enact sweeping damage cap legislation.\(^{235}\) Going forward, it appears that caps will not be the answer, and no one is quite sure what will be. As discussed above, some feel that different payment structures, a medical malpractice reporting system, or even regulation of the insurance industry will be the panacea. To be sure, each proposed solution has its drawbacks, but it does show that there is more than one alternative to consider. It may even take several of the measures to achieve the results and justice we seek.

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