

UPDATE

THE LIABILITY INSURANCE CRISIS: WHAT NEXT

(Updating Backgrounder No. 498, "The Liability Insurance Crisis: What Washington Can Do to Help," March 27, 1986.)

Only a half-year ago, America was facing a liability insurance crisis. Desperate businessmen without insurance and cities closing playgrounds for lack of coverage were subjects of front-page headlines and magazine cover stories. Then, suddenly, the whole issue seems to have disappeared. Has the liability crisis been solved? Or was it a myth conjured up by insurance companies? To both questions the answer is no. The U.S. is still suffering an insurance liability crisis and consumers across the country are paying the price. The situation is now more stable--and thus no longer newsworthy--but it has not been solved. Reform of the tort laws still is needed.

Such reform, however, at least has begun. While Congress failed to enact reform legislation last year, numerous state legislatures acted. As many of these legislatures reconvene this month, further reform efforts are scheduled. This process of reform will be slow, as legislators try to correct problems of the tort system that have been developing for decades, but it must continue.

The liability insurance crisis first gained widespread attention early last year, as businesses and non-profit groups across the country experienced huge increases in liability insurance premiums. Many even faced cancellation of their insurance. The U.S. Chamber of Commerce reported that 40 percent of its members had seen increases of 100 to 500 percent in their insurance costs. Some 20 percent had their policies cancelled altogether.

This situation has now stabilized: for the most part insurance rates have been level for about the last six months and some cancelled policies have been restored. However, rates generally have not

decreased; consumers still are paying several times as much for insurance as they did only a year ago. Thus, consumers continue to bear the high cost of a badly flawed liability system.

Significant progress was made last year in reforming liability rules. Although Congress passed no liability reform legislation, many states did act. Among the most important changes:

- * Twelve states, including California, modified the joint and several liability rule. Under this rule, a defendant, even if only 1 percent at fault, can be held liable for 100 percent of a judgment, thus forcing many defendants to pay for injuries for which they are only peripherally responsible. Three of these states completely abolished the rule, while the rest limited its application.

- * Seven states limited the amount of non-economic damages, such as for pain and suffering, which may be awarded to plaintiffs.

- * Ten states made punitive damages more difficult to obtain, or capped the amount. New Hampshire abolished punitive damages entirely.

- * Five states provided for the award of attorney's fees to the winning party when a lawsuit is found to be "frivolous," thus discouraging potential plaintiffs from filing such suits.

At the same time, however, many states also enacted measures increasing regulation of the insurance industry. Florida, for instance, mandated a 40 percent roll-back in rates. Such forced reductions, however, as other forms of price controls, ultimately hurt rather than help consumers by discouraging the supply of insurance. In fact, within two weeks of passage of Florida's measure, six major insurers stopped writing policies in the state. Others are expected to follow suit if a court challenge to the measure fails, leaving Floridians with even less access to insurance.

Despite last year's welcome progress, the real job of reforming the liability system has only begun. More states need to act, for instance, to reform their joint and several liability rules, to restrain unwarranted punitive damage awards, and to provide for awards of attorney's fees to discourage unwarranted litigation. More fundamentally, the underlying standards of liability in particular areas of tort law, such as product liability and professional malpractice, must be reexamined.

The job of restoring balance and fairness to the liability system will take a long time, and will require changes in judicial attitudes as well as legislation. Yet, important progress was made last year by state legislators. With continued efforts by the states and by Congress, the crisis finally can be resolved, to the benefit of all consumers.

James L. Gattuso
Policy Analyst