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<table>
<thead>
<tr>
<th>SUBJECT INDEX</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Administration of Justice</td>
<td>vii</td>
</tr>
<tr>
<td>Alternative Dispute Resolution</td>
<td>ix</td>
</tr>
<tr>
<td>Areas of Liability</td>
<td>xi</td>
</tr>
<tr>
<td>Asbestos</td>
<td>xi</td>
</tr>
<tr>
<td>Auto Personal Injury Compensation</td>
<td>xii</td>
</tr>
<tr>
<td>Aviation Accidents</td>
<td>xiv</td>
</tr>
<tr>
<td>Environment</td>
<td>xiv</td>
</tr>
<tr>
<td>Medical Malpractice</td>
<td>xv</td>
</tr>
<tr>
<td>Product Liability</td>
<td>xvii</td>
</tr>
<tr>
<td>Workers’ Compensation</td>
<td>xviii</td>
</tr>
<tr>
<td>Terrorism</td>
<td>xviii</td>
</tr>
<tr>
<td>Bankruptcy</td>
<td>xxi</td>
</tr>
<tr>
<td>The Business of Law</td>
<td>xxi</td>
</tr>
<tr>
<td>Corporate Ethics and Governance</td>
<td>xxi</td>
</tr>
<tr>
<td>Employment Law</td>
<td>xxii</td>
</tr>
<tr>
<td>Entrepreneurship</td>
<td>xxii</td>
</tr>
<tr>
<td>Health and Safety in the Workplace</td>
<td>xxiii</td>
</tr>
<tr>
<td>Health Law</td>
<td>xxiii</td>
</tr>
<tr>
<td>Insurance Law and Regulation</td>
<td>xxiv</td>
</tr>
<tr>
<td>Litigation, Jury Verdicts, and Damages</td>
<td>xxviii</td>
</tr>
<tr>
<td>Mass Torts and Class Actions</td>
<td>xxx</td>
</tr>
<tr>
<td>Terrorism Risk Management Policy</td>
<td>xxxi</td>
</tr>
<tr>
<td>Tort Reform</td>
<td>xxxii</td>
</tr>
<tr>
<td>Trends in the Tort Litigation System</td>
<td>xxxiii</td>
</tr>
<tr>
<td>Category</td>
<td>Page</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>ABSTRACTS</td>
<td>1</td>
</tr>
<tr>
<td>Monograph/Reports</td>
<td>1</td>
</tr>
<tr>
<td>Monographs</td>
<td>13</td>
</tr>
<tr>
<td>Reports</td>
<td>19</td>
</tr>
<tr>
<td>Technical Reports</td>
<td>37</td>
</tr>
<tr>
<td>Notes</td>
<td>41</td>
</tr>
<tr>
<td>Papers</td>
<td>47</td>
</tr>
<tr>
<td>Issue Papers</td>
<td>53</td>
</tr>
<tr>
<td>Occasional Papers</td>
<td>57</td>
</tr>
<tr>
<td>Working Papers</td>
<td>59</td>
</tr>
<tr>
<td>Documented Briefings</td>
<td>67</td>
</tr>
<tr>
<td>Conference Proceedings</td>
<td>69</td>
</tr>
<tr>
<td>Testimony</td>
<td>71</td>
</tr>
<tr>
<td>Drafts</td>
<td>73</td>
</tr>
<tr>
<td>Reprints</td>
<td>75</td>
</tr>
<tr>
<td>Journal Articles and Book Chapters</td>
<td>97</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Category</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>AUTHOR INDEX</td>
<td>101</td>
</tr>
</tbody>
</table>
Administration of Justice


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Kakalik, J. S., and N. M. Pace, *Costs and Compensation Paid in Tort Litigation: Testimony Before the Joint Economic Committee of the U.S. Congress*, P-7243-ICJ, July 1986. ...................... 49


Resnik, J., “Managerial Judges,” R-3002-ICJ, 1982. ................................................................. 23


**Alternative Dispute Resolution**


Hensler, D. R., *Court-Annexed Arbitration in the State Trial Court System*, P-6963-ICJ, 1984. (Testimony before the Judiciary Committee Subcommittee on Courts, United States Senate, February 1984.) ...................................................... 47


———, *Summary of Research Results on the Tort Liability System*, P-7210-ICJ, 1986. (Testimony before the Committee on Commerce, Science, and Transportation, United States Senate, February 1986.) ...................................................... 48

———, *What We Know and Don’t Know About Court-Administered Arbitration*, N-2444-ICJ, 1986. ................................................................. 42


———, “A Research Agenda: What We Need to Know About Court-Connected ADR,” RP-871-ICJ, 2000. (Reprinted from *Dispute Resolution*, Fall 1999.) ...................................................... 89


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**Areas of Liability**

**Asbestos**


(Testimony before the National Conference of State Legislatures, January 1986.) .................. 48

**Auto Personal Injury Compensation**


Carroll, S. J., J. S. Kakalik, N. M. Pace, and J. L. Adams, No-Fault Approaches to Compensating People Injured in Automobile Accidents, R-4019-ICJ, 1991 .................. 35


———, Compensation for Accidental Injuries: Research Design and Methods, N-3230-HHS/ICJ, 1991. ........................................................................ 44

Houchens, R. L., Automobile Accident Compensation: Volume III, Payments from All Sources, R-3052-ICJ, 1985. ........................................................................ 26


———, Deterring Fraud: The Role of General Damage Awards in Automobile Insurance Settlements, DRU-2832-ICJ, 2002. .......................................................... 74


MacCoun, R. J., “Blaming Others to a Fault?” RP-286. (Reprinted from Chance, Vol. 6, No. 4, Fall 1993.) .......................................................... 80


**Aviation Accidents**


———, *Aviation Accident Litigation Survey: Data Collection Forms*, N-2773-ICJ, 1988. .................................................. 43


———, *Dispute Resolution Following Airplane Crashes*, R-3585-ICJ, 1988. .................................................. 31


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**Environment**


September 2008
Dixon, L. S., Superfund and Transaction Costs: The Experiences of Insurers and Very Large Industrial Firms, CT-102, 1992. ................................................................. 71

———, RAND Research on Superfund Transaction Costs: A Summary of Findings to Date, CT-111, November 1993. ................................................................. 71


———, Superfund Liability Reform: Implications for Transaction Costs and Site Cleanup, CT-125, 1995. ........................................................................... 71

———, The Financial Implications of Releasing Small Firms and Small-Volume Contributors from Superfund Liability, MR-1171-EPA, 2000. .................................................... 7


———, Economic Perspectives on Revising California’s Zero-Emission Vehicle Mandate, CT-137, March 1996. ................................................................. 72


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———, The Disposition of Medical Malpractice Claims, R-2622-HCFA, 1980. ..................................................... 19

———, Why Are Malpractice Premiums So High—Or So Low? R-2623-HCFA, 1980. ..................................................... 19
———, The Frequency and Severity of Medical Malpractice Claims, R-2870-ICJ/HCFA, 1982. ................................................................. 21

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Kravitz, R. L., J. E. Rolph, and K. A. McGuigan, Malpractice Claims Data as a Quality Improvement Tool: I. Epidemiology of Error in Four Specialties, N-3448/1-RWJ, 1991. .......................................... 45


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Shubert, G. H., Some Observations on the Need for Tort Reform, P-7189-ICJ, 1986. (Testimony before the National Conference of State Legislatures, January 1986.) ..................... 48


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R-2716/1-ICJ, 1980. .................................................... 20


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R-3999/1-HHS/ICJ, 1991. ............................................. 35


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MacCoun, R. J., “Blaming Others to a Fault?” RP-286. (Reprinted from *Chance*, Vol. 6, No. 4, Fall 1993.) ...................................................... 80


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———, Paying for Repackaged Drugs Under the California Workers’ Compensation Official Medical Fee Schedule, WR-260-1-ICJ, 2005. .......................................................... 60

Wynn, B. O., and G. Bergamo, Payments for Burn Patients Under California’s Official Medical Fee Schedule for Injured Workers, WR-263-1-ICJ, 2005. .......................................................... 60
Payment for Hardware Used in Complex Spinal Procedures Under California’s Official Medical Fee Schedule for Injured Workers, WR-301-ICJ, 2005. .......................... 61


Bankruptcy


The Business of Law
Danzon, P. M., Contingent Fees for Personal Injury Litigation, R-2458-HCFA, 1980. .......................... 19


Corporate Ethics and Governance


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**Employment Law**

*See also Areas of Liability: Workers’ Compensation and Health and Safety in the Workplace.*


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**Entrepreneurship**


**Health and Safety in the Workplace**


Marquis, M. S., *Economic Consequences of Work-Related Injuries*, CT-103, 1992. .................................................. 71


<table>
<thead>
<tr>
<th>Name</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
</table>
Insurance Law and Regulation


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A Policy Perspective, R-4019 /1-ICJ, 1991. .......................................................... 35
Carroll, S. J., J. S. Kakalik, N. M. Pace, and J. L. Adams, No-Fault Approaches to 
Compensating People Injured in Automobile Accidents, R-4019-ICJ, 1991. ................. 35
Carroll, S. J., T. LaTourrette, B. G. Chow, G. S. Jones, and C. Martin, Distribution of 
Losses from Large Terrorist Attacks Under the Terrorism Risk Insurance Act, MG-427- 
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Chalk, P., B. Hoffman, and R. T. Reville, Trends in Terrorism: Threats to the United States 
and the Future of the Terrorism Risk Insurance Act, MG-393-CTRMP, 2005. ................. 14
Dixon, L. J., Arlington, S. J. Carroll, D. Lakdawalla, R. T. Reville, and D. M. Adamson, 
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OP-135-ICJ, 2004. ..................................................................................... 57
Dixon, L., N. Clancy, B. Bender, and P. K. Ehrler, The Lender-Placed Flood Insurance 
Program’s Market Penetration Rate: Estimates and Policy Implications, TR-300-FEMA, 2006. ................................................................. 37
Dixon, L., R. J. Lempert, T. LaTourrette, and R. T. Reville, The Federal Role in Terrorism 
Dixon, L., R. J. Lempert, T. LaTourrette, R. T. Reville, and P. Steinberg, Trade-Offs 
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Results, DB-525-CTRMP, 2007. ........................................................................ 68
Dixon, L., J. W. Macdonald, and J. Zissimopoulos, Commercial Wind Insurance in the 
Gulf States: Developments Since Hurricane Katrina and Challenges Moving Forward, OP-
190-ICJ, 2007. ..................................................................................... 58
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and Development, Catastrophic Risks and Insurance: Policy Issues in Insurance, No. 8, 
2005.) ................................................................. 94
———, “National Security and Private-Sector Risk Management for Terrorism,” RP-
1233, 2006. (Reprinted from P. Auerswald, L. M. Branscomb, T. M. La Porte, E. Michel-
University Press, 2006, Chapter 18, pp. 292–304.) ..................................................... 94
Eibner, C., The Economic Burden of Providing Health Insurance: How Much Worse Off Are 
Small Firms? TR-559-EMKF, 2008. ................................................................. 40
Farley, D. O., M. D. Greenberg, C. Nelson, S. Seabury, Assessment of 24-Hour Care 
Options for California. MG-280-ICJ, 2004 .......................................................... 14
———, Assessment of 24-Hour Care Options for California, WR-163-1-ICJ, 2004. .......... 59
Gates, S. M., K. Kapur, and P. Karaca-Mandic, State Health Insurance Mandates, 
Consumer-Directed Health Plans and Health Savings Accounts: Are They a Panacea for Small 
Businesses? WR-450-ICJ, 2007. ........................................................................ 64
———, Consumer-Directed Health Plans and Health Savings Accounts: Are They a Panacea for Small Businesses? WR-520-EMKF, 2007. ............................................................ 65

———, “Consumer-Directed Health Plans and Health Savings Accounts: Have They Worked for Small Business?” published in Forum for Health Economics & Policy, Vol. 11, No. 2 (Health Economics), Article 4, 2008. ........................................ 100

Gates, S. M., and K. J. Leuschner, eds., In the Name of Entrepreneurship? The Logic and Effects of Special Regulatory Treatment for Small Business, MG-663-EMKF, 2007. ............................................ 16


Greenberg, M. D., P. Chalk, H. H. Willis, I. Khilko, and D. S. Ortiz, Maritime Terrorism: Risk and Liability, MG-520-CTRMP, 2006. .................................................. 15


———, Compensation for Accidental Injuries: Research Design and Methods, N-3230-HHS/ICJ, 1991. ................................................................. 44

Houchens, R. L., Automobile Accident Compensation: Volume III, Payments from All Sources, R-3052-ICJ, 1985. ................................................................. 26


———, *Deterring Fraud: The Role of General Damage Awards in Automobile Insurance Settlements*, DRU-2832-ICJ, 2002. .......................................................... 74

MacCoun, R. J., “Blaming Others to a Fault?” RP-286. (Reprinted from *Chance*, Vol. 6, No. 4, Fall 1993.) .......................................................... 80


**Litigation, Jury Verdicts, and Damages**


———, Punitive Damages in Financial Injury Jury Verdicts, CT-143, June 1997. (Written statement delivered on June 24, 1997, to the Judiciary Committee of the United States Senate.) ................................................................. 72


Hensler, D. R., Summary of Research Results on the Tort Liability System, P-7210-ICJ, 1986. (Testimony before the Committee on Commerce, Science, and Transportation, United States Senate, February 1986.) .................................................... 48


———, Compensation for Accidental Injuries: Research Design and Methods, N-3230-HHS/ICJ, 1991. ......................... 44


MacCoun, R. J., Getting Inside the Black Box: Toward a Better Understanding of Civil Jury Behavior, N-2671-ICJ, 1987. ................................................................. 43


<table>
<thead>
<tr>
<th>Subject Index</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>—,—, Improving Jury Comprehension in Criminal and Civil Trials, CT-136, July 1995.</strong></td>
</tr>
<tr>
<td><strong>Martin, J. W., Jr, Establishing a Good-Faith Defense to Punitive-Damage Claims, P-8048, 2000.</strong></td>
</tr>
<tr>
<td><strong>Moller, E., Trends in Punitive Damages: Preliminary Data from California, DRU-1059-ICJ, 1995.</strong></td>
</tr>
<tr>
<td><strong>Moller, E., N. M. Pace, and S. J. Carroll, Punitive Damages in Financial Injury Jury Verdicts, MR-888-ICJ, 1997.</strong></td>
</tr>
<tr>
<td><strong>—,—, Punitive Damages in Financial Injury Jury Verdicts: Executive Summary, MR-889-ICJ, 1997.</strong></td>
</tr>
<tr>
<td><strong>Moller, E., E. S. Rolph, and P. Ebener, Private Dispute Resolution in the Banking Industry, MR-259-ICJ, 1993.</strong></td>
</tr>
<tr>
<td><strong>Peterson, M. A., Compensation of Injuries: Civil Jury Verdicts in Cook County, R-3011-ICJ, 1984.</strong></td>
</tr>
<tr>
<td><strong>—,—, Punitive Damages: Preliminary Empirical Findings, N-2342-ICJ, 1985.</strong></td>
</tr>
<tr>
<td><strong>—,—, Summary of Research Results: Trends and Patterns in Civil Jury Verdicts, P-7222-ICJ, 1986. (Testimony before the Subcommittee on Oversight, Committee on Ways and Means, United States House of Representatives, March 1986.)</strong></td>
</tr>
<tr>
<td><strong>Peterson, M. A., S. Sarma, and M. G. Shanley, Punitive Damages: Empirical Findings, R-3311-ICJ, 1987.</strong></td>
</tr>
<tr>
<td><strong>—,—, Posttrial Adjustments to Jury Awards, R-3511-ICJ, 1987.</strong></td>
</tr>
</tbody>
</table>
(Testimony before the National Conference of State Legislatures, January 1986.) ............... 48

**Mass Torts and Class Actions**


(Testimony before the Courts and Judicial Administration Subcommittee, United States House Judiciary Committee, October 1991.) .................................................. 48


(Testimony before the Committee on Commerce, Science, and Transportation, United States Senate, February 1986.) ................................................................. 48


Terrorism Risk Management Policy


**Tort Reform**

Bailis, D. S., and R. J. MacCoun, *The Effects of Tort Reform on the Frequency and Severity of Medical Malpractice Claims: A Summary of Research Results*, P-7211-ICJ, 1986. (Testimony before the Committee on the Judiciary, United States Senate, March 1986.) ............................. 49


Trends in the Tort Litigation System


Carroll, S. J., Punitive Damages in Financial Injury Jury Verdicts, CT-143, June 1997. (Written statement delivered on June 24, 1997, to the Judiciary Committee of the United States Senate.) ......................................................... 72


Dunworth, T., and N. M. Pace, Statistical Overview of Civil Litigation in the Federal Courts, R-3885-ICJ, 1990. ................................................................. 34


Hensler, D. R., Summary of Research Results on the Tort Liability System, P-7210-ICJ, 1986. (Testimony before the Committee on Commerce, Science, and Transportation, United States Senate, February 1986.) ....................................................... 48

———, Trends in California Tort Liability Litigation, P-7287-ICJ, 1987. (Testimony before the Select Committee on Insurance, California State Assembly, 1987.) ........................................ 50


———, *Costs and Compensation Paid in Tort Litigation: Testimony Before the Joint Economic Committee of the U.S. Congress*, P-7243-ICJ, July 1986. ......................................................... 49


MONOGRAPH/REPORTS


This report estimates the transaction-cost share for 108 firms with annual revenues of less than $20 billion between 1981 and 1991 for 18 sites on the National Priority List—the worst sites to be cleaned up by the Superfund program. (Transaction costs are expenditures for litigation and negotiation; the transaction cost share is the ratio of transaction costs to the sum of transaction cost and cleanup costs.) The study estimates that private-sector firms spent an average of $32 million per site at the 18 study sites between 1981 and 1991 and that the average transaction-cost share was 32 percent. The small size of the sample introduced considerable uncertainty into these estimates. Transaction cost shares were higher for smaller firms because they tend to have a smaller volume of waste at the site. Sixty-five percent of the transaction costs were for legal work; many firms spent money on coverage dispute with their insurers, but few received reimbursement. Transaction costs were higher at sites with higher estimated total cleanup costs. 86 pages. Bibliography.


This report examines the use of private alternative dispute resolution (private ADR) by firms in the banking industry in response to a perceived liability crisis in the 1980s. The firms initially tested a procedure with which they were familiar, contractual arbitration provisions, in those contracts that were the source of the greatest liability concern and the most litigation cost. The firms stated that they were most interested in reducing the likelihood of punitive damages and eliminating the unpredictability of juries. Interviews indicate satisfaction with the private ADR program. Data collected from one firm show that the number of new cases filed against that firm in those areas, and the expected liability from those cases, declined after the introduction of the provisions. However, the actual funds paid for verdicts and settlements in those areas increased. Despite these conflicting results, the future appears to be bright for private ADR in this industry. 47 pages. Bibliography.


This report focuses on the possible effect of the proposed Superfund Reform Act of 1994 on transaction costs—costs resulting not from cleanup but from assigning liability for cleanup among the various parties. The analysis is based on previous work on transaction costs performed at RAND, and on telephone interviews with various stakeholders in the Superfund process. Stakeholders interviewed include representatives of large and small potentially responsible parties, insurers, reinsurers, the Environmental Protection Agency, the Department of the Treasury, environmental groups, and researchers. Because of its focus on transaction costs, this report does not address other important effects of the proposed legislation. For example, it does not discuss the effect of the proposed reforms on the EPA’s budget or on the relationship between the cost of Superfund cleanups and the benefits to human health and the environment from cleanups. 102 pages. Bibliography.

This study profiles private alternative dispute resolution (ADR) in Los Angeles. The study focused on all civil money suits in Los Angeles county in 1992 and 1993. Data came from interviews with six of the most active private ADR organizations, a survey of third-party neutrals offering services, and the Los Angeles County Superior Court case records. The study found that private ADR is a small, but growing, segment of the Los Angeles market and has the potential to reduce court workload. Private ADR is attracting substantial numbers of judges at retirement age. Because nearly half of the private ADR cases are automobile personal injury disputes, private ADR is probably not currently reducing the courts’ ability to set precedents through the public decision process. Providers of ADR services have substantial training and experience. Private ADR is serving individuals, business, and especially insurers. Most private ADR users choose arbitration, but mediation is receiving an increasing number of disputes. 63 pages. Bibliography.


The results of a survey of members of the California bar, conducted by the ICJ at the request of the Commission on the Future of the Legal Profession, are provided in this report. The Commission was established in 1993 to identify the key factors that will influence the delivery of legal services and the administration of justice over the next 25 years, develop a vision of the California legal profession of the future, and recommend to the State Bar of California’s Board of Governors how best to meet the future needs of the public and the profession. The ICJ survey asked State Bar members how they view the current state of the legal profession, what changes they expect to see in the future, and how the Bar can help the profession serve the public, now and in the future. 63 pages. Bibliography.


The Administrative Conference of the United States asked the Institute for Civil Justice to prepare a manual and develop prototype data collection instruments to assist those with responsibility for evaluating federal agency alternative dispute resolution programs. The manual discusses issues in designing evaluations, lays out approaches to data collection, provides sample data analysis plans, and includes a number of prototype data collection instruments. 93 pages. Bibliography.


Choice auto insurance would let drivers choose between traditional auto insurance and a no-fault plan. This report estimates how choice auto insurance would affect auto insurance costs in each state. The authors analyze the cost effects of a choice between tort and absolute no-fault in each of the states that now rely on the traditional tort system. (Absolute no-fault means that motorists neither recover nor are liable for noneconomic loss for any auto accident injury). For states that already have some form of no-fault auto insurance, the authors consider a plan offering a choice between the state’s current no-fault plan and absolute no-fault. Key findings state that if insurance premiums are proportional to compensation costs, drivers who choose absolute no-fault should save about 60 percent on their premiums for personal injury coverage. The plan will have little effect on drivers who opt for coverage under their state’s current system. 55 pages. Bibliography.

This report describes all civil jury verdicts reached from 1985 to 1994 in the state courts of general jurisdiction in 15 jurisdictions across the nation and identifies trends in these verdicts. Several descriptive measures are used, including number of verdicts, number of verdicts within different case types, percentage of cases in which the plaintiff is successful, award amounts (typical, maximum, and expected awards), variation in awards, and the occurrence and size of punitive damage awards. The study finds that trial rates are generally flat or decreasing; case mix has not changed significantly in the past ten years; award amounts are generally increasing; and punitive damage awards are rare, but their amounts increased dramatically between 1985 and 1989 and between 1990 and 1994. Jury verdicts can provide valuable information about the signals that attorneys and potential claimants receive from the civil justice system, but the report cautions that those verdicts reveal little about the underlying dynamics of jury behavior. 84 pages. Bibliography.


Economic costs and environmental effects are analyzed for California’s multi-pronged strategy for reducing emissions from passenger cars and light-duty trucks, vehicles that are believed to account for a substantial fraction of ozone-producing emissions across the state. The study analyzes costs, effects on emissions, effects on vehicle markets, and the distribution of costs for enforcing regulations. These regulations include those concerning new gasoline-powered vehicles only, other regulations affecting both new and existing gasoline-powered vehicles, and also the extremely controversial zero-emission vehicle mandate. The study considers policy choice in the face of extreme uncertainty about the effects of several policy elements, particularly the scrappage program, enhanced vehicle inspection and maintenance, on-board emission diagnostic systems, and the zero-emission vehicle mandate. Although the zero-emission vehicle mandate poses major economic and environmental risks, there are also major risks to repealing the mandate altogether. The study concludes by suggesting principles for creating a zero-emission vehicle policy in the face of extreme uncertainty about the development of technology for battery-powered electric vehicles and the future effectiveness of policies to control emissions from gasoline vehicles. See also MR-695/1-ICJ. 476 pages. Bibliography.


This report is an executive summary of MR-695-ICJ. 60 pages. Bibliography.


The Civil Justice Reform Act of 1990 (CJRA) required each federal district court to develop a case management plan to reduce costs and delays. The legislation also created a pilot program to test six principles of case management, and required an independent evaluation to assess their effects. This executive summary provides an overview of the purpose of the CJRA, the basic design of the evaluation, the key findings, and their policy implications. Detailed results appear in three other reports: MR-801-ICJ, which traces the stages in the implementation of the CJRA in the study districts; MR-802-ICJ, which presents the main descriptive and statistical evaluation of how the CJRA case management principles implemented in the study districts affected cost, time to disposition, and participants’ satisfaction and views of fairness; and MR-803-ICJ, which describes the results of an evaluation of mediation and neutral evaluation designed to supplement the alternative dispute resolution assessment contained in the main CJRA evaluation. 44 pages.

The Civil Justice Reform Act of 1990 (CJRA) required each federal district court to develop a case management plan to reduce costs and delays. The legislation also created a pilot program to test six principles of case management, and required an independent evaluation to assess their effects. This report is one of four documents describing the evaluation, which was conducted by RAND’s Institute for Civil Justice. This report traces the stages in the CJRA implementation: the recommendations of the advisory groups, the plans adopted by the districts, and the plans actually implemented. The study found that all pilot districts complied with the statutory language of the act. But the amount of change varied widely, and, in some districts, planned changes were not fully implemented. However, implementing the pilot plans may have heightened the consciousness of judges and lawyers and brought about some important implicit shifts in their approach to case management. See also MR-800-ICJ, MR-801-ICJ, and MR-803-ICJ. 263 pages. Bibliography.


The Civil Justice Reform Act of 1990 (CJRA) required each federal district court to develop a case management plan to reduce costs and delays. The legislation also created a pilot program to test six principles of case management, and required an independent evaluation to assess their effects. This report is one of four documents describing the evaluation, which was conducted by RAND’s Institute for Civil Justice. This report provides an assessment of the effects of six different alternative dispute resolution (ADR) programs that included mediation and early neutral evaluation. The study found that after litigation had begun referral to ADR was not a panacea, nor was it detrimental. Neither time nor costs nor lawyer views of satisfaction or fairness changed significantly as a result of referral to any of these programs; however, lawyers and litigants who participated in the programs liked them. The only statistically significant finding was that cases referred to ADR were more likely to have a monetary outcome. See also MR-800-ICJ, MR-801-ICJ, and MR-802-ICJ. 455 pages. Bibliography.


This report provides the technical details of an Institute for Civil Justice analysis of trends and patterns in punitive damage awards in financial injury cases. The cases were in selected jurisdictions during 1985 through 1994. The policies, as it was implemented, had little effect on any of these outcomes. However, what judges do to manage cases does matter. A package of procedures containing early judicial management, early setting of a trial date, and shorter time to discovery cutoff could reduce time to disposition by 30 percent, with no change in litigation costs, satisfaction, or perceived fairness. See also MR-800-ICJ, MR-801-ICJ, and MR-803-ICJ. 349 pages. Bibliography.
jurisdictions include all state trial courts of general jurisdiction in the states of California and New York; Cook County, Illinois (Chicago); the St. Louis, Missouri, metropolitan area; and Harris County, Texas (Houston). These data are supplemented by information obtained from the Administrative Office of the Alabama Courts for verdicts reached in that state’s trial courts of general jurisdiction during 1992 to 1997. The study also estimates what percentage of the financial injury punitive awards in the database would have been affected by caps of various sizes and how the caps would have affected the total amount of punitive damages awarded in such cases. See also MR-889-ICJ. 84 pages.

Bibliography.


This report is an executive summary of MR-888-ICJ. 34 pages. References.


This report is an executive summary of MR-920-ICJ. 38 pages.


Workers in California experiencing injuries at work that result in permanent partial disabilities (PPD) are eligible to receive compensation. The workers’ benefits, doctors’ and attorneys’ fees, and the system that processes the hundreds of thousands of annual claims cost employers billions of dollars each year. This report evaluates the workers’ compensation system by examining its efficiency and the adequacy and equity of its benefits, and suggests system reforms. The authors conducted interviews with system participants and found that the system is still troubled by many of the same problems that plagued it before the 1989 and 1993 reforms. It remains overly costly, complex, and litigious while delivering modest benefits. The authors estimated the wage losses of PPD claimants in 1991 through 1993, and found that even after five years, the injured workers earned considerably less than the controls. In addition, injured workers experience considerable time out of work, not just immediately after the injury, but also after the initial return to work. The authors identified particular problems among claims categorized by the workers’ compensation system as “minor,” which are the vast majority of claims. For this group, wage-replacement rates were lowest. Reform proposals include an elective fast track to streamline claims processing, and a revision to the disability rating schedule to improve the relationship between wage loss and benefits paid. See also MR-919-ICJ. 228 pages. Bibliography.


The Civil Justice Reform Act of 1990 (CJRA) required that each federal district court develop a case-management plan to reduce costs and delay. The legislation also created a pilot program to test six principles of case management and required an independent evaluation to assess their effects. After the main evaluation report was completed, the Advisory Committee on Civil Rules of the Judicial Conference of the United States asked RAND to conduct further analyses of the CJRA evaluation data to shed additional light on discovery management. The report uses both descriptive tabulations and statistical techniques to assess policy effects. Management policies are evaluated when used in various combinations, such as early management combined with discovery plans and early scheduling of a trial date. Subsets of types of cases or lawyers, such as high-complexity cases only, high-stakes cases only, contingent-fee lawyers only, or tort cases only, are also analyzed. For each type of case, the data include time to disposition, lawyer satisfaction with judicial case management, lawyer views on the fairness of judicial case
management, total lawyer work hours per litigant, lawyer work hours on discovery, and the number of discovery motions filed. 152 pages.

Bibliography.


Class action lawsuits—allowing one or a few plaintiffs to represent many individuals seeking redress—have long been controversial. The current controversy, centered on lawsuits for money damages, is characterized by sharp disagreement among stakeholders about the kinds of suits being filed, whether plaintiffs’ claims are meritorious, and whether resolutions to class actions are fair or socially desirable. Ultimately, these concerns lead many to wonder, Are class actions worth their costs to society and to business? And do they do more harm than good? To describe the landscape of current class action litigation for damages, elucidate its problems, and identify solutions, ICJ conducted a study using qualitative and quantitative research methods. The researchers concluded that the controversy over damage class actions has proven intractable because of the deeply held but sharply contested ideological views among stakeholders. Nevertheless, many of the political antagonists agree that class action practices merit improvement. The authors argue that both practices and outcomes could be substantially improved if more judges would supervise class action litigation more actively and scrutinize proposed settlements and fee awards more carefully. Educating and empowering judges to take more responsibility for case outcomes, and ensuring that they have the resources to do so, can help the civil justice system achieve a better balance between the public goals of class actions and the private interests that drive them. 609 pages. References. Index. See also MR-969/1.


This document is an executive summary of MR-969-ICJ. 37 pages.


This report updates an earlier study (see MR-540-ICJ, based on 1987 data) in which the authors estimated the effects of a choice automobile insurance plan on the costs of compensating auto accident victims if the no-fault option was absolute no-fault (ANF). The authors assumed that 50 percent of the consumers who would have purchased auto insurance under their state’s current system would switch to ANF under the choice plan. The earlier study, requested by the Joint Economic Committee of the U.S. Senate and using data from 1987, estimated how a variant of that plan would affect the cost of private passenger auto insurance if all currently insured drivers elected the no-fault option. The present report uses recently obtained data for a representative sample of people who were compensated for auto accident injuries in 1992. Using these data, the authors have replicated their analyses for 46 states. They find that the choice plan could substantially reduce the costs of compensating people injured in auto accidents. 67 pages. Bibliography.


Recent high-profile commercial aviation mishaps have stretched the National Transportation Safety Board’s resources to the limit and are testing the agency’s ability to unravel the sorts of complex failures that lead to tragic accidents. Recognizing the enormous challenges the NTSB faces, agency Chairman Jim Hall sought a critical examination
of the NTSB’s ability to investigate major transportation accidents, in particular commercial aviation accidents. The results of that study are contained in this report, the most comprehensive examination of the workings of the NTSB in the 30-year history of the agency. Adopting a multidisciplinary approach, RAND used a variety of quantitative and qualitative research techniques to assess the NTSB’s operations and processes. This research, conducted in RAND’s Institute for Civil Justice, outlines recommendations aimed at (1) strengthening the party process, which involves manufacturers, operators, and others in the determination of the probable cause of an accident; (2) expanding the statement of causation; (3) modernizing the investigative procedures of the NTSB and streamlining its internal processes; (4) managing the agency’s resources and staffing more effectively; (5) developing training opportunities for NTSB staff; and (6) improving the agency’s R&D facilities. 329 pages. Bibliography.


This report is an executive summary of MR-1122/1-ICJ. 56 pages.


“Choice” auto insurance gives drivers the option of selecting either a modified version of their state’s current auto insurance plan or a no-fault plan. Using the same analytical methods as in their two previous studies on the same subject (MR-540-ICJ, based on 1987 data; and MR-970-ICJ, based on 1992 data), the authors estimated the effects of a choice automobile insurance plan on the costs of compensating auto accident victims. They find the choice plan can deliver on its promise of offering dramatically less expensive insurance to drivers who are willing to give up access to compensation for noneconomic loss by purchasing no-fault insurance, with little effect on those who want to retain access to compensation for both economic and noneconomic loss. If insurers pass on cost savings, the adoption of a choice plan could translate into savings on total premiums of about 23 percent for purchasers of no-fault insurance. Because claims behavior has varied over the years, these savings are greater than the authors’ estimate based on 1992 data, but not as large as the savings based on 1987 data. 40 pages. Bibliography.


Recent congressional proposals to reform the federal Superfund program would release potentially responsible parties (PRPs) that are small in size or that only played a minor role at the site from liability for cleanup costs. These reforms transfer the cleanup costs from released parties to the Superfund Trust Fund. This report estimates the number of PRPs that would be released and the cleanup costs that would be transferred to the Fund by recent proposals. It also estimates the costs transferred to the Fund per firm released and the financial consequences for those PRPs that remain liable. Releasing from liability those firms that contributed only a small proportion of the waste to a site appears to be more cost-effective than releasing firms that are small in size. In addition, although evidence exists that large firms will benefit from the transfer of small firms’ costs to the Fund, the effect of such a transfer is ambiguous. Implementing reforms that would release small firms or small-volume firms and transferring their volume-based cleanup costs to the Fund may prove costly in terms of additional transaction costs. 53 pages. References.


Whether an automobile accident victim should be allowed to bring a claim for punitive damages for unfair settlement practices against another person’s liability insurer—a so-called third-party,
bad faith suit—has become an important policy concern. This book examines the compensation that automobile insurers paid to accident victims in California during a period, 1979 to 1988, when such punitive damages claims were permitted. This book looks at the effects of the adoption and subsequent rejection of the Royal Globe doctrine, which allowed third-party bad-faith suits, on compensation and costs of bodily injury claims. The authors find that the adoption of Royal Globe triggered sharp increases in both the average bodily compensation payment and the relative frequency of bodily injury claims in California relative to the other tort states. In contrast, the elimination of Royal Globe dramatically reversed these trends. 76 pages. Bibliography.


Air pollution damages health and reduces the quality of life in California, in particular the South Coast Air Basin. This report examines the effects of an innovative and controversial program, called “voluntary accelerated vehicle retirement,” which is part of California’s plan for implementing the federal Clean Air Act. Under the program, as many as 75,000 light-duty vehicles (LDVs) that are at least 15 years old would be bought and scrapped every year from 2001 to 2010. The authors predict that the program will increase used-LDV prices over the first five years, but at a decreasing rate. Similarly, emission reductions are predicted to be largest in 2005, declining gradually during the following five years. The program would be discontinued in 2010, and the effects on used-LDV prices and emissions would essentially be eliminated by 2014. The authors conclude that despite the roughly $100-million-per-year price tag (some of it probably from state tax dollars), the program is nevertheless cost-effective. If it is not implemented, less cost-effective programs—or even ineffective ones—may replace it in the struggle to comply with federal standards. 86 pages. References.
been proposed for California. At the request of the California State Senate, the authors conducted a systematic literature review on involuntary outpatient commitment; examined the experience of eight other states including in-depth interviews with attorneys, officials, and psychiatrists; and analyzed the California data on service records for all persons served by California’s county-contract mental health agencies. They found that involuntary outpatient commitment, when combined with intensive mental health services, can be effective in reducing the risk of negative outcomes. But whether commitment orders without intensive treatment have any effect is an unanswered question. However, there is clear evidence that intensive community-based voluntary mental health treatment can produce good outcomes. Because it is impossible to know for sure whether an involuntary outpatient commitment system is worth the additional cost, California policymakers might consider a limited statute that provides for a large, well-designed evaluation to answer some of these questions. 176 pages. References.


No-fault auto insurance opponents frequently argue that no-fault may ultimately lead to higher auto insurance costs by reducing drivers’ incentives to drive carefully and thereby increasing the accident rate. The intuition behind this criticism of no-fault is simple: No-fault auto insurance lowers the cost of driving negligently by limiting first-party liability for the injuries suffered by third parties in auto accidents. This book evaluates this criticism of no-fault by examining trends in fatal and non-fatal automobile accidents rates and rates of driver negligence in the United States between 1967 and 1989. Contrary to some earlier research, the author finds no evidence that the adoption of no-fault auto insurance between 1971 and 1976 in 16 states increased fatal accident rates in those states. This book also finds no correlation between the presence of no-fault auto insurance and a state’s overall accident rate or rate of driver negligence. 63 pages. Bibliography.


The New Mexico workers’ compensation system has been widely regarded as a success story since it was significantly reformed a decade ago. Workers’ compensation costs for the state’s employers are among the lowest in the country, insurer profits are among the highest, and the system is among the least litigious. Given this environment, this book evaluates the adequacy and equity of workers’ compensation indemnity for New Mexico workers receiving permanent partial disability benefits. The authors compare outcomes for workers with partially disabling occupational injuries in New Mexico with outcomes for their counterparts in California, Washington, Oregon, and Wisconsin. After controlling for differences across the five states, New Mexico’s replacement rates fall in the middle; however, benefits for sustained earnings losses are not adequate by the commonly cited replacement standard of two-thirds of pre-tax wages. Scheduled injuries, which include primarily injuries to the arms and legs, are less adequately compensated than unscheduled injuries, which are primarily injuries to the back. The duration of time until an employee’s return to work in New Mexico is much longer than that in other states, which may be accounted for by the other states’ active return-to-work programs. 117 pages. Bibliography.


For more than two decades, the workers’ compensation courts increasingly have been perceived as a weak link in the California workers’ compensation system. The courts have been criticized for being slow, expensive, and procedurally inconsistent. In response to these
concerns, the California Commission on Health and Safety and Workers’ Compensation engaged the RAND Institute for Civil Justice to conduct a top-to-bottom review of the workers’ compensation courts in the state. The research team analyzed the causes of delay in the resolution of workers’ compensation disputes, the reasons for the high costs of litigation, and why procedures are inconsistent across the state. They found that the courts’ problems stem largely from severe understaffing, the failure to upgrade their management information system, and a lack of clear guidance and coordination in the governing rules and procedures. The study team proposes a number of recommendations for change (covering areas such as staffing, technology, judicial training, calendaring, continuance policies, internal office practices, and case management) that are designed to improve the process of dispute resolution for California’s injured workers. 743 pages. Bibliography. (Note: This document is available on CD only, packaged with MR1425/1-ICJ.)


This report is an executive summary of MR-1425-ICJ. It is packaged with a companion CD that contains the full text of MR-1425-ICJ. 34 pages.


The U.S. Supreme Court’s 1993 Daubert decision directed federal judges to scrutinize the reliability of expert evidence proposed for admission at trial. This study uses a sample of federal district court opinions between 1980 and 1999 to examine how judges, plaintiffs, and defendants responded to the new directive. The authors find that after Daubert judges increasingly evaluated the reliability of expert evidence. A rise in both the proportion of challenged evidence that is found unreliable and the proportion of challenged evidence that is excluded suggests that the standards for admitting evidence tightened. A subsequent fall in these two proportions suggests that the parties proposing and challenging evidence responded to the change in standards. The authors also examine how “general acceptance” of proposed evidence in the expert community enters the reliability assessment and which types of evidence were affected by Daubert. The authors caution that even though judges are more actively screening expert evidence, whether they are doing so in ways that produce better outcomes has not been determined. The study concludes by identifying gaps in what is known about how well federal courts screen expert evidence and by recommending research to help fill those gaps. 116 pages. References.


The adequacy of benefits for permanent disability from occupational injuries is a continuing source of controversy among policymakers in California. This book focuses on the economic consequences of disabling injuries and what those outcomes suggest about the current adequacy of workers’ compensation in California. In particular, the authors investigate the relationship between losses in earnings from workplace injuries and economic conditions in the state during the 1990s. Although changes in economic conditions had some impact on earnings losses experienced by permanent partial disability claimants, especially less-severely injured workers who are more easily accommodated by their employers, the decline in earnings losses may be more closely related to changes in the workers’ compensation market. Even though benefit levels have increased since 1991 and earnings losses have declined, replacement rates for lost income remain below two-thirds of pre-tax wages, the standard commonly cited for adequacy. Because benefits have declined (in inflation-corrected dollars) since their last increase in 1996 and, as of 2001, the
economy is headed into a new recession, it is possible that workers injured today will have worse outcomes than workers injured in 1996 or 1997. 66 pages. References.


Medical costs have become the fastest-growing component of the California workers’ compensation program, increasing from 45 percent of benefit costs in the mid-1990s to an estimated 55 percent of benefit costs in 2003. In response to concerns about these rapidly increasing costs, the California Commission on Health and Safety and Workers’ Compensation is recommending changes in the current Division of Workers’ Compensation Official Medical Fee Schedule (OMFS) that determines the amount health care providers are paid for their medical services to the state’s injured workers. Specifically, the Commission proposes that the OMFS be linked to Medicare fee schedules for all services other than pharmaceutical services. This study examines areas that must be addressed if such a link were to occur, including policy issues arising from the differences between the OMFS and the Medicare fee schedules, modifications that are likely to be necessary to tailor the Medicare fee schedules to California’s injured workers, and the implications of automatic annual updates to the schedules. 186 pages. References.
MONOGRAPHS


Asbestos litigation is the longest-running mass tort litigation in U.S. history. Through 2002, approximately 730,000 individuals who had been exposed to asbestos have brought claims against some 8,400 business entities, and almost as many more future claims are likely. Defendants and insurers have spent a total of $70 billion on asbestos litigation through 2002, more than half of which was consumed by claimants’ and defendants’ litigation expenses. This monograph, the most comprehensive description to date of asbestos litigation, builds on previous RAND briefings, providing more detailed analyses and updating data to summer 2004. The authors report on what happened to those who have claimed injury from asbestos, what happened to the defendants in those cases, and how lawyers and judges have managed the cases, with an overall focus on how the litigation system has been performing in resolving asbestos claims. 206 pages. Bibliography.


Concerns over the price and availability of medical malpractice insurance have sparked a vigorous national debate over proposed federal legislation calling for limits on trial awards and attorneys’ fees in medical malpractice cases. A model for such limits is the Medical Injury Compensation Reform Act (MICRA), a law enacted in California in 1975 in the hope of controlling soaring medical malpractice insurance premiums and ensuring the continuing availability of malpractice insurance coverage. MICRA caps awards for non-economic losses, such as pain or suffering, at $250,000 and limits plaintiffs’ attorney fees. The authors studied the effects of MICRA on plaintiffs’ awards and on defendants’ liabilities and in doing so addressed a number of questions: How have MICRA’s caps on non-economic damages affected the final judgments in California jury trials? What types of cases and claims are most likely to have an award cap imposed following trial? What have been the effects of MICRA on plaintiffs’ attorney fees and net recoveries? If the MICRA cap had been adjusted for inflation, what would have been the effect on plaintiffs’ final awards? 108 pages. Bibliography.


The process for evaluating the severity of permanent disabilities due to workplace injuries for the purpose of determining workers’ compensation benefits has long been a matter of considerable controversy in California. The state’s disability rating system has been criticized as being inconsistent and prone to promote disputes over the appropriate level of permanent disability benefits. This monograph follows up on an earlier interim briefing on California’s permanent disability rating schedule. Here, the authors provide a systematic evaluation of California’s permanent disability ratings system that was used prior to the state’s 2004 workers’ compensation reform efforts. They examine the extent to which workers with higher disability ratings experience higher earnings losses, and the extent to which workers with similar ratings for impairments in different parts of the body experience similar earnings losses. Among other analyses, they examine the consistency with which physicians evaluate the same injuries. They discuss the implication of these results, for California and potentially for other states, with a focus on interpreting the results in light of the recent reforms. 170 pages. Bibliography.

The terrorist attacks of September 11, 2001, caused tremendous loss of life, property, and income, and the resulting response from public and private organizations was unprecedented. This monograph examines the benefits received by those who were killed or seriously injured in the attacks and the benefits provided to individuals and businesses in New York City that suffered losses from the attack on the World Trade Center. The authors examine the performance of the four basic mechanisms of the compensation system in the United States—insurance, the tort system, government programs, and charity—in responding to the losses stemming from the events of 9/11. This assessment should be useful in understanding how the losses created by 9/11 differ from those following natural disasters and other catastrophic events, and can be used to develop objectives for compensation in the event of a future major attack. 212 pages. References.


Employers, insurers, and policymakers in California have been searching for options to the current California workers’ compensation benefits system, which has both the highest and the fastest-growing insurance premium costs in the country. Proponents of a type of insurance program called 24-hour care believe that such a program could yield substantial workers’ compensation savings. A 24-hour care plan would consolidate employers’ health care benefits, and possibly disability benefits, for both work-related and non-work-related claims, and services could be delivered by the same group of providers under a coordinated insurance package. (The name “24-hour care” derives from the premise that a single benefit mechanism can cover health care needs following an injury wherever it occurs during the day, either at work or at home.) In this monograph, the authors present the results of their assessment of the value of 24-hour care as a mechanism for reducing workers’ compensation costs, while maintaining or improving the quality of care. The authors discuss possible options for 24-hour care models, including one that consolidates only medical care services and one that consolidates both services and health insurance. 112 pages. References.


The Terrorism Risk Insurance Act (TRIA) requires insurers to offer commercial insurance that will pay on claims that occur from a terrorist attack, and for losses on the scale of 9/11, TRIA provides a “backstop” in the form of free reinsurance. The authors describe the evolving terrorist threat with the goal of comparing the underlying risk of attack to the architecture of financial protection that has been facilitated by TRIA, which will “sunset” in December 2005. While TRIA was originally justified primarily as a measure to stimulate the economy, insurance also has the effect of promoting resilience in the aftermath of an attack. Thus, a functioning terrorism insurance system, at least in the context of economic targeting by al Qaeda, should be thought of as not just an economic development mechanism but also as a counterterrorism tool. 80 pages. Bibliography.


In recent years, the California workers’ compensation system has been encumbered by rising costs and high utilization of medical care. To address these concerns, the California legislature passed a series of initiatives that call for the use of evidence-based medical-treatment guidelines concerning, at a minimum, the frequency, duration, intensity, and appropriateness of all treatment procedures and modalities commonly performed in workers’ compensation cases. The American College of Occupational and Environmental Medicine
(ACOEM) guidelines were adopted as presumptively correct until alternative plans could be evaluated and a decision made about which guidelines to adopt for the long term. This report presents an evaluation of the medical guidelines that might be used to determine the appropriateness of care provided California’s injured workers. The study identified 72 guidelines for work-related injuries, which were then screened using multiple criteria. Five comprehensive guideline sets were found to satisfy the requirements of the legislation and the preferences of the state. A comparative evaluation was made of both the technical quality and clinical content of the selected guidelines. Based on the results of the evaluation, recommendations are presented for actions the state might take in the short term, the intermediate term, and the longer term. 170 pages. Bibliography.


Following the 9/11 attacks and the substantial losses incurred, insurers questioned their ability to pay claims in future attacks and began to exclude terrorism coverage from commercial insurance policies. The fear that a lack of insurance coverage would threaten economic stability and growth, urban development, and jobs led the federal government to adopt the Terrorism Risk Insurance Act (TRIA) of 2002. The pending expiration of TRIA requires that policymakers assess the effectiveness of TRIA and decide whether to extend, modify, or terminate it. A central issue for this assessment is how TRIA will redistribute losses among the different parties under different circumstances. To provide an accurate basis on which to determine the effects of TRIA, the authors simulate the expected losses and the distribution of losses among stakeholder groups for each of three attack modes: an aircraft impact on a major office building, an indoor anthrax attack on a major office building, and an outdoor anthrax attack in a major urban area. The study’s results show that the ultimate distribution of losses under TRIA depends on the attack mode and cumulative annual losses. The authors also estimate the loss distribution that would result when different provisions of TRIA are changed. Based on this analysis, overall, the role of taxpayers is expected to be minimal in all but very rare cases, such as serial large attacks on major buildings, highly effective large outdoor anthrax releases, or nuclear detonations. In addition, while TRIA helps reduce uninsured terrorism losses by making coverage available and by limiting target insurers’ exposure, the analysis in this study shows that, even with TRIA in place, a high fraction of losses would go uninsured in each of the attack scenarios examined. 152 pages. Bibliography.


Policymakers have become increasingly concerned in recent years about the possibility of future maritime terrorist attacks. Though the historical occurrence of such attacks has been limited, recognition that maritime vessels and facilities may be particularly vulnerable to terrorism has galvanized concerns. In addition, some plausible maritime attacks could have very significant consequences, in the form of mass casualties, severe property damage, and attendant disruption of commerce. Understanding the nature of maritime terrorism risk requires an investigation of threats, vulnerabilities, and consequences associated with potential attacks, as grounded both by relevant historical data and by intelligence on the capabilities and intentions of known terrorist groups. These risks also provide the context for understanding government institutions that will respond to future attacks, and particularly so with regard to the U.S. civil justice system. In principle, civil liability operates to redistribute the harms associated with legally redressable claims, so that related costs are borne by the parties responsible for having caused them. In connection with maritime terrorism, civil liability creates the prospect that independent commercial defendants will be held responsible for damages caused by terrorist attacks. This book explores risks and U.S. civil liability rules as they
Class actions, which are civil cases in which parties initiate a lawsuit on behalf of other plaintiffs not specifically named in the complaint, often make the headlines, especially when they result in settlements affecting millions of class members and requiring millions of dollars in restitution. They have also aroused vocal policy debates, as exemplified during the deliberations of the U.S. Congress prior to the enactment of the Class Action Fairness Act of 2005. But despite this long-standing interest, policymakers and the public know very little about the majority of class actions filed in this country—their numbers, their dynamics, or their outcomes. RAND used a defendant-based survey to collect original data on both state and federal insurance class actions, and also surveyed state departments of insurance to learn more about the interests of regulators in the issues litigated by the parties in these cases. This book presents the results. With these data, we are able to describe important characteristics of the litigation, including what types of classes are sought, where these cases are being filed, what allegations are made, how these cases are resolved, how much time it takes to bring them to resolution, and the possible impact of the Class Action Fairness Act of 2005. See also WR-405. 198 pages. Bibliography.

MG-663-EMKF—In the Name of Entrepreneurship? The Logic and Effects of Special Regulatory Treatment for Small Business. S. M. Gates, K. J. Leuschner, eds. 2007.

There has been ongoing concern that some regulations, rules, and government policies place a disproportionate burden on small businesses and entrepreneurs. For this reason, small businesses often receive special regulatory treatment, such as exemptions from legislation or extended deadlines for compliance. However, the desire to support small businesses can come into conflict with the interest in addressing the concerns that led to the regulation or policy in the first place. Moreover, it is often unclear whether special regulatory treatment for small businesses is having the intended effect. This book sheds light on these issues through analysis of the regulatory and public policy environment with regard to small businesses, including focused studies in four key areas: health insurance, workplace safety, corporate governance, and business organization. The authors offer support for the idea that the regulatory environment has a different effect on the behavior of small businesses than it has on that of large ones. However, they also demonstrate that policies designed specifically to help small businesses do not always have the intended effect. The lack of a consistent definition of small business confounds our understanding of these issues. The book suggests possible directions for future policy that achieves a better balance between the interest in restricting firm behavior through regulation and the desire to encourage small businesses and entrepreneurs. 368 pages. References.


Concerned that the unavailability of terrorism insurance would impede economic recovery and hinder growth after the 9/11 attacks, Congress passed the Terrorism Risk Insurance Act of 2002 (TRIA). TRIA will sunset at the end of 2007 unless Congress takes further action. This book examines the implications of allowing TRIA to expire and of enhancements aimed at improving the availability and affordability of insurance for nuclear, biological, chemical, and radiological (NBCR) attacks. The analysis takes a systematic approach to addressing the deep uncertainties that underlie the market for terrorism insurance and is the first study of TRIA to consider not just taxpayer payments through the program but also the cost of government compensation and assistance following a terrorist attack when analyzing the program’s effect on government spending. The authors conclude that taxpayer cost is lower with TRIA than without TRIA across a broad range of
assumptions about attack frequency and the proportion of uninsured losses that are compensated postattack. The analysis also cautions policymakers to be careful when modifying the program to better address NBCR attacks: Simply expanding the program to require insurers to offer NBCR coverage may not achieve the desired outcomes. The authors identify program changes that will produce positive results for both NBCR and conventional attacks that are robust to key underlying uncertainties. 150 pages. References.
REPORTS


Plaintiff attorneys on personal injury cases are typically paid a contingent fee. Contingent fees are widely believed to induce excessive litigation and are increasingly regulated. A theoretical analysis of contingent and hourly wage contracts shows that, with competition for cases, attorneys paid a contingent fee will devote the amount of effort that would be chosen by fully informed, risk-neutral plaintiffs paying by the hour: the net value of the claim to the plaintiff will be maximized. However, risk-averse plaintiffs will underinvest in the number of suits and amount spent per case, if attorneys must be paid by the hour. Estimates of the effects of limits on contingent fees are presented. If the benchmark of the optimum expenditure on litigation is that which would be chosen by fully informed, risk-neutral plaintiffs, the unconstrained contingent fee is likely to induce the closest approximation to this ideal. 45 pages. References.


A theoretical and empirical analysis of the disposition of malpractice claims compares the actual outcomes with the legal standard of payment equal to damages, if, and only if, negligence occurred. An economic model of the settlement process assumes that the litigants attempt to maximize wealth, subject to the legal standards of liability and damage, and the costs of litigating. The model predicts that awards in settlements out of court will reflect the expected verdict, the probability of the plaintiff’s winning, and the costs of going to court. The probability of the plaintiff’s winning in settlement will also reflect the probability of winning in court, the size of the expected verdict, and the costs of going to court. Evidence from three malpractice claims surveys is consistent with the legal standard but departs in ways predicted by the model. Characteristics of the injury, the plaintiff, and the defense influence the outcome. 72 pages. Bibliography.


An empirical analysis of malpractice premiums paid by physicians in 1976 shows that the huge range ($75 to more than $50,000) reflects the multiplicative structure of rates. The rates are the product of state, specialty, and coverage differentials, which together account for roughly 60 percent of the total variation in premiums. This implies that the rating structure recommended by the Insurance Services Office is widely followed. In this sample, state differentials account for a smaller fraction of the total variance than specialty differentials. About half the total state effect can be attributed to differences in the frequency and severity of claims, presence of a discovery rule (an indicator of risk), and operation of medical society programs. Further research is necessary to determine how far this rigid structure of rates interferes with the efficient functioning of the tort system. See also R-2458, R-2622, R-2661. 45 pages. Bibliography.


This document presents a review of the major issues of current concern to insurers, employers, workers, and government agencies regarding workers’ compensation law. The compensation system has changed rapidly and dramatically over the past decade, raising new questions and problems with each reform. The authors discuss the issues that have been identified by experts in the field and suggest areas for research that will help to clarify the effects of different options for reforming or redesigning the system in response to these concerns. A brief history of workers’ compensation in the United States and description of the current status of the law and the system itself are presented. The report also analyzes in greater detail some of the economic issues presented. The final section of the report presents some suggestions for future research, which are directed toward achieving a greater understand-
The report describes how the procedures operate and raises implementation issues that courts planning to adopt such techniques should consider. 117 pages. Bibliography. See also R-2732/1-ICJ.


This report is an executive summary of R-2732-ICJ. 27 pages.


A study of the critical implementation phase of the California judicial arbitration program is the subject of this report. The authors begin by identifying the primary objectives of the program’s supporters. They then describe the historical background of the adoption of mandatory arbitration in California, and the evolution of the program’s design. The results of the exploratory analysis of the program’s effects are presented. Arbitration’s potential for reducing court workload is examined. The costs of operating the program during the first year are analyzed and an approach to estimating the program’s potential effect on court costs is presented. The effects of arbitration on litigants, focusing on time to disposition, costs of litigation, and equity, are discussed. The final section summarizes the findings and discusses how certain groups are likely to respond to the program in the future. The section concludes with a discussion of the research that will be needed for a comprehensive analysis of the costs and benefits of the judicial arbitration program. 120 pages. See also R-2733/1-ICJ.


This report is an executive summary of R-2733-ICJ. 13 pages.


This report is an inventory of state and local trial court procedures employed to reduce pretrial delay of civil cases. It lists and describes techniques employed by the courts to combat pretrial delays in all 50 state court systems, as reported by court administrators at both the state and metropolitan levels. It includes observations by court officials on the extent to which the adopted measures have really changed the prior situation, and what problems, if any, have arisen.

The report describes how the procedures operate and raises implementation issues that courts planning to adopt such techniques should consider. 117 pages. Bibliography. See also R-2732/1-ICJ.


This report is an executive summary of R-2732-ICJ. 27 pages.


A study of the critical implementation phase of the California judicial arbitration program is the subject of this report. The authors begin by identifying the primary objectives of the program’s supporters. They then describe the historical background of the adoption of mandatory arbitration in California, and the evolution of the program’s design. The results of the exploratory analysis of the program’s effects are presented. Arbitration’s potential for reducing court workload is examined. The costs of operating the program during the first year are analyzed and an approach to estimating the program’s potential effect on court costs is presented. The effects of arbitration on litigants, focusing on time to disposition, costs of litigation, and equity, are discussed. The final section summarizes the findings and discusses how certain groups are likely to respond to the program in the future. The section concludes with a discussion of the research that will be needed for a comprehensive analysis of the costs and benefits of the judicial arbitration program. 120 pages. See also R-2733/1-ICJ.


This report is an executive summary of R-2733-ICJ. 13 pages.

This report makes two contributions to the area of legal studies. First, it develops a methodology that permits estimation of a model of the dispute resolution process, including outcomes in court settlements and out-of-court settlements. This methodology, including issues of statistical estimation and identification, is carefully detailed. Second, the report applies the model to data on medical malpractice claims. The model of dispute resolution is presented in Section II of the report. Section III discusses statistical issues of estimation, parameter identification, and prediction. Section IV describes the malpractice data for 1974 and 1976 and briefly presents parameter estimates. The parameter estimates and their interpretation are discussed in further detail in Section V. Section VI presents further implications of the estimates for tort reform, accounting for the distribution of dollar payments and the probability of winning in court. Concluding remarks appear in Section VII. 59 pages. References.


In the early 1970s, both the frequency of medical malpractice claims and the dollar awards to successful plaintiffs rose at unprecedented rates. In 1974 through 1975, the malpractice insurance crisis erupted. By the end of 1976, most state legislatures had enacted laws to deal with the perceived causes of the crisis. However, with only scant empirical evidence on the actual operation of the tort system and the likely effects of any changes, legislators have had to rely on anecdotal evidence, subjective reasoning, and conventional wisdom. The research summarized in this report aims at rectifying that deficiency. It analyzes two computerized files on more than 6,000 closed claims, using a computerized model of the bargaining behavior through which claims are resolved. It produced useful evidence on the actual operation of the malpractice system, including changes made during the crisis, and analytic tools that can be applied to understand dispute resolution in other contexts. 33 pages. References.


The frequency and severity of medical malpractice claims increased dramatically in the late 1960s and early 1970s. In response to the malpractice crisis, many states enacted changes in tort law applicable to medical practitioners. This report presents some empirical evidence on the contribution of various factors to the diversity in the frequency and severity of claims across states and over time. Section II provides an overview of countrywide trends in claims for different lines of liability insurance and differences among states in malpractice litigation. Section III presents a theoretical model of the frequency and severity of medical malpractice claims. Section IV describes the data and methodological issues. Section V reports the empirical analysis of frequency of claims per capita, average severity per claim, and average claim cost per capita. Section VI analyzes the determinants of the post-1975 tort reforms. Section VII summarizes the findings and policy implications. 52 pages. Bibliography.


This report presents the results of an extensive examination of the decisions made by litigants, courts, and juries in a large number of civil jury trials. It is based on detailed data on 9,000 civil cases that were tried before juries in Cook County, Illinois (the nation’s second largest county), between 1960 and 1979. The information in the report details more than 9,000 civil suits tried to verdict. These include all civil suits for money damages other than those arising from automobile and common carrier accidents and a one-quarter random sample of automobile and common carrier cases. The report describes trends in the number of civil jury trials, in the proportion of cases in which defendants are found liable, and in
the size of awards to plaintiffs. These trends are analyzed separately for ten different types of civil cases. The report does not try to explain the trends or to draw out their implications. This report is the first in a series that will use the data to delve into the underlying causes of the events. See also R-2881-ICJ. 73 pages. Bibliography.


This is an executive summary of R-2881-ICJ. 14 pages.


The purpose of this study is to explore the opportunities for expanding the use of cost-benefit analysis, discuss problems standing in the way of expanding its usage, and suggest experiments with it that can serve as benchmarks for further application. The study also recommends the collection of better product-hazard information; such information would be valuable input if cost-benefit analysis is adopted, or if it is not, the information could still serve as a partial substitute for cost-benefit analysis in the formulation of future standards. Section II treats several topics as a foundation for the subsequent analysis. Section III discusses the relationships among costs, benefits, and the optimal level of product safety, and the difficulties of pursuing cost-benefit analysis. Section IV explores the very limited past use of cost-benefit analysis in developing voluntary standards. Section V addresses a particularly important problem in improving the quality of cost-benefit analysis—that of obtaining better hazard information. The concluding Section VI touches briefly on tradeoffs between devoting resources to cost-benefit analysis and devoting them to other approaches to help ensure the appropriate level of product safety. 71 pages. Bibliography.


This report deals with government expenditures for processing tort cases, drawing on available data from federal and state agencies. Section II presents data on average judge-time expended per tort cases filed, followed in Section III by data on the total government expenditure per judge. In Section IV, the average government expenditure per tort case filed is calculated by multiplying the judge-time per case by the total government expenditure for all types of personnel combined and other resources used per judge-minute. Finally, Section V estimates the nationwide total annual government expenditure for processing tort cases. 91 pages. References.


This report analyzes the use of the civil justice system to decide on the allocation of public services, in particular with regard to the 1975 Education for All Handicapped Children Act. The authors found various levels of effects of using civil justice procedures to allocate educational services: (1) effects on the courts are slight; (2) effects on school systems are real but limited; and (3) effects on handicapped children are positive—but some, especially those whose parents are willing to threaten litigation, benefit far more than others. The most important finding of the study is that the introduction of civil justice procedures has had an enormous effect on local school policy, despite the low volume of litigation. The authors drew two conclusions regarding the use of the civil justice system to decide on the allocation of public services: (1) Thanks to the introduction of civil justice methods, PL-94–142 is applied with far more rigorous attention to the rights and duties of school personnel and beneficiaries than are other federal education programs; and (2) despite the optimistic conclusions, the findings do not necessarily warrant the extension of civil justice procedures to
other areas of local educational policy. 34 pages.

References.


This report uses the tools of economic theory to analyze how firms can be expected to respond to financial incentives. The report focuses on a statement that is usually assumed to be true and is repeated as conventional wisdom by many policymakers and the researchers who advise them: Increasing Workers’ Compensation (WC) benefits induces a firm to increase safety. This report presents the results of a theoretical analysis of how WC financial incentives influence the safety decisions of rational profit-maximizing firms. The research suggests that although the common wisdom has a strong theoretical basis in many cases, it does not have it in all cases, and the empirical evidence fails to provide much support for it. The analysis explores the conditions under which increasing WC benefits may enhance, diminish, or leave unaffected employers’ investments in safety. 64 pages. Bibliography.


This document reports the proceedings of a conference dealing with past and planned empirical investigation of the delay of litigation. The three sessions of the conference dealt with the pace of court activity, the pace of lawyer activity, and arbitration, and the pace of litigation. Part I provides a synopsis of conference proceedings and Part II provides a transcript of the talks and discussions that followed. 145 pages. Bibliography.


This report provides, for the first time in a convenient form, data and methods needed to examine the nature, size, and adequacy of Workers’ Compensation (WC) financial incentives for prevention, and thereby to evaluate the conventional wisdom about WC and safety. The report examines the WC financial incentives facing employers, under different insurance arrangements. The findings of the study demonstrate the sensitivity of incentives to the characteristics of each state’s WC system, firm size, interest rates, and insurance arrangements. Other conclusions reached include: (1) The conventional wisdom is that self-insured incentives exceed experience-rated insured incentives, but the reverse is often true; (2) retrospective-rated incentives will typically exceed both self-insured and experience-rated incentives; and (3) generalizations about the size of WC financial incentives should be made with great care. 68 pages. Bibliography.


This report analyzes the cost of processing domestic relations, mental health, probate and guardianship, property rights and condemnation, torts contracts and other civil complaints, and other civil petitions cases. Section II details the procedures for estimating and analyzing government expenditures for processing civil cases. Section III describes how the study derived the government expenditure per judge for each of the courts in the study—a necessary element in the cost-estimation procedure. Section IV reports the estimates of government expenditure and judge-time per civil case filed for various types of civil cases in state and federal courts. Finally, Section V provides estimates of the total nationwide government expenditure for processing civil cases. 125 pages. Bibliography.


This report is a study of the recent development of case management by federal judges during both the pretrial and posttrial phases of litigation. After discussing the underlying assumptions about the traditional judicial role, the author gives a full description of how judges manage both phases of lawsuits. Next, the author analyzes what is
24 Reports

currently known about the results of pretrial management and what effect such management might have upon the traditional judicial role. Finally, the author sets forth the alternative routes that judicial reformers might follow. An appendix on the iconography of justice is included. 74 pages. Bibliography.


In this report, the authors describe San Francisco jury trials and jury verdicts during the 20-year period from 1960 through 1979, and compare trends and patterns with those found in Cook County, Illinois. The data describe approximately 5,300 civil cases that were tried before juries in San Francisco County. These are then compared with an earlier study of Cook County civil jury trials. The study suggests that there is reasonable similarity in jury decisions over time and in different places. Although these results provide reassurance about juries, the frequency of these low-stakes cases raises questions about the economics of the civil justice system. However, most of the jury trials studied are probably economically justified for the parties. Although the analyses in this report cannot explain why, there was one important change in jury verdicts in both jurisdictions: the size of the largest awards. The size of the largest awards grew sharply in both jurisdictions. In both studies, the authors found a general stability and consistency in jury decisions over time and across jurisdictions. 91 pages. Bibliography.


This report describes types of injuries and losses claimed by plaintiffs, changes in claims during the 1960s and 1970s, and relationships between juries’ decisions and (1) the plaintiff’s physical injury; (2) the economic loss suffered by the plaintiff; (3) the type of lawsuit brought; and (4) the year in which the case was tried. The findings show that neither the types of injuries claimed by plaintiffs or the level of compensation for most injuries changed appreciably between 1960 and 1980. However, compensation for the small number of cases that involved unusually severe injuries grew in recent years. The findings also show that compensation for similar injuries differed by as much as fourfold among different types of lawsuits, and that such differences increased in the 1970s. The report offers explanations for why compensation might differ among types of suits and describes further research that will examine some of these possible explanations. 95 pages. References.


The resolution of civil liability claims is an expensive and uncertain process. Frequent parties to civil litigation face growing costs, but they may reduce the expense and uncertainty of litigation through new methods of using computers. Organizations that have experience in handling a large volume of civil litigation can use these methods to manage groups of cases and organize single, complex cases. Four new methods for using computers—open claim analysis, closed claim analysis, decision analysis, and rule-based modeling—may reduce the direct costs of litigation and the indirect costs of uncertainty in evaluating civil claims. All four methods have been used to analyze and support decisions about litigation, but most have not been widely applied. This report describes the development, uses, and limitations of each method, so that insurance company claim departments, law firms, corporations, and other frequent parties to litigation can consider whether those methods may be of help. 40 pages. References.


This report analyzes ways in which firms have responded to recent changes in pressures to design safer products, using interviews with product safety officials with major manufacturers and extensive analysis of legal and scholarly literatures. Shifts to strict liability and more stringent regulation during the past 15 years have
increased pressure to invest in safety assurance procedures, as evidenced by creation of new corporate product safety units. The effectiveness of regulation has been more questionable than has strict liability in inducing better design practices. This report argues that federal product liability legislation will have marginal effect, despite the current variations in state law on the matter. This report also discusses the factors that influence the effectiveness of corporate product safety units and suggests that combining product safety with quality assurance may be the optimal strategy for a firm. 160 pages. References.


This study addresses the relationship between litigated disputes and disputes settled before or during litigation by presenting a model of the litigation process in which the determinants of settlement and litigation are solely economic, including the expected costs to parties of favorable or adverse decisions, the information that parties possess about the likelihood of success at trial, and the direct costs of litigation and settlement. The most important assumption of the model is that potential litigants form rational estimates of the likely decision, whether it is based on applicable legal precedent or judicial or jury bias. From this proposition, the model shows that the disputes selected for litigation (as opposed to settlement) constitute neither a random nor a representative sample of the set of all disputes. 55 pages. Bibliography.


This report examines the money spent to resolve asbestos-related injury lawsuits: who pays it, who receives it, and for what purposes. After sketching in the Introduction the tangled context in which spending occurs for asbestos product liability litigation, subsequent sections analyze the actual costs incurred by plaintiffs, defendants, and insurers in the course of processing asbestos suits to resolution. The analysis focuses on net compensation (money received by injured persons after deducting litigation expenses), and on defense and plaintiff expenses (money paid to operate the legal and insurance systems through which society decides who should receive how much compensation and actual payment is arranged). Finally, the authors total the expenditures and examine the ratio between litigation expense payments and net compensation (the “overhead” costs incurred in generating one dollar in payment to an injured person). 40 pages.


This study uses statistical methods to compare state automobile accident compensation systems by examining how likely an accident victim is to be paid and the amount and timing of his payment. The study analyzes how various aspects of the tort system and the no-fault systems, where present, affect these outcomes. Among its findings were (1) victims in no-fault states more often collect from first-party automobile insurance than victims in other states; (2) victims in no-fault states are more likely to receive some payment; and (3) there is more consistency in payments in no-fault states in that the total amount of compensation a victim receives for a given economic loss varies less. See also R-3051-ICJ, R-3052-ICJ, R-3053-ICJ. 33 pages. Bibliography.


Automobile accident victims may receive financial compensation from several sources, depending on the rules of their individual states. This report analyzes closed insurance claims data to describe the effects of interstate differences in liability rules and insurance regulations on the compensation payments made under automobile no-fault and liability insurance policies. No-fault payments are usually equal to the claimant’s economic loss, and no-fault claimants generally receive at least partial payment more quickly than liability-insurance claimants. Liability-insurance payments also cover most claimants’ economic losses, and frequently
include payment for general damages (for example, pain and suffering) which, while highly variable, often exceed economic losses. Alternative liability rules have only modest effects on the number of victims who obtain payment under a liability policy. See also R-3050-ICJ, R-3052-ICJ, R-3053-ICJ. 121 pages. References.


This report compares outcomes of compensation systems for victims of automobile accidents from three groups of states: (1) no-fault states, with no-fault legislation that restricts tort liability; (2) add-on states, in which no-fault legislation does not restrict tort liability; and (3) tort states, without no-fault legislation. Among the study’s conclusions were the following: (1) the probability of an auto accident victim’s receiving any payment for his losses is higher in add-on and no-fault states than in tort states; (2) the average payment to the victim is usually nearer his economic loss in no-fault states than it is in tort states and add-on states for small losses; (3) the employer is the single most frequent source for payment of wage loss, and pays exactly the amount of wage loss about 80 percent of the time; and (4) victims in no-fault states appear to have a better chance of getting some compensation for wage loss than do victims in tort states. See also R-3050-ICJ, R-3051-ICJ, R-3053-ICJ. 63 pages. References.


The rules governing the sources of financial compensation that are available to accident victims vary widely between states. This report catalogues and explains the current liability rules and insurance regulations in all fifty states. As an aid to understanding the patterns of rules within states, it classifies the states into ten groups, using a refinement of the traditional tort/no-fault/add-on system. See also R-3050-ICJ, R-3051-ICJ, R-3052-ICJ. 61 pages. References.


This report examines the arbitration program of the Pittsburgh (Allegheny County) Court of Common Pleas, which at the time of the study applied to cases of $10,000 or less. Section II describes how arbitration works in Pittsburgh and analyzes the characteristics of the arbitration caseload. Section III analyzes the objective outcomes of arbitration: the distribution of wins and losses, the amounts of money awarded to different types of cases and litigants, the pattern of appeals, the distribution of appeal outcomes, and the costs associated with taking a case to arbitration hearing and through the appeal process. In Section IV, the authors discuss litigants’ views of arbitration. Also described are litigants’ assessments of the “fairness” of the arbitration process and of the appropriateness of case outcomes, their level of satisfaction, and the role of perceptions of procedural fairness in determining litigant satisfaction. Section V assesses the uses and limitations of court-administered arbitration programs, drawing on the results of the previous sections. 152 pages. References.


In recent years, courts and legislatures have used rules that shift liability for court costs and attorneys’ fees to plaintiffs or defendants to achieve two different objectives: to encourage litigation by particular plaintiffs (in civil rights, pollution, and consumer litigation), and to regulate the volume of litigation (most commonly to encourage settlement). These goals are contradictory and in conflict in a recent Supreme Court case, Delta Air Lines, Inc. vs. August. This essay discusses the distributive effects of these rules and their effects on the rate of litigation. The analysis expands other recent treatments by considering offer-of-judgment rules and the parties’ strategic actions. 21 pages. Bibliography.

This report analyzes characteristics of individual claims that explain variation in compensation and expenses. The first section describes the research approach and sketches the tangled context in which spending occurs for asbestos product liability litigation. Section II presents data on the characteristics of closed claims and on the actual compensation paid and expenses incurred by plaintiffs, defendants, and insurers in 1980–1982. Section III focuses on explaining the variation in total compensation. Sections IV, V, and VI, respectively, analyze claim characteristics that help explain why certain claims receive no compensation, identify which claims proceed to trial instead of being closed before trial, and identify which claims result in punitive awards. Sections VII and VIII analyze the variations in defense and plaintiff litigation expenses. Finally, Section IX totals the expenditures and examines the ratio between litigation expense payments and net compensation. 91 pages. Bibliography.


This study of civil delay and congestion in the Los Angeles Superior Court since the early twentieth century is an effort to provide an empirical basis for determining the extent to which these problems have worsened over the years. It considers (1) whether civil delay has increased steadily; (2) whether sources of delay are the same now as in the past; (3) effectiveness of innovations the court has introduced in the past to improve the situation; (4) larger institutional or political forces that may have influenced the effectiveness of any procedural innovation; and (5) how delay in Los Angeles courts compares with that of other metropolitan trial courts. The authors do not find a conclusive explanation for the recent increases in civil delay in Los Angeles, but believe that changes in the characteristics of the civil caseload may have contributed to increased delay, and find that this conclusion applies to other metropolitan areas as well. They conclude that the court should focus its delay-reduction efforts on adding to its existing resources and more effectively allocating the resources it does have to its most time-consuming cases. 172 pages. Bibliography.


Court-annexed arbitration is a court-run dispute resolution process to which cases that meet some specified criteria are involuntarily assigned. Arbitrators hear the case and render awards that are not binding, however, as a litigant may always request a trial. In the last decade, court-annexed arbitration has gained popularity as a means of handling small civil cases. Using in-depth analysis of arbitration in several courts, and survey results from a remaining group of courts, this report summarizes the variety of program design alternatives, assesses the probable implications of choosing one set of alternatives over another, and discusses methods that courts adopting arbitration might use to evaluate its effectiveness. 113 pages. Bibliography.


This report examines how different types of parties fared in over 9,000 civil jury trials in Cook County, Illinois, between 1959 and 1979. It builds on two previous studies of civil jury trials, The Civil Jury: Trends in Trials and Verdicts, Cook County, Illinois 1960–1979 R-2881-ICJ, and Compensation of Injuries: Civil Jury Verdicts in Cook County R-3011-ICJ. These studies found substantial disparities in outcomes for different types of lawsuits, even after the types and seriousness of plaintiffs’ injuries and the amount of claimed economic losses were accounted for. The analyses in the present report describe variations in outcomes for different types of litigants, and find that corporate defendants paid damage awards that were one-third larger than those that individual defendants had to pay. Government defendants paid even more than
corporations in most of their lawsuits. However, corporations fared worse than all other defendants in lawsuits where plaintiffs claimed very severe injuries. Among individual litigants, blacks lost more often than whites, both as plaintiffs and defendants, and black plaintiffs received smaller awards. Black defendants, however, paid less than their white counterparts. 108 pages. References.


Based on cases that reached jury verdict in Cook County, Illinois, and San Francisco, California, from 1960 to 1984, this report presents analytically derived answers to questions surrounding the award of punitive damages: (1) how frequently punitive damages are awarded in civil suits; (2) what types of cases and defendants are most subject to such awards; and (3) what proportion of the monies awarded in punitive damages is actually paid out. The findings confirm trends for which there had only been anecdotal evidence: The incidence of punitive damage awards (measured by proportion of cases in which such awards are made) and the amount of money (measured in constant 1984 dollars) awarded for punitive purposes have increased substantially over the years. Corporate defendants are in fact more likely than individuals or public agencies to be the target of such awards. Many damage awards are significantly reduced and only about half of the dollars awarded are ultimately paid subsequent to award at the trial court level. 68 pages. References.


This report presents the results of a study of how the civil justice system has dealt with the challenges presented by asbestos litigation. Its sections describe (1) the characteristics of asbestos litigation, both at the individual case level and at the aggregate level; (2) the way in which the court system has approached the three critical tasks of litigation: substantive decisionmaking, preparing cases for trial, and disposing of cases; and (3) the implications of the findings. Based on their observations of the asbestos litigation process, the authors review the strengths and weaknesses of the tort system as a mechanism for resolving mass toxic torts, consider changes that might strengthen the system, and suggest a mechanism for formulating new policies. 128 pages. Bibliography.


This study was undertaken to answer the following questions: What was the total expenditure nationwide for tort litigation terminated in state and federal courts of general jurisdiction in 1985? How much of the total was spent for the various costs of the tort litigation system: plaintiffs’ and defendants’ legal fees and other litigation expenses, the value of litigants’ time spent on the lawsuits, the value of time spent by insurance personnel, and the costs of operating the courts? How much of the total was net compensation to plaintiffs? How do litigation costs and compensation paid differ for torts involving motor vehicles and for all other torts? How fast is the tort system growing? The study indicates that plaintiffs with tort lawsuits in state and federal courts of general jurisdiction received approximately half of the $27 billion to $34 billion spent in 1985. The costs of litigation consumed the other half. 157 pages. Bibliography.


This report updates an earlier analysis (R-2870-ICJ/HCFA) of the effects of demographic, medical, and legal factors on the frequency and severity of medical malpractice claims. Using claims data from 1975–1984, the author analyzes the effects of tort reform on malpractice claims after taking into account the effects of other variables that have previously been shown to correlate with claims frequency and severity. The evidence from the study suggests that the last round of tort reforms affected the frequency and severity of malpractice claims over the decade 1975–1984 in a way broadly consistent with theory and previous evidence. Claim frequency per
physician has grown at roughly 10 percent a year and severity has increased at twice the consumer price inflation rate. Nevertheless, tort changes have had some effect. States that enacted shorter statutes of limitations and set outer limits on discovery rules have had less growth in claim frequency than would otherwise have been predicted. States with statutes permitting or mandating the offset of collateral benefits had 14 percent fewer claims, and 11 to 18 percent smaller payouts, than would otherwise have been predicted. States with caps on awards have reduced severity by 23 percent. Arbitration statutes appear to have increased claim frequency but reduced average severity. 35 pages.

Bibliography.


Based on a review of more than 2,000 U.S. airline aviation accident death cases from 1970 to 1984, this report describes the characteristics of the decedents and compares the compensation paid to their survivors with the levels of economic loss they suffered. The study found that the plaintiffs received 71 percent in net compensation, and 29 percent went for transactions costs. The findings indicate that airline accident litigation has higher transactions costs, but a lower ratio of transactions costs to total expenditures than tort litigation in general. See also R-3549, R-3551, R-3585, R-3684, N-2773. 150 pages. Bibliography.


This report extends earlier efforts to document and analyze the outcomes produced by the civil justice system, based on studies of civil jury trials in Cook County, Illinois, and San Francisco County, California. First, the report updates the earlier work by incorporating data for the years 1980 through 1984. Second, it expands the scope of the study to include the entire state of California. Past patterns in jury awards continued in Cook County during the 1980s: The size of most jury awards did not increase (the median actually fell), but large jury awards, and therefore the average, increased sharply. The pattern that prevailed in both jurisdictions during the 1960s and 1970s, however, changed in San Francisco: There was a substantial increase in the size of awards during the 1980s across the entire range of cases tried in state and federal courts. Unlike past findings, the increase was not restricted to a few very large awards. The average award increased as in previous years, but median awards also increased to triple the median of the late 1970s. 62 pages. References.


Recent verdicts in lawsuits that are arising from widespread exposure to toxic substances, and the large compensatory and punitive awards in traditional liability cases, have revived debates and complaints about the competency of lay jurors. This case study describes an interview conducted with the jury that decided an asbestos products liability case in Texas in 1984. After deliberating for one day, the jury found each defendant liable and awarded the four plaintiffs $7.9 million. The legal issues raised in the Newman trial, the claims made, and the witnesses and evidence on each side are typical of those raised in other asbestos jury trials. According to experimental research, jurors do not have full or accurate memories for trial testimony. The Newman panel behavior is consonant with experimentally based observations, but that does not explain why the panel reached its specific decision. In some ways, most notably how it computed its large compensatory damage awards, its behavior was inconsistent with previous findings about jury behavior. 110 pages. Bibliography.

Motivated by the recent national debate on the growth of jury awards, this report examines how jury awards change after trial. It considers not just tort actions, but all civil suits for money damages. For all types of cases, it (1) compares jury awards to final payments; (2) examines how results vary by award size; and (3) studies whether results differ by case characteristics. The authors find that, in the locales studied, defendants paid out an average proportion of 0.71 of the amount the jury originally awarded. Further, reductions were generally greater among cases with the largest awards. However, some sizable awards were not lowered, and results differed significantly depending on the characteristics of the case. The findings suggest that the system works already in much the same way that the current proposals for legal change are intended to work, namely, by affecting “excessive” awards. 76 pages.

References.


This report outlines a new method for computing economic loss in cases of wrongful death. The authors use the human capital (or lost economic output) approach because it dominates actual litigation. In this conceptual model, economic loss is the value of the decedent’s lost future productivity, market and nonmarket. The methodology includes seven elements: (1) base-year incomes; (2) salary growth; (3) work life discounts; (4) nonmarket loss; (5) personal consumption offset; (6) taxes; and (7) discount rates. The methodology can be applied in a wide range of tort cases besides wrongful death. See also R-3421, R-3549, R-3585, R-3684, N-2773. 124 pages. Bibliography.


This report considers wrongful-death litigation resulting from aviation accidents. It compares benchmark measures of economic loss and loss to survivors with the compensation that beneficiaries actually received. The findings indicate that for the years under study, the tort system did not fully compensate survivors for the losses they suffered from air accidents; similarly harmed individuals were not treated the same; compensation paid through the tort system does not significantly add to safety incentives; and compensation and recovery rates have risen dramatically over the years under study. See also R-3421, R-3549, R-3585, R-3684, N-2773. 123 pages.


This report offers a framework for assessing the effects of tort reforms. It attempts to provide a coherent structure for systematically thinking about how research can contribute to the policy debate over tort reform. It identifies four basic policy issues critical to assessing the effects of tort reforms on the tort system: (1) how soon we can expect to see effects of reforms; (2) whether reforms have affected the outcomes of disputes; (3) who won, who lost, and how much; and (4) whether reforms have affected economic behavior. The author points out that the kinds of data needed to assess the effects of reform are generally not available, and suggests that three types of new data collection systems need to be considered: (1) systematic efforts to obtain data from insurers and self-insured defendants on the aggregate outcomes of liability claims; (2) special surveys of claimants, the bar, and insurers to obtain the detailed individual claim information needed to identify the winners and losers in the reformed system; and (3) systems for collecting information both on the other factors that affect the behavior of participants in the tort system, and on economic outcomes and injuries. 72 pages. Bibliography.

This Special Report from The RAND Corporation’s Institute for Civil Justice draws on seven years of ICJ research to consider three issues at the heart of the recent debate on trends in tort litigation: (1) how much litigation there is; (2) whether jury awards are stable or out of control; and (3) how much litigation costs and who gets the money. The research suggests that discrepancies among the statistics on tort litigation can be explained by the fact that there is no longer, if there ever was, a single tort system. Instead, there are at least three types of tort litigation, each with its own class of litigants, attorneys, and legal dynamics. The three types of torts are routine personal injury torts (for example, auto suits), high-stakes personal injury torts (for example, product liability, malpractice, and business suits), and mass latent injury cases (for example, asbestos litigation). Each of these areas is characterized by a different litigation growth rate, jury verdict trend, and cost profile; therefore, treating them together—as is done whenever overall statistics for tort litigation are reported—produces a distorted picture. 34 pages.


Although there has been an uproar over wrongful termination litigation, the aggregate legal costs are not large, even compared with the number of involuntarily terminated employees who are not otherwise protected by collective bargaining agreements, civil service regulations, or explicit employment contracts. The direct costs may underestimate the effects of wrongful termination suits. The fear of such suits could prevent managers from being flexible in adjusting to business cycles, new investment opportunities, or evolving technologies. In response to wrongful termination suits, administrative costs may rise substantially. Costly procedural changes could be balanced by benefits stemming from more efficient utilization of human resources, making everyone better off. 73 pages. References.


This report analyzes the product liability litigation that occurred in federal district courts from mid-1973 through mid-1986. It attempts to clarify the debate over whether product liability litigation has involved thousands of companies and products and therefore damaged U.S. business, or whether such litigation has consisted primarily of “epidemics” of suits limited to a few products and affecting only a few businesses. It considers how many companies have been involved in federal product liability litigation and to which industry groups they belong; and it examines the patterns exhibited by federal product liability filings since the mid-1970s. The most important general conclusion is that there is significant diversity among defendants, among industries, and even within industries. In particular, a distinction must be drawn between the tiny number of defendants named in thousands of suits, and the thousands of defendants named only once or twice. Policy and law developed to deal with the situation must
recognize that an approach that seems suitable for one facet of litigation may be inappropriate for another. 79 pages. Bibliography.


In 1985, New Jersey implemented a statewide program of mandatory court-administered arbitration of automobile injury lawsuits. In order to evaluate the program, the Institute for Civil Justice examined court records for a random sample of more than 1,000 auto negligence cases filed in either 1983 (pre-arbitration) or 1985 (post-arbitration), and surveyed approximately 300 litigants and 400 attorneys. No significant changes in trial rates or litigation costs were found. However, the program has had some unanticipated effects. Cases that are assigned to the program are significantly less likely to settle privately without a third-party hearing and, on average, take significantly longer to terminate than in the pre-arbitration period. Both litigants and attorneys evaluate arbitration hearings quite favorably. It appears that the program is providing disputants greater access to third-party hearings, but not greater efficiency. 134 pages. References.


In 1985, RAND’s Institute for Civil Justice undertook a detailed study of aviation accident litigation in the United States. This report summarizes the resulting four detailed study reports. It describes the characteristics of the decedents and the litigation, and provides data on compensation paid, litigation costs, and economic losses suffered. The report compares the economic losses and transactions costs with the amount of compensation paid. The findings indicate that airlines and other defendants compensated victims’ survivors for less than half of their average economic loss. The findings also indicate that aviation accident litigation has higher transactions costs than tort litigation in general, but a lower ratio of transactions costs to total expenditures. See also R-3421, R-3549, R-3551, R-3585, N-2773. 64 pages. Bibliography.


This report investigates the attitudes and perceptions of individual plaintiffs and defendants in personal-injury tort cases in three state courts. Specifically, the report investigates how tort litigants’ impressions of fairness and satisfaction with their experiences in the civil justice system are affected by hearing procedures, case events, and the litigation process. The authors found that the three third-party procedures they studied—trial, court-annexed arbitration, and judicial settlement—differed considerably in the procedural fairness and satisfaction ratings they engendered: Arbitration hearings and trials were viewed more favorably than were settlement conferences. The findings suggest that improvements in perceived justice and satisfaction are more likely to come from changes in the tone of the judicial process than from innovations designed to cut costs or reduce delay. Further, innovations intended to reduce costs and delay should not do so at the expense of those qualities of the judicial process that are more important to litigants. 93 pages. References.


Delay in the disposition of civil cases in the Los Angeles Superior Court is a severe problem. Litigants who want a jury trial must now typically wait five years from the time they file their cases for the trials to begin. Time to disposition is much longer in Los Angeles than in the typical urban court and much longer than the two-year time standard. Court judges and administrators have long recognized the delay problem and have been working hard to find ways to speed the disposi-
tion of civil cases. Despite their efforts, the delay problem has persisted and has worsened in recent years. This analysis explored the major possible explanations for the current long times to disposition in the Los Angeles Superior Court. The authors show that the causes of civil delay are multiple and complex, but largely result from three factors: the demand for court services exceeds the supply of judicial officers; the court could manage individual cases and court personnel more effectively; and litigants and their lawyers are, in some instances, delaying the disposition of cases. See also N-2988. 117 pages.


Court-annexed arbitration, which requires the referral of civil cases to nonbinding arbitration before a lawyer-arbitrator, has become an increasingly common feature of civil procedure, though it has been largely confined to state court programs for small tort cases. In the past decade, however, arbitration procedures have increasingly been used in the federal district courts, which tend to apply such procedures to much larger cases and to contract cases as well as torts. This report describes a four-year study of court-annexed arbitration in the U.S. District Court for the Middle District of North Carolina. The study examined the efficacy of court-annexed arbitration in high-stakes federal tort and contract cases. The study found the program had few negative effects and many positive ones, including improved access to the justice system, reduction of private litigation costs, and favorable reactions by both litigants and attorneys. The success of the arbitration program in the Middle District of North Carolina shows that alternative dispute resolution can produce benefits for disputants in large-stakes cases. 120 pages. Bibliography.


Jury verdicts directly affect the lives of hundreds of thousands of people in the United States every year and serve a bellwether function in plea bargaining and settlement negotiations. But because juries deliberate in secret, legal policymakers have made important decisions about the scope and conduct of jury trials on the basis of untested intuitions about how juries reach verdicts. In this review of research on jury behavior, the author emphasizes the use of mock jury experiments to test hypotheses and refine theoretical models of the decision process. Because jury decisionmaking involves two different phases—cognitive processing during the trial and deliberation in the jury room—the author reviews research on both the trial and deliberation phases of the judgment process. In keeping with the emphasis of most jury research, he focuses primarily on decisionmaking in criminal trials; the extent to which the findings can be applied to civil litigation is discussed in N-2671. (Reprinted from Science, Vol. 244, June 1989.) 5 pages. References.


The Superfund program, established by Congress in 1980 and reauthorized in 1986, is intended to handle emergencies arising from the release of hazardous wastes, to provide long-term cleanup for a limited number of sites, and to encourage more responsible disposal of hazardous wastes in the future. This report (1) provides an overview of the Superfund program, its legal basis, and its sources of funds; (2) presents a concise description of incentives and the major administrative steps taken in their application; (3) gives an overview of the major indicators of program effect based on public data available from the Environmental Protection Agency and other selected sources; (4) presents a short interpretation of some of the most interesting or puzzling findings; and (5) outlines statistics and attempts to capture costs and activities for each major group participating in the Superfund process. This report also considers the transaction-cost issue, focusing on
two of the key players in the cleanup process: very large companies (potentially responsible parties) and insurers that are brought into the hazardous-waste cleanup process by their policyholders’ indemnity claims. It describes their experiences with Superfund and Superfund-type sites, and shows the division of their expenses between cleanup and transaction costs. 65 pages.

References.


This report presents a longitudinal study of filing patterns in federal district courts and of the time taken to dispose of cases in those courts. It takes as its focus private civil litigation conducted between 1971 and 1986; hence, all such cases that were terminated by the district court system during that period are included in the analysis. The study, which assesses the performance of the entire district court system and provides an in-depth examination of case processing in fast, slow, and average districts, shows that in the aggregate, private civil suits reached disposition in about the same amount of time in 1986 as in 1971, but that this measure varied considerably from district to district. A review of factors that intuitively seem likely to be associated with such time-to-disposition differences, including case mixture, processing characteristics, and resource levels, reveals that none, in fact, bears a substantial relationship to variation in disposition times. The report concludes with a consideration of further research that might shed light on the determinants of the pace of case processing. 92 pages.

References.


One in every six Americans sustains an injury in an accident that results in measurable economic loss, and about one-third of those victims suffer a moderate to very severe injury that imposes significant costs on them and on society. The United States has developed a loose network of public and private programs designed to help alleviate the costs those losses impose by providing compensation to accident victims. This network includes private insurance, publicly subsidized
programs like Medicare, work-related programs like workers’ compensation, and the fault-based tort liability system. These programs have come under increasing scrutiny, as has the compensation network as a whole. This report evaluates the total system of compensation by examining the role of individual compensation mechanisms; investigating the experience of individual American households; and examining the ways experiences vary by accident, injury, and sociodemographic circumstances. Specifically, it presents the results of the first phase of analysis of data collected in a large, nationally representative survey, the purpose of which was to describe the universe of accidents and injuries the authors studied, develop estimates of costs and compensation, describe the liability claiming process, and examine the correlates of liability claiming. See also R-3999/1-HHS/ICJ. 217 pages. References.


The Institute for Civil Justice has developed a program of research on the design and performance of alternative compensation systems and the role played by the tort liability system in the network of programs, including a study of how compensation programs are designed, covering such critical elements as eligibility standards, compensation levels, case processing, and funding mechanisms. It also includes studies of specific compensation programs, for example, automobile no-fault. A critical component of this work is a national survey of accident victims that seeks to determine who these victims are, how severely they are injured, how much their injuries cost, how the victims seek compensation, who files liability claims and why, and what results victims obtain. This report contains the first findings from that survey. 33 pages. Bibliography.


Widespread dissatisfaction with the traditional approach to compensating people for auto accident injuries has revived interest in no-fault approaches. This report estimates the effects of a broad range of no-fault plans, compared with the traditional system. The study is primarily based on data from two sources—closed-claim surveys and a household survey—which were combined to construct a representative sample of people injured in auto accidents. The authors use data on what actually happened to people injured in auto accidents in states that have adopted no-fault systems to develop statistical models relating their injuries, losses, and other factors to whether or not they received any compensation from auto insurance and, if so, how much, how quickly, and at what transaction costs. They then apply these models to samples of people injured in auto accidents in states that retain the traditional compensation system to estimate what would have been their outcomes under a specified no-fault alternative. Finally, they compare the actual outcomes people experienced under the traditional system with their estimated outcomes under various no-fault alternatives. The findings indicate that no-fault can yield substantial savings over the traditional system, or may increase costs substantially, depending on the no-fault plan’s provisions. Regardless of plan provisions, all no-fault plans reduce transaction costs, match compensation more closely with economic loss, reduce the amounts paid in compensation for noneconomic loss to less seriously injured people, and speed up compensation. 239 pages. Bibliography.


This report considers what would happen if a state adopted a no-fault auto insurance system. Specifically, it examines (1) how a no-fault plan would affect the costs of compensating for
injuries, the amount spent on transactions, the adequacy and equity of injury compensation, and the timeliness of compensation; (2) how the design of the no-fault plan would influence these effects; and (3) how these effects would vary between states. The authors conclude that no-fault can yield substantial savings over the traditional system or it may increase costs, depending on the no-fault plan’s provisions and on differences among states in factors that affect the auto-insurance system. They also conclude that no-fault plans reduce transaction costs, align injury compensation more closely with economic loss, eliminate compensation for noneconomic loss for less serious injuries, and generally speed up compensation. 23 pages.


Congress enacted the Superfund program in 1980 to clean up the nation’s worst inactive hazardous-waste sites. Superfund uses a liability-based approach intended to help government tap private-sector resources to finance and conduct cleanups. Based on an examination of the activities and expenditures of two sets of private parties—large industrial firms (the potentially responsible parties, or PRPs) and insurance companies—this report studies empirically the effects of Superfund’s liability-based approach on the cost of waste-site cleanup. The analysis focuses on insurer and PRP expenditures and the breakdown of those expenditures into cleanup and transaction costs (incurred in resolving disputes about who is responsible for cleanup). The analysis includes cleanups instigated by state programs and those undertaken privately, as well as those in the federal Superfund program. The research suggests that there is considerable variation in transaction-cost shares across sites. More information on the characteristics of the nation’s inactive hazardous-waste sites would provide a better prediction of what transaction costs will ultimately be. However, it may only be as time passes and more sites move into the later stages of the cleanup process that we will be able to develop an accurate picture of the transaction costs generated by the liability-based approach of Superfund and similar state laws. 82 pages.

References.


This study examined the economic effects of product liability on firms producing drugs and medical devices. The analysis drew on empirical information from a wide variety of sources, simulations, and interviews at three major pharmaceutical companies to examine the effects of liability on product availability, safety, effectiveness, and innovation. The study found that the liability system enhances the economic contributions of these industries in some ways—for example, encouraging them to invest in safer designs for medical devices, undermines them in others—for example, causing companies to withdraw products that the medical community generally believe were beneficial, and has mixed effects in others—for example, in the areas of pricing and innovation. The effects are industry specific, and the perceptions of firm decision-makers about the probability and consequences of liability suits must be addressed to understand both the effects of the current system and the effects of reforms. The study identified liability policy reforms that should improve economic performance: Make regulatory compliance central for drugs and extensively regulated devices, specify explicit standards for behavior warranting punitive damages, and improve procedures for weighing scientific evidence about the cause of injury. 227 pages. Bibliography.
Technical Reports


Flooding is a major source of loss to individuals and businesses in the United States. Private insurers have historically been unable to provide flood insurance at affordable rates, and until the establishment of the National Flood Insurance Program in 1968, the primary recourse for flood victims was government disaster assistance. Congress adopted this program in response to the ongoing unavailability of private insurance and continued increases in federal disaster assistance. The Federal Emergency Management Agency is currently conducting a major evaluation of the program’s goals and performance. This report contributes to that evaluation by developing more reliable estimates of the proportion of single-family homes (excluding condominiums) that have flood insurance (the market penetration rate); by identifying factors that determine the market penetration rate; and by examining some of the opportunities for, and the potential benefits of, increasing the market penetration rate. 138 pages. References.


Over 55 percent of Americans are employed in businesses with fewer than 100 workers. Policymakers have taken action to lessen regulatory burden on small business. However, evidence shows that small establishments-single physical locations-have much higher rates of deaths or serious injuries than do larger establishments. This study examined the relationship between fatality rate and business size, both in terms of establishment size and firm size, from 1992 to 2001. The analysis uses fatality data drawn from Occupational Safety and Health Administration (OSHA) accident investigation reports and employment data from the U.S. Department of Commerce and the U.S. Census Bureau. The study found the following: (1) The smallest establishments had the highest fatality rates. (2) Within firms of a given size, fatality risk still declines steadily with larger establishment size, but if one controls for establishment size, firm size has little impact on risk. (3) In small establishments, there is some protective value in being a small firm. (4) Higher fatality rates in small businesses are related to OSHA violations. (5) Electrocutions are slightly more common in small establishments. (6) Fatality rates at small establishments declined slightly over time. (7) Nonmetropolitan location and unionization were both associated with higher establishment fatality rates. 102 pages. References.


In recent years, there has been a growing concern that targeted acts of terrorism, focused on critical economic infrastructure, could produce cascading social and economic effects on a very wide scale. The authors carry out a scenario analysis and strategic gaming revolving around a catastrophic terrorist attack on the Port of Long Beach. The authors describe the results from this investigation and provide many of the primary results from the analysis in the appendixes. The analysis tools developed by the authors for this study lay the groundwork for research exploring both the short- and long-term effects of catastrophic events. The need is pressing to continue such investigations, particularly of longer-term economic repercussions. This work would entail developing scenarios for a new generation of strategic games. The overarching goals would be to gain insight into the decision landscape in the months following attacks of this magnitude with a focus on identifying where existing systems are likely to fail and evaluating the benefits of a range of potential economic policies. With these types of tools, policymakers could start to anticipate the types of decisions they might be called upon to make, reflect in times of relative calm on their options, and plan well in advance for contingencies. 70 pages.
In 2000, the Small Business Reauthorization Act authorized restricting competition for federal contracts on a discretionary basis to women-owned small businesses (WOSBs) in industries where they are underrepresented, i.e., where the share of contracts awarded to them is small relative to the prevalence of like firms in the pool of those “ready, willing, and able” to perform government contracts. Underrepresentation is commonly measured by a disparity ratio. A disparity ratio of less than 1.0 suggests that the firms are underrepresented in federal contracting, one greater than 1.0 suggests that they are overrepresented.

This report presents disparity ratios for WOSBs, computed in four ways: based on number of contracts and on contract dollars for the population of all employer firms, and based on number of contracts and contract dollars for the population of all firms that have registered as potential bidders for federal contracts. The measurement is sensitive to whether awards are measured in dollars or in number and to whether the population of ready, willing, and able firms comprises all employer firms or just those that have registered as potential bidders on federal contracts. Depending on the measure used, underrepresentation of WOSBs in government contracting occurs in 0 to 87 percent of industries. The variation is especially large in the measures that use contract dollars rather than number of contracts. The report highlights industries where disparities occur and discusses how their identification varies depending on the methodology used and on data limitations. 62 pages. Bibliography.

As the U.S. population ages, so will the population of licensed drivers. Policymakers are concerned that this will lead to increases in traffic accidents and, consequently, injury to property and person. Although the capacity to safely operate a motor vehicle decreases at older ages, at least some older individuals voluntarily limit their driving when they perceive that their ability to drive has diminished. Do the elderly self-regulate enough that their overall negative impact on traffic safety is no more than that of other drivers? The research reported in this volume estimates how the probability of causing an automobile accident varies with age. Findings include that older drivers are somewhat more likely than middle-aged ones to cause an accident, but the bigger issue may be that they are much more likely to be injured or killed if they are in an accident, regardless of fault. 64 pages. Bibliography.

The National Flood Insurance Program (NFIP), a part of the U.S. Federal Emergency Management Agency (FEMA), provides the majority of flood insurance on residential properties in the United States. While insurance agents sell nearly all NFIP policies through private insurance companies, the federal government still underwrites them. Flood insurance is also available from private insurers that underwrite it themselves and assume the risk. However, little systematic information is available about the size of the private market, how the policies that private insurers offer compare with those that the NFIP offers, or the reasons buyers choose private market policies over federal program policies. This report provides information in each of these three areas. 68 pages. References.

Recent acts of terrorism and statements by terrorist organizations have focused attention on the economic damages that can be produced by terrorist activities and the desire of some terrorists to inflict economic harm in pursuit of their goals. Based on a review of the relevant literature, this report describes the range of economic effects of terrorist activities. It examines in detail the September 11, 2001, attacks and the extended terrorist campaign waged by the Provisional Irish Republican Army as examples of two extremes of terrorist economic targeting: high-impact, episodic terrorism and lower-level, but extended, campaign terrorism. From these examples, the authors develop a framework capturing the full range of costs that may result from economic targeting and use it to explore the range of defensive measures that might be used to respond to this threat. 84 pages. Bibliography.


The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) requires that debtors filing for bankruptcy whose monthly income exceeds the median income for their household size in their state use the IRS expense standards rather than their current expenses to calculate their monthly disposable income (MDI). This change can affect both the options available to a debtor considering filing for bankruptcy and the amount the debtor must pay to creditors under a repayment plan. This report assesses this new requirement’s effects on debtors and the courts, finding the following. Similarly situated debtors may have substantially different payment obligations depending on the jurisdiction in which they live. Each bankruptcy case now requires more judicial time. The IRS standards, especially living expenses, yield larger deductions, on average, and, therefore, lower MDIs across the country. Generally, higher-income debtors gain less using the IRS standards rather than current expenses than do otherwise similar, lower-income debtors; this difference is significant for homeowners and highly so for renters. 66 pages. References.


The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) limited the types and quantities of exempt household goods on which debtors could avoid certain liens. Part of the motivation for these changes was a perception that debtors were using their household goods as collateral to obtain loans that they never intended to repay. The Executive Office for U.S. Trustees (EOUST) asked the RAND Corporation to analyze the similarities and differences in the amounts and types of loans secured by debtors’ household goods reported in bankruptcy cases filed before and after BAPCPA. RAND found no changes in debtor or creditor behavior due to the new definition of household goods. Some interview participants noted that it may be too early to tell whether debtors are changing their practices related to this issue. 44 pages. References.


In theory, financial professionals are relatively distinct: A broker conducts transactions in securities on behalf of others; a dealer buys and sells securities for his or her own accounts; and an investment adviser provides advice to others regarding securities. Broker-dealers and investment advisers are subject to different regulatory structures. But trends in the financial services market since the early 1990s have blurred the boundaries between them. Regulatory reform
requires a clearer understanding of the industry’s complexities. The U.S. Securities and Exchange Commission asked RAND to conduct this study to examine the professionals’ current business practices and whether investors understand differences between and relationships among them. The report describes a heterogeneous industry, with firms taking many different forms and offering a multitude of services and products and with investors failing to distinguish broker-dealers and investment advisers along regulatory lines. Despite this, investors express high levels of satisfaction with the services they receive from their own financial service providers. This satisfaction was much more frequently reported to arise from the personal attention the investor receives than from the actual financial returns arising from this relationship. 228 pages.

References.


More than 60 percent of nonelderly Americans receive health-insurance (HI) coverage through employers, either as policyholders or as dependents. However, rising health-care costs are leading many to question the long-term viability of the employer-based insurance system. Concerns about the economic burden of providing HI are particularly acute for small businesses, which are both less likely than larger firms to offer HI and more sensitive to price when deciding to offer insurance. Small firms may have difficulty containing costs due to their limited bargaining power and their inability to hire experts skilled in negotiating with insurance companies. Further, while few recent studies have systematically explored differences in the quality of HI plans that small and large firms offer, small firms may offer health plans of lower quality. To better understand these issues, researchers from the Kauffman-RAND Institute for Entrepreneurship Public Policy (KRI) explored trends in the economic burden associated with HI provision, as well as the distribution of this burden, for small and large businesses. They also considered the quality of plans that small and large firms offer. 80 pages. References.
NOTES


Merit rating is not widely used in setting medical malpractice insurance premiums. This note discusses a statistical analysis of two different data sets showing that actual malpractice claims experience is inconsistent with the notion that claims occur randomly among physicians within each specialty class. Consequently, a statistical model allowing physician specific claims propensities is fit to a recent data set. Calculations using this model indicate that the additional effect of four years of a physician’s claims experience on his or her expected claims rate is comparable to the effect of knowing the physician’s medical specialty. Consequently, merit rating deserves more serious attention in medical malpractice insurance. 23 pages. References.


This note presents the preliminary results of a year-long study of the Pittsburgh (Allegheny County Court of Common Pleas) arbitration program. It seeks to understand how litigants fare in such a program, which seeks to deliver “rough justice” in a highly efficient fashion. This note summarizes the findings to date, highlighting issues that may be of particular concern to those interested in consumer dispute resolution. The findings are based on analyses of court record data for a sample of cases filed in arbitration in 1980 and 1981, and on interviews with litigants whose cases were heard in 1982. 25 pages. References.


This note reports the preliminary results of research which empirically examines issues central to the prejudgment interest policy debate. The work thus far establishes that juries are implicitly awarding prejudgment interest. The analysis is based on data on all awards returned in civil jury trials in the federal, state, and municipal courts in Cook County, Illinois, from 1960 to 1979 relating to injuries arising from automobile accidents (1,349 cases). Controlling for the severity of injury, it was found that, on average, juries increased awards over and above inflation as measured by the Consumer Price Index at a rate of 3.7 percent per year for the time between injury and trial. Overall, juries implicitly provide prejudgment interest at a rate equal to the underlying inflation rate plus 3.7 percent per year. The Note addresses the implication of these effects for the policy debate about prejudgment interest. 47 pages. Bibliography.


This note presents a case study of one of the most controversial actions of the 1981–1982 California legislative sessions: passage of mandatory prejudgment interest on personal injury awards (SB 203). This law entitles successful plaintiffs to interest, which accrues prior to judgment from the date of the first offer to compromise that is exceeded by judgment, to the date of the satisfaction of the judgment. The study sheds some light on the politics of tort reform in California. Section II reviews the major contested issues and how they were received in the legislature. Section III analyzes the political dynamics that help to explain passage of this bill, considers the role of analysis in the debate, and finally draws some conclusions and generalizations from the exercise. 31 pages. Bibliography.


This note, a shortened version of a study published as R-2733-ICJ, examines the experimental court-ordered arbitration program established in California in 1979, in an effort to determine whether court-ordered arbitration reduces court congestion and backlogs; whether it cuts costs, by how much, and to whom; and whether participants, both litigants and attorneys, like the pro-
gram. The authors found California’s year-old program to be a modest success: It provides some objective benefits, particularly to courts, and it seems to hurt no one. 18 pages. References.


This note reports the findings of a national survey to determine the current status of court-annexed arbitration among state and federal trial courts. It is an update of a similar survey conducted by The Institute for Civil Justice in 1980 and published as R-2732-ICJ. Since then, the number of jurisdictions around the country that authorize court-annexed arbitration has doubled. Currently 16 states have authorized arbitration programs and all but two of those have active programs under way in one or more major courts. On the federal side, 8 additional districts are implementing court-annexed arbitration programs, bringing the total to 10. There is considerable variation among the programs: The upper limit on the value of cases eligible for the program varies from $3,000 in Alaska to $150,000 in a number of the federal district courts. Other features, such as the disincentive to appeal arbitrator awards, the number of arbitrators, and their rate of compensation, also vary among jurisdictions. Eight more states are considering court-annexed arbitration programs, and 26 states reported that current demand on judicial resources did not warrant such a program. Appendixes provide copies of authorizing legislation and examples of state and local court rules. 350 pages. Bibliography.


This note presents preliminary information on punitive damages awarded between 1959 and 1984 by juries in Cook County, Illinois, and San Francisco County, California. Findings confirm widespread perceptions that punitive awards have become both more frequent and larger, although only 45 percent of large punitive awards were actually paid by defendants. Punitive awards occur most frequently in trials involving intentional tort claims (assault, discrimination, and defamation), but trends have been stable for those cases. Punitive awards are less frequent for business torts or breach-of-contract claims, but the number and size of such awards have grown steadily, increasing greatly in the 1980s. Punitive awards were rare for personal injury cases based on negligence or strict liability but increased greatly in the 1980s in Cook County. Most punitive awards were against individual defendants, but businesses were assessed far larger awards. 49 pages. References.


“No-fault” automobile insurance plans are designed to supplant the tort system by requiring motorists to purchase no-fault insurance and allowing victims to file liability insurance claims and tort suits only if their injuries exceed a legislated “tort threshold.” While thresholds vary among states, many are satisfied if the victim incurs medical expenses as low as a few hundred dollars. Using insurance claims data, the authors estimate the effectiveness of several states’ thresholds. They find that tort thresholds are surprisingly effective: Modest tort thresholds reduce the number of successful tort claimants by half, and the strictest thresholds may exclude nine-tenths of potential claimants. Moreover, the authors find little evidence of claimants “padding” their claims to exceed the dollar thresholds. This note is a reprint of an article that appeared in Law & Policy in October 1985. 15 pages. References.


This note, a reprint of an article that originally appeared in the February–March 1986 issue of Judicature, summarizes the results of research conducted by the Institute for Civil Justice in the area of court-administered arbitration. It describes what has been learned to date, and identifies some issues that remain to be examined: (1) the kinds of
cases that are not good candidates for arbitration; (2) the factors that affect decisions to appeal; (3) the effect of arbitration on settlement; and (4) the effect of arbitration on the practice of law. 8 pages.

Bibliography.


This note advocates the use of systematic empirical research on civil jury behavior as an important tool in the policymaking process. The author discusses the methods that have been used for studying jury behavior, summarizes major findings of previous research (primarily on criminal juries), and considers what various research strategies can contribute to our understanding of jury behavior. In particular, he emphasizes the importance of mock jury experiments for explaining patterns identified in archival analyses and for testing the effects of proposed policy changes. In addition, he outlines four topics that should be given high priority on the research agenda: (1) identify the processes that have brought about the apparent patterns of inequity identified in archival analyses of jury verdicts; (2) examine the relationship between damages and liability; (3) study the effect of special or itemized verdict forms on the deliberation process, and how accurately they represent the jurors’ actual judgments; and (4) assist the courts in improving the structure of the trial and the decision task. 49 pages. References.


In 1985, RAND’s Institute for Civil Justice undertook a detailed study of aviation accident litigation in the United States. The study covered the general character of aviation accident litigation; reviewed the underlying principles and procedures used to compute the economic loss associated with individual decedents; described the characteristics of the decedents and compared the compensation paid to their survivors with the levels of economic loss they suffered; and analyzed the legal and economic determinants of the litigation decisions that plaintiffs and defendants faced. This note contains the forms used to compile the data used in the various analyses. See also R-3421, R-3549, R-3551, R-3585, R-3684. 85 pages.


The civil justice system is increasingly being asked to resolve disputes between large aggregations of plaintiffs and defendants. This mass litigation is placing considerable strain on a system whose formal and informal procedures and practices are based on expectations about traditional disputants that no longer necessarily hold. Some formal mechanisms, such as class actions and multidistricting, have been devised to deal with certain classes of mass litigation, but there are questions about when and how they should be applied. This note presents the Institute for Civil Justice’s agenda for a program of research on mass tort litigation, and the results of ICJ work to date. The analysis explores the effects of aggregation on the characteristics, course, and outcome of mass litigation. 70 pages. References.


The legal liabilities facing U.S. corporations have expanded substantially over the last decade. Traditional liabilities, notably those associated with defective products, have become more stringent, while new liabilities, particularly those associated with hazardous waste disposal and the discharge of employees, have emerged. The corporate sector has expressed considerable concern about the impact of these new liabilities on the economic performance of the nation, arguing that they have significantly reduced the productivity and international competitiveness of U.S. firms. This note presents a framework for analyzing how expanded liability might affect such outcomes as productivity and international competitiveness and offers some preliminary evidence on the impact of expanded liabilities on the behavior of corporations. The note is based in
part on a review of existing studies, and it also incorporates the results of interviews with a number of corporate officials involved in liability-related matters. 54 pages. References.


In 1979, California instituted one of the most ambitious court-based alternative dispute-resolution programs in the country. In an effort to reduce congestion on the civil trial calendars, the legislature required litigants in the state’s largest courts to submit their cases to nonbinding arbitration. Over the years, the jurisdiction of the program has been expanded, so that all cases involving money damages of $50,000 or less that are filed in the state’s 16 largest court jurisdictions must attempt arbitration before they will be allowed to proceed to trial. This note reports the findings of a 1987 survey of court officials that was undertaken to determine the status of California’s judicial arbitration program. The note also describes how local courts have implemented the program, analyzes selected program outcomes, and examines program trends. 48 pages. Bibliography.


This note contains the technical appendixes to R-3762-ICJ, which presents findings about the causes of civil case delay in the Los Angeles Superior Court and proposes strategies for attacking the problem. These appendixes include more detailed analyses and additional new data from surveys of lawyers, judges, the Register of Actions, cases that reached the mandatory settlement conference stage, and cases that were tried. Individual appendixes contain information on (1) causes of delay; (2) the flow of cases through the court system; (3) end-stage civil cases and lawyers; (4) the characteristics of cases that have mandatory settlement conferences and factors influencing the decision to settle or go to trial; and (5) the characteristics of civil trials. A final appendix presents the authors’ analyses of judge time and government expenditures to process civil cases. 134 pages. Bibliography.


To support its research on the design and performance of accidental injury compensation systems, the Institute for Civil Justice undertook a national survey of accident victims that sought to determine who these victims are, how severely they are injured, how much their injuries cost, how the victims seek compensation, who files liability claims and why, and what results victims obtain. This note describes the overall design and research procedures of the injury compensation study, the results of which are fully documented in R-3999-HHS/ICJ. This note (1) presents a brief introduction to the study; (2) discusses the authors’ research strategy, highlighting key analytic decisions; (3) presents a detailed description of the sample design, survey completion rates, and weighting procedures; (4) compares estimates of key parameters with estimates from other studies of accidents and injuries; and (5) discusses survey data collection and compares the design of this survey with other major national surveys. 146 pages. Bibliography.


Using medical malpractice claims data from the Medical Inter-Insurance Exchange of New Jersey, which insures approximately 70 percent of the physicians practicing in the state, this note analyzes physician negligence. Of the three aspects of the physician’s claims history that might be used either alone or in combination to measure negligence—(1) the total number of claims filed against a physician including both paid and unpaid claims (where “unpaid” claims are those for which no indemnity payment is made in the settlement or verdict); (2) the number of paid claims; and (3) the average amount of the
indemnity paid on each claim (claims severity)—the author decided to measure an individual’s negligence solely by the number of paid claims. He finds evidence that physicians vary widely in their tendency to generate paid claims, but that individuals’ claims histories are only moderately accurate in identifying more versus less claims-prone physicians. This finding limits the potential of deterrent policies that use past claims to target individual physicians. 22 pages. Bibliography.


This note attempts to identify potentially preventable sources of medical injury in obstetrics and gynecology, general surgery, anesthesiology, and radiology. It is based on a retrospective review of physician malpractice claim records of a large New Jersey insurer of physicians practicing in those specialties during any period between 1977 and 1989. The authors examined the proportion of claims due to negligence associated with errors in (1) patient management; (2) technical performance; and (3) medical and nursing staff coordination, and considered the clinical and financial consequences of such errors. Among 1,371 claims ascribed to negligence, patient management errors were cited most frequently (48 to 75 percent) in all four of the specialties and, compared with performance and coordination problems, were generally associated with a higher frequency of serious injury and higher median payments. Coordination problems accounted for approximately 9 percent of claims. In obstetrics and gynecology, newborn delivery claims usually arose from management errors (57 to 68 percent), whereas gynecologic procedure claims were most often associated with performance errors (55 to 73 percent). Under-performance of cesarean section was cited more frequently than overperformance (31 percent versus 3 percent). General surgery claims were about equally divided between management and performance types regardless of procedure. Failure to perform appropriate diagnostic testing or monitoring was the main problem in 3 to 8 percent of claims. The authors conclude that malpractice data can be used to identify problem-prone clinical processes and suggest interventions that may reduce negligence. (Reprinted from JAMA, Journal of the American Medical Association, Vol. 266, No. 15, October 16, 1991.) 6 pages. References.


This note attempts to evaluate the usefulness of malpractice claims data for identifying (1) physicians who are prone to negligent errors, and (2) physician and hospital characteristics associated with particular kinds of errors. It is based on a retrospective review of physician malpractice claim records of a large New Jersey insurer of physicians practicing in obstetrics and gynecology, general surgery, anesthesiology, or radiology during any period between 1977 and 1989. The authors classified the claims into 11 clinical error categories and 3 broad groups: (1) patient management; (2) technical performance; and (3) staff coordination. Outcomes were expressed as per-physician frequency of claims due to negligence and proportion of claims associated with various types of errors. The use of five years of claims history to predict long-term claims proneness was more accurate than using chance alone by 57 percent in obstetrics and gynecology, 33 percent in general surgery, 11 percent in anesthesiology, and 15 percent in radiology. Cross-validated recursive partitioning showed that among physician characteristics, only the physician’s specialty was predictive of physician error profiles. For physician claims arising in acute care hospitals, hospital size and location in addition to hospital services discriminated among different error profiles; the cross-validated accuracy of this method was 69 percent compared with 22 percent accuracy achieved by random prediction. The authors conclude that using physicians’ malpractice claims histories to target individuals for education or sanctions is problematic because of the only modest predictive power of such claims histories.
Medical malpractice is one of the most studied and best understood of the several classes of tort liability. However, the health care delivery system is now undergoing profound and rapid change—change that may substantially redefine the issues at the intersection of health care delivery and malpractice law. In order to examine the directions of change and how they may either conflict with or find support in current tort rules, the Institute for Civil Justice organized a conference on the topic of “Changing Health Care Delivery and Implications for Tort Liability.” This note summarizes the conference proceedings, presents the papers drafted for the conference, and in a final section, outlines future policy and research concerns. 131 pages. Bibliography.
PAPERS


The main purpose of this paper is to present empirical estimates of a model of the disposition of claims through the courts. A second purpose of the paper is to provide evidence relevant to the policy debate over tort reform. The theoretical model is described in Section 2. Section 3 discusses estimation and describes the data. Section 4 reports empirical results, including goodness of fit of the model and parameter estimates. Section 5 provides estimates of the probability of winning at verdict for cases settled out of court. Section 6 analyzes the discrepancy between mean award at verdict and settlement and the extremely skewed distribution of dollar payout. Section 7 discusses the effects of actual and hypothetical tort reforms and simulates their ramifications on the entire disposition process. Section 8 contains concluding remarks. 55 pages. Bibliography.


Research effort has been directed toward investigating the use of court-annexed arbitration in the state trial courts, and evaluating the effectiveness of this type of arbitration for managing the civil caseload and alleviating the burdens that the litigation process places on private citizens who bring their disputes to the courts for resolution. The testimony presented by the author to the U.S. Senate Judiciary Committee Subcommittee on the Courts deals with four topics: (1) the spread of court-annexed arbitration through the state trial court system; (2) variations in the design of court-arbitration programs nationwide; (3) the effectiveness of arbitration in reducing court congestion; and (4) how arbitration affects litigants. 12 pages.


This paper, originally published in the *New Jersey Bell Journal*, Summer 1984, describes some factors contributing to the congestion, delay, and expense that currently trouble the country’s civil courts. It describes court-administered arbitration, an approach that is being tested to resolve a broad range of civil cases involving money damages: personal injury and property damage suits, breach of contract cases, and collection disputes. It reviews the results of two RAND Institute for Civil Justice studies on the effectiveness of court-annexed arbitration, which found, among other things, significant cost reductions and a high degree of satisfaction with arbitration procedures among attorneys and litigants. 10 pages.


This paper, a reprint of an article that originally appeared in Vol. 1 of the journal *Expert Systems*, describes the authors’ current work in applying expert systems—a sophisticated form of computer modeling—to describe the reasoning involved in settlement of civil liability claims. The authors studied how lawyers and adjusters evaluate civil claims in the product liability area and developed a schema that organizes the facts and issues of a case. The schema, and a large set of rules they use to elaborate the schema, form the basis for an expert system that models legal decisionmaking. This system, called LDS, can help both researchers and litigators better understand how claim evaluation takes place because it provides a basis for generating and organizing hypotheses about litigators’ methods for making settlements. The findings suggest that rule-based expert systems can be developed and used to understand decisions involved in civil litigation; this information can be translated into the if-then rules of a rule-based model, and that model can capture much of the richness and flexibility of legal reasoning. 12 pages. References.
This paper, which appeared in the *Journal of Products Liability*, Vol. 7, 1985, is excerpted from a larger study with the same title, published as RAND report R-3022-ICJ. It analyzes ways in which firms have responded to recent changes in pressures to design safer products, based on interviews with product safety officials in major manufacturers and extensive analysis of legal and scholarly literature. Shifts to strict liability and more stringent regulation during the past 15 years have increased pressure to invest in safety assurance procedures, as evidenced by the creation of new corporate product safety units. The effectiveness of regulation has been more questionable than has strict liability in inducing better design practices. The authors (1) argue that federal product liability legislation will have marginal effect, despite the current variation in state law on the matter; (2) discuss the factors that influence the effectiveness of corporate product safety units; and (3) suggest that combining product safety with quality assurance may be the optimal strategy for a firm. 32 pages. References.


This paper focuses on the impact of fee arrangement on the amount of time lawyers are likely to devote to civil cases (“effort”). Drawing on data collected by the Civil Litigation Research Project, the authors compare the behavior of lawyers working on an hourly fee basis with the behavior of contingent fee lawyers. Like previous work on this issue, the paper finds that the fee arrangement does influence the amount of effort a lawyer devotes to a given case. However, contrary to previous work, the analysis indicates that the impact on hours worked is not defined simply; the effect on a number of aspects of a lawyer behavior is complex. Together, these behaviors have an effect on hours that varies by the size of the case. For modest cases (with stakes of $6,000 or less), contingent fee lawyers spend less time on a case than hourly fee lawyers. Yet, the authors find no statistically significant evidence of a differential in effort for larger cases but rather an indication that, if any effect exists, it may work in the opposite direction. 28 pages. References.


This paper was originally presented to the National Conference of State Legislatures in Denver, Colorado, in January 1986, and in an earlier version to the Public Policy Institute in Albany, New York, in November 1985. It draws on studies of civil court congestion and delay, alternative dispute resolution, the public costs of civil litigation, asbestos-related litigation, punitive damages, and medical malpractice. The author explores the relevance of policy research to tort reform, and concludes that the underlying problem with the civil justice system is the inability to decide whether we in the United States want to have a pure compensatory system, in which everyone is compensated for every injury no matter what its cause, or a fault-based liability system, in which compensation is limited in a strict way, comparative way, contributory way to those who have caused the injury. 11 pages.


This paper was originally presented as testimony before the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation in February 1986. It presents the results of research conducted by the Institute for Civil Justice relevant to the product liability system. It considers five areas of research: (1) trends in civil jury verdicts, particularly as they relate to product liability lawsuits; (2) effects of product liability lawsuits on corporate behavior; (3) public expenditures to process tort liability suits; (4) special problems posed by mass toxic lawsuits; and (5) the use of alternative dispute resolution procedures for resolving tort cases. 11 pages. References.

This paper, originally presented as testimony before the Committee on the Judiciary of the United States Senate, reviews the results of three studies on the frequency and severity of medical malpractice claims. The findings of the three studies suggest that caps on awards and collateral source offset have significantly reduced claims severity, and collateral source offset and shorter statutes of repose have significantly reduced claims frequency. The author cautions that, from a public policy perspective, the goal of tort reform should not be simply to reduce the costs of claims and of malpractice insurance. Rather, reforms should be evaluated in the broader context of the fundamental purposes of the tort system, which are deterrence of medical negligence and efficient compensation of its victims. 11 pages. References.


This paper was originally presented as testimony before the Subcommittee on Oversight of the United States House of Representatives Committee on Ways and Means. It draws on the author’s analysis of civil jury verdicts rendered between 1960 and 1979 in Cook County, Illinois, and San Francisco, California. The testimony focuses on trends and patterns over time, and on how the type of liability, nature and circumstances of injury, and characteristics of plaintiffs and defendants affect the outcomes of civil jury trials. 6 pages. References.


This paper is extracted from the Director’s Report in the Institute for Civil Justice’s Report on the First Six Program Years, April 1980–March 1986. It reviews findings of the ICJ’s research on the civil justice system regarding (1) civil jury verdicts; (2) the private and public costs of civil litigation; and (3) the effectiveness of the processes of the system. This research underlines the need for policymakers to anticipate the impact of legislative changes on costs, outcomes, and processes. In addition, it emphasizes the need to build into every reform the capacity to evaluate its actual impact and to provide for subsequent correction. 4 pages.


This paper is the text of testimony presented before the subcommittee on Trade, Productivity, and Economic Growth of the Joint Economic Committee of the U.S. Congress on July 29, 1986. It summarizes preliminary results of RAND research undertaken to provide empirical evidence on the following issues: (1) the total expenditure for tort litigation in state and federal courts in 1985; (2) the proportion of costs that went to plaintiffs’ and defendants’ legal fees and other litigation expenses, the value of time spent by both litigants and insurance personnel, and the costs of operating the courts; (3) what proportion of the total was net compensation to plaintiffs; (4) the difference in litigation costs and compensation for torts involving motor vehicles and all other torts; and (5) the rate at which the tort system is growing. The study indicates that plaintiffs with tort lawsuits in state and federal courts of general jurisdiction received approximately half of the $27 to $34 billion spent in 1985. The costs of litigation consumed the other half. 10 pages. Bibliography.


This paper is an edited transcript of written testimony delivered in October 1986 to the United States Senate Judiciary Committee. The author summarizes the results of empirical research conducted by the Institute for Civil Justice on four topics relevant to the discussion of the product liability system, including trends in litigation, expenditures for liability cases, the effects of product liability lawsuits on corporate behavior,
and the special problems of mass toxic torts. 13 pages. References.


This paper, reprinted from The University of Chicago Law Review, Vol. 53, No. 2, 1986, discusses the changes in federal litigation during the almost 50 years that the Federal Rules of Civil Procedure have been in effect. The paper considers why the drafters of the Rules did what they did, how the Rules in turn helped to create the environment that has given rise to the contemporary criticism of civil litigation, and how they might be revised. The author suggests that any revision of the Rules ought to be undertaken with the intent of preserving their accomplishments, including ready access to the judicial apparatus. 67 pages. Bibliography.


This paper, testimony presented before the California State Legislature’s Assembly Select Committee on Insurance, covers trends in liability litigation in California. Over the past decade, personal injury lawsuits filed statewide have increased substantially. Automobile accident filing rates are roughly equal to the increase in population, but the rate of increase in other types of lawsuits has considerably outstripped population growth. A smaller fraction of personal injury lawsuits are fully contested, and the number of such cases tried to verdict has dropped in San Francisco, and probably elsewhere. Recent San Francisco verdicts are similar to those in other major jurisdictions. Increases in jury awards have been higher for product liability and medical malpractice cases—a significant proportion of the personal injury caseload—than for the slower-growing automobile accident cases. The vast majority of cases are settled, not tried. Although most practitioners assume that settlement amounts in personal injury cases are strongly influenced by jury verdicts, no comprehensive study examines how such trends are related to trends in settlement. The growth in jury verdicts has probably been reflected in trends in total compensation. 13 pages. Bibliography.


This paper originally appeared in The University of Florida Law Review, Vol. 39, No. 2 (Spring 1987), and was presented at the “Conference on Procedural Due Process: Liberty and Justice,” University of Florida, February 13–14, 1987. The author explores the public dimension of the due process theory: the role of the public in the adjudicative process and the function of the adjudicative process for the public. The author considers the role the public plays as an audience, the modes of adjudication, the problems associated with public access, and the forms of public participation. 27 pages. Bibliography.


This paper was originally presented at a symposium on consent decrees, and appeared in the University of Chicago Legal Forum, Vol. 1987. It explores the growing interest in consent decrees, by which lawsuits are resolved with the issuance of a judgment or decree, entered with the agreement of the parties. Arguments have been made that consent decrees are more economical than adjudicated decrees and achieve greater rates of compliance, but the empirical bases for such claims have not yet been established. The author examines the standard arguments for consent decrees and considers the role of judges in reviewing and entering them. She discusses the fact that judges must rely on the involved parties to present sufficient information for judging the adequacy of an agreement. The author concludes that, in many cases (for example, class actions), judges must determine the adequacy of either the representation of the decree or of the settlement itself. However, as judicial involvement in crafting settlements grows, the ability of judges to make disinterested determinations of the adequacy of settlements diminishes. 60 pages.

This paper reports on the need for more research on outcomes and appropriateness of medical care to develop a more rational system for preventing, punishing, and compensating for medical malpractice. Malpractice claims are clearly linked to outcomes of care, and a large proportion of court decisions settling these claims confuse bad outcomes with inappropriate care because of the lack of definitive research on how specific medical interventions affect patient outcomes. The author suggests that the medical malpractice system might be improved by conducting more research on outcomes and appropriateness of care to inform medical decisionmaking and to set standards relevant only to a certain class of malpractice problems, ones in which it was not appropriate to take a specific action. Developing more explicit standards of care treats both doctor and patient more equitably by offering a statement about range of expected risks and benefits of the intervention under consideration as well as providing a structure to ease problems of malpractice. 7 pages. References.


This paper, reprinted from Law and Contemporary Problems, Vol. 51, No. 3, Summer 1988, was prepared for a symposium on Empirical Studies of Civil Procedure at Duke University in spring 1988. The author discusses some issues civil justice researchers face when their results are used in public policy debate. She points out that researchers have a responsibility to indicate the sorts of inferences that can and cannot be drawn from the data they collect and analyze. They also have a responsibility to educate policymakers about the uses of statistical data, and to be conscious of how they describe magnitude differences, select standards for comparisons, and define time periods for graphing trends. Researchers should also help policymakers decide when it makes sense to extrapolate from limited data and when it does not. Finally, they should be aware of the ways in which their own political and social values affect their choices of research questions, research designs, and final reports. 11 pages. Bibliography.


Since the early 1980s, the thinking surrounding mass toxic torts has changed dramatically, and a consensus has emerged calling for substantial modifications in traditional court processes to improve the efficiency and equity of the mass claims resolution process. Debate about the type of modifications focuses on expanding the use of formal aggregative procedures such as class actions, consolidations, and multidistrict litigation. The debate over expanded use of aggregative procedures also revolves around the choice between different “versions of legal reality.” When scholars and practitioners assess the appropriateness of applying various formal aggregative approaches to mass torts, they use the “traditional tort approach” as their standard for comparison. This paper argues that this version of legal reality is factitious, both with regard to process and substantive outcomes. The author discusses what empirical research demonstrates about the divergence between the traditional image of the tort approach and the actual workings of the tort system, in both routine and mass tort cases. The discussion focuses on three issues: (1) lawyer-client relations and litigant control; (2) opportunities for adjudication; and (3) substantive outcomes. (Reprinted from University of Illinois Law Review, Vol. 1989, No. 1, 1989.) 16 pages.


An edited transcript of written testimony delivered in September 1991 to the Consumer Subcommittee of the United States Senate Commerce Committee. The author covers five topics: trends in product liability; the nature and extent of product-associated injuries and the rate of claiming associated with these; the role of the tort liability system in compensating injuries; the effects on manufacturer behavior; and the need for
additional information about the product-liability phenomenon. 11 pages. Bibliography.


This paper, an edited transcript of written testimony delivered in October 1991 to the Courts and Judicial Administration Subcommittee, United States House Judiciary Committee, summarizes the scope of asbestos litigation in the United States, the response of the civil justice system to date, and the obstacles to efficient and equitable resolution of asbestos-related personal injury claims. An equitable and efficient national solution to the asbestos litigation problem will have to demonstrate sensitivity to the past history of asbestos litigation, cope with the current crush of claims, and include a strategy for responding to future claims. Most important, the success of any solution will depend on a realistic assessment of the number and type of future asbestos-related claims. 19 pages. Bibliography.


To compare the malpractice claims experience of physicians in a high malpractice risk population to those in a normal population, the authors used claims data from one national surplus lines malpractice insurer and one large standard lines malpractice insurer. In addition, a second surplus lines insurer supplied data on policyholder characteristics that was used to compare the characteristics of physicians across populations. Surplus-lines insured physicians had frequencies of filed claims over twice that of doctors in comparable specialties insured by the standard lines insurer. Surplus-lines insureds had much shorter coverage periods (72 percent leaving within a year or less) as compared with those with conventional coverage (less than 11 percent leaving within a year or less). Surplus-lines insureds were somewhat older, more frequently board certified, and were proportionately more in high-risk specialties than the physician population of the country. 23 pages. Bibliography.


This paper argues that if the main purpose of punitive damages in product liability cases is to deter conduct that results in unsafe consumer products, the threat of punitive damages ought to be better targeted at the conduct of senior management, rather than the misconduct of employees. In most jurisdictions, punitive damages may be imposed on a firm for misconduct by employees who are not part of senior management. In a sizeable number of these cases, punitive damages are imposed even though the employees whose conduct led to litigation were acting contrary to firm policy. Although the imposition of compensatory liability is clearly appropriate when a firm’s products injure consumers, allowing punitive damages for conduct contrary to management’s direction dilutes management’s incentive to exercise appropriate control over the behavior of employees. Management can’t guarantee that every employee will make appropriate decisions regarding safety issues, but it can establish well-designed policies and procedures to guide these decisions. A standard designed to influence the behavior of management should provide an incentive for management to take actions within its power to assure that its firm’s products are safe. Building on concepts enunciated in a recent Supreme Court case involving employment discrimination, this paper argues that the deterrent effect of punitive damages would be enhanced by a rule that provides an affirmative defense against punitive damage claims based on reckless conduct of employees, when that conduct is contrary to a firm’s good-faith efforts to employ well-designed safety policies and procedures. It further argues that the so-called “government standards” defense against punitive damages should be defined in a way that both promotes compliance with government standards and helps to assure that the standards provide adequate public safety. This goal could be accomplished by providing that compliance with an applicable federal safety standard constitutes prima facie evidence of good faith and shifts the burden of
proof to the plaintiff to show, by clear and convincing evidence that either (1) the defendant was guilty of fraud on a regulatory agency; (2) clear advances in the state of the art, implemented after the standard had been adopted but before the defendant’s product was designed, had rendered the product obsolete; or (3) the standard itself reflects a flagrant indifference to safety.

16 pages.
ISSUE PAPERS


A wide-spread perception exists that America’s tort system is biased against so-called deep-pocket defendants—defendants such as corporations, governments, and wealthy individuals who have extensive financial resources. This issue paper summarizes what we know and don’t know about deep-pocket biases. Archival analyses of 20 years of verdicts in Cook County, Illinois, and mock jury experimentation both indicate that, in similar cases, juries do in fact treat corporations differently from individuals. Juries are more likely to find corporations liable and award plaintiffs more money. However, other mock jury experiments show that rich individuals are treated more like poor individuals than like corporations. Therefore, jurors do treat corporations differently, but not because of wealth. Future research is necessary to clarify what causes juries to treat corporations differently from individuals.


This issue paper estimates how a pure no-fault automobile insurance plan, proposed for California in 1995, would affect the costs of automobile insurance in the state. The plan would have eliminated tort liability for auto accident personal injuries. Based on data from a random sample of auto accident victims compensated in 1992, the analysis suggests that the proposed plan would have reduced the costs of compensating auto accident victims for personal injuries by 21 to 54 percent compared with California’s current auto insurance system. If the premium an insurer charges for a policy varies in proportion to the compensation costs it can expect to incur on behalf of the policyholder, the plan would have reduced the average California driver’s auto insurance premiums by 11 to 29 percent.


Proposition 213, the Personal Responsibility Act of 1996, which qualified for the November 1996 California ballot, would have barred drunk drivers and uninsured motorists from compensation for any noneconomic losses resulting from auto accident injuries. It would also have barred compensation for any loss incurred by felons who were involved in auto accidents while committing crimes or fleeing from them. This issue paper describes the likely effects of the proposition’s provisions regarding uninsured or drunk drivers on the costs of private-passenger auto insurance. The analyses suggest that the proposition would have reduced auto insurance costs. If current claiming, negotiating, and insurance-purchase patterns persist, the proposition would have reduced auto insurers’ compensation costs for personal injuries by about 10 percent relative to the costs under California’s current auto insurance rules. Given the past relationship between compensation costs and auto insurance premiums in California, this difference would translate into a reduction of about 5 percent in the average California driver’s auto insurance premiums.


The authors apply models from their earlier research on California (see IP-157) regarding the implications of auto insurance reform to Texas. “No pay/no play” refers to insurance policies that cost less because they limit compensation rights for insureds who were breaking the law when they were injured. Basing their analysis of the effects of barring noneconomic compensation to accident victims who were driving drunk or uninsured at the time of the accident on a sample of paid claims in Texas during 1992, the authors conclude that implementing the proposed reforms would save the average Texan insured driver about 3 percent on his or her annual premium. The paper also notes projections for cost if the implementation of these reforms altered claims
and policy-purchase patterns among Texas drivers, concluding that auto insurers would save at least 6 percent in claims paid under a variety of scenarios that would permit them to achieve the same profit levels through premiums that were reduced by 3 percent.


Whether to allow lawsuits against private, employer-sponsored health plans for delay or denial of benefits is one of the most controversial issues of the current patients’ rights debate. Most proposed changes to regulations governing such litigation would include amending ERISA, a provision that has been interpreted by federal courts to strictly limit recovery in private suits. Since assertions concerning ERISA reform are based on views about litigation and the legal system, this work examines the basis for proponents’ and opponents’ assumptions. The analysis finds that support for claims on both sides is weak. Although some increase in litigation is likely, little hard evidence is available to predict the effect of changes to ERISA. The work also postulates a behavioral model for estimating litigation rates in a changed ERISA environment.
OCCASIONAL PAPERS


Following the 9/11 terrorist attacks, the federal government adopted the Terrorism Risk Insurance Act (TRIA), which requires insurers to make terrorism coverage available to commercial policyholders. In exchange, the federal government will reimburse insurers for a portion of insured losses above a particular threshold. TRIA’s impending “sunset”—on December 31, 2005—presents an opportune time to evaluate what role the U.S. government should play in the terrorism insurance market and what approach should be taken to manage risks and to provide compensation for personal injury and property and financial losses due to acts of terrorism. This paper has a dual purpose: to help frame the central issues that should be considered in the debate over whether to extend, modify, or end TRIA, and to explore the broader issue of the appropriate role of disaster insurance within a system for managing risks created by the possibility of terrorist attacks and compensating losses caused by terrorist attacks. The paper also discusses options that policymakers might consider in addressing these issues and goals against which various options may be evaluated. 54 pages. References.


Pretrial discovery—the exchange of relevant information between litigants—is central to the American civil legal process. As computer technologies continue to develop, concerns have arisen that, because of the sheer volume of electronically stored information, requests for electronic discovery (e-discovery) can increase litigation costs, impose new risks on lawyers and their clients, and alter expectations about likely court outcomes. For example, concerns about e-discovery may cause businesses to alter the ways in which they track and store information, or they may make certain types of plaintiffs and defendants more likely to sue, settle out of court, or go to trial. This paper presents the results of an exploratory study to identify the most important legal and economic implications of e-discovery. The authors interviewed plaintiffs and defense attorneys as well as corporate information technology staff and in-house counsel, and they reviewed the current state of e-discovery law and procedure. They then developed a preliminary model to explore the range of plausible effects that e-discovery might have on case outcomes. After summarizing this research, the authors propose five studies that will evaluate how e-discovery affects and is affected by technology, costs, business practices, legal outcomes, and public policy. 38 pages.


Are older drivers posing an increasing risk to the public? If they are, what options should policymakers consider to mitigate that risk? This research offers a new perspective on these questions. Using an innovative approach to estimate the extent to which older drivers are on the road and their riskiness compared with drivers of other age groups, the study finds that older drivers (those 65 and older) are slightly (16 percent) likelier than drivers aged 25 to 64 to cause an accident and that they pose much less risk to the public than do drivers aged 18 to 24, who are nearly three times likelier than older drivers to cause an accident. However, because of their greater frailty, older drivers are much likelier than other drivers to be seriously injured or killed when involved in an accident. In light of these findings, the authors find little support for the idea that stricter licensing policies targeting older drivers would substantially improve traffic safety. 38 pages. Bibliography.

Following the devastating hurricane seasons of 2004 and 2005, there were indications of dramatic changes in the market for commercial property insurance in the Gulf States, including skyrocketing insurance prices and difficulty finding adequate coverage. These changes had and continue to have crucial ramifications for the region’s economic recovery and ongoing economic vitality, which is why it is essential that the insurance system for commercial wind risk be assessed to see how it performed following Hurricane Katrina and to determine whether government programs and regulations related to wind risk insurance need to be changed. The authors provide an overview of the 2005 hurricane season’s impact on the commercial property insurance market in the Gulf States and the outlook for the future. They also propose three basic goals for a wind risk insurance system and examine some of the challenges involved in achieving these goals. Additionally, they recommend that the debate over any needed changes to government programs and policies include all stakeholders and be informed by further research and analysis in specific areas. 12 pages. References.


Pennsylvania’s workers’ compensation system was the subject of legislative changes in the 1990s and again in 2004 and 2006, changes that were partly a response to rising workers’ compensation costs over the preceding 30 years. In this paper, Greenberg and Haviland examine the performance of the commonwealth’s workers’ compensation system and the issues it faces, focusing particularly on benefits and compensation, workplace safety, medical care, and dispute resolution. The authors review the published research and the available data on workers’ compensation in Pennsylvania, and they supplement this review with qualitative interviews with a range of stakeholder groups in the state. Greenberg and Haviland find generally that Pennsylvania’s workers’ compensation system performs reasonably well relative to other states, but they note that the commonwealth may not be as strong in its performance on some safety measures. Greenberg and Haviland also note that Pennsylvania, like the nation as a whole, will continue to face the challenge of rising health care costs. The authors conclude with a series of recommendations for policymakers, emphasizing the importance of collecting more and better data on the performance of the workers’ compensation system, to inform the debate over future reforms and initiatives. 80 pages.
Proponents of a type of health-care insurance program called “24-hour care” believe that such a program could yield substantial workers’ compensation savings. A 24-hour care plan would consolidate employers’ health care benefits, and possibly disability benefits, for both work-related and non-work-related claims, and services would be delivered by one group of providers under a coordinated insurance package. In December 2003, the California Commission on Health and Safety and Workers’ compensation asked the RAND Institute for Civil Justice to conduct a study of 24-hour care. This paper assesses the value of 24-hour care as a mechanism for reducing workers’ compensation costs while maintaining or improving the quality of care. It also seeks to clarify some of the important legal and organizational challenges for 24-hour care and identify ways those challenges might be met. 86 pages. References.


This paper investigates the rationale for public intervention in the terrorism insurance market. The authors argue that government subsidies for terrorism insurance are aimed, in part, at discouraging self-protection and limiting the negative “externalities” associated with self-protection. The authors further contend that self-protective behavior by a potential terrorist target can have negative social consequences (e.g., a potential target that takes protective steps may increase the risk of loss for another, more vulnerable target). The authors also argue that negative externalities distinguish the terrorism insurance market from other insurance markets, and help to explain why availability problems in this market have elicited a much stronger government response that similar problems in other catastrophe-insurance markets. 47 pages. References.


In recent years, the California workers’ compensation system has been encumbered by rising costs and high utilization of medical care. To address these concerns, the California legislature passed a series of initiatives that call for the use of evidence-based medical-treatment guidelines concerning, at a minimum, the frequency, duration, intensity, and appropriateness of all treatment procedures and modalities commonly performed in workers’ compensation cases. The American College of Occupational and Environmental Medicine guidelines were adopted as presumptively correct until alternative plans could be evaluated and a decision made about which guidelines to adopt for the long term. This working paper presents an evaluation of the medical guidelines that might be used to determine the appropriateness of care provided to California’s injured workers. The study identified 73 guidelines for work-related injuries, which were then screened using multiple criteria. Five comprehensive guideline sets were found to satisfy the requirements of California legislation and the preferences of the state. A comparative evaluation was made of both the technical quality and clinical content of the selected guidelines. Based on the results of the evaluation, the authors present recommendations for actions the state might take in the short term, the intermediate term, and the longer term. 155 pages. References.


Workers’ compensation provides insurance against job-related injuries, but as many as half of injured workers choose not to file. A common explanation for this is the existence of private health insurance, an alternative source of health...
care that may discourage insured workers from taking the time to file a workers’ compensation claim. However, data from the National Longitudinal Survey of Youth (NLSY) paint a surprising picture: uninsured and more vulnerable workers are actually less likely to file claims than the insured. This paper studies this relationship and finds that it emerges as the result of employer characteristics. In particular, whether or not employers offer health insurance to employees appears most important, much more important even than the insurance status of workers themselves. Indeed, even repeat injury-sufferers are more likely to file during episodes in which their employer offers health insurance, but not statistically more likely to file during episodes in which they themselves are insured. This suggests that the workplace environment and employer incentives may have a significant, or perhaps even the dominant, impact on workers’ compensation filing. 38 pages. References.


The passage of California Senate Bill 899 introduced sweeping reforms to the California workers’ compensation system. One of these reforms was the requirement that the system for evaluating the severity of permanent disabilities incorporate empirical data on the long-term loss of income experienced by workers with injuries to different parts of the body. However, no previous work has provided enough information on the predicted loss of earnings capacity for different types of injuries to generate a complete set of adjustments to the rating schedule. This working paper summarizes the average disability ratings and three-year cumulative proportional earnings losses for 23 different categories of disabilities. It includes a discussion justifying the use of standard ratings (ratings before age and occupation adjustments), proportional earnings losses calculated at the individual level, and estimates of ratings and losses for injuries to three separate regions of the spine. 20 pages. References.


This working paper considers potential options for establishing the maximum allowable fees for repackaged drugs that are provided to California’s injured workers. These are drugs that have been purchased in bulk and repackaged into individual prescription sizes for physician office dispensing. The maximum allowable fees for most pharmaceuticals under the workers’ compensation program are tied to the MediCal pharmacy fee schedule. However, repackaged drugs are not in the MediCal formulary and higher fees are allowed for repackaged drugs until the Division of Workers’ Compensation (DWC) Administrative Director (AD) issues a fee schedule amount for them. 22 pages. References.


This study updates analyses from a 2003 RAND report examining Official Medical Fee Schedule (OMFS) payments for workers’ compensation burn discharges from acute care hospitals. Until January 1, 2004, burn cases were exempt from the OMFS maximum allowable fees for inpatient hospital care. These fees are based on 120 percent of the amount that would be payable under the Medicare prospective payment system for inpatient services. The 2003 RAND report concluded that the fees should be adequate using a Medicare-based fee schedule. Senate Bill 228 (Alarcón 2003) ended the exemption for burns cases. The California Hospital Association has raised concerns regarding losses being incurred by hospitals for workers’ compensation burn cases. Pending legislation would re-institute the OMFS exemption for inpatient stays involving extensive burns. 40 pages.
This paper reviews federal workplace, environmental, economic regulations. It describes the purpose of and requirements associated with the regulations, any penalties associated with regulatory violations and how requirements or penalties differ for small v. large firms. The paper also describes programs designed to support small businesses and the firm characteristics that determine eligibility for such programs. This review reveals that in the regulatory sphere, there is no single definition of small business that applies across policy areas. Businesses that might be considered “small” for the purposes of one regulation may be considered “large” for the purposes of another. 46 pages.

This paper describes the main government and private data sources currently available or under construction for research on small business and entrepreneurship. It also provides a listing of resources researchers can use to gain more information about each data set. Of particular importance are new longitudinal data sets created by the Census Bureau and Bureau of Labor Statistics, which allow for the study of business entry and exit (which is especially relevant to small business policy) as well as changes within establishments and firms to be studied over time. The most notable gap in current small business data sources is the lack of a publicly available source of longitudinal data. In the next five years, this gap will be at least partially addressed by the Kauffman Firm Survey of new businesses. Information on this survey design and instrument is available now and researchers can begin to design research studies that would take advantage of the data when they become available. 72 pages.

This paper investigates whether the regulatory regime created by the Sarbanes-Oxley Act of 2002 (SOX) has driven firms in general, and small firms in particular, out of the public capital market. Previous attempts to address this question have had difficulty controlling for other factors that could have affected exit decisions around the enactment of SOX. To address this difficulty, the authors examine the post-SOX change in the propensity of public American target firms to be bought by private acquirers rather than public ones with the corresponding change for foreign target firms, which were outside the purview of SOX. Their findings are consistent with the hypothesis that SOX induced small firms to exit the public capital market during the first year of its enactment. Large firms, by contrast, do not appear to have been affected. 66 pages.

This study updates analyses from a 2003 RAND report examining Official Medical Fee Schedule (OMFS) payments for workers’ compensation spinal surgery discharges from acute care hospitals. The OMFS maximum allowable fees for inpatient hospital care are based on 120 percent of the amount that would be payable under the Medicare prospective payment system for inpatient services. In addition, separate payment is made for hardware and instrumentation used during complex spinal surgeries. The 2003 RAND report concluded that the fees should be adequate without the additional payment. Senate Bill 228 (Alarcón, 2003) provides for the additional payments only until the Administrative Director (AD) of the Division of Workers’ Compensation (DWC) adopts a regulation specifying separate reimbursement, if any, for the hardware and instrumentation. 32 pages.

Professional service providers who wish to organize as multi-person firms have historically been limited to the partnership form. Such organizational forms trade the benefit of risk diversification off against the costs of diluted incentives and liability exposure in choosing their optimal size. More recently, states have permitted limited-liability entities that combine the simplicity, flexibility and tax advantages of a partnership with the liability shield of a corporation. The authors develop a game theoretic model of professional-firm organization that integrates the provision of incentives in a multi-person firm with the choice of business form. They then test the model’s predictions with a new longitudinal data set on American law firms. Consistent with their predictions, initial firm size is a strong positive predictor of subsequent conversion to a new limited-liability form. Also consistent with their theory, growth rate of small converters substantially exceeds that of larger adopters. Overall, their findings suggest that while the promulgation of new organizational forms has stimulated growth in the legal services industry, the principal beneficiaries of this growth have been large, well-established firms rather than small, entrepreneurial, boutique practices. 68 pages. References.


This working paper surveys existing research and the general state of knowledge on the impact of regulation and legislation on small business. It focuses on laws and regulations in four key regulatory areas: corporate securities, environmental protection, employment, and health insurance. In each of these areas, the review summarizes the regulatory environment, discusses the impact of the regulatory environment on small business and highlights issues in need of further research. In so doing, the review explores the ways small businesses and entrepreneurs behave differently from large businesses; the ways that policymakers, customers, employees and other organizations treat small businesses differently from larger businesses; and how these differences relate to the policy rationales that underlie regulation and the use of the tort system. A primary aim of this review is to identify additional research that would assist regulators, courts, legislatures, and others in balancing competing policy objectives. The report concludes with suggestions for future research. 82 pages. References.


The cost of health insurance has been the primary concern of small business owners for several decades. State small group health insurance reforms, implemented in the 1990s, aimed to control the variability of health insurance premiums and to improve access to health insurance. These small group reforms only affected firms within a specific size range, and the definition of the upper size threshold for small firms varied by state and over time. The primary intended result of these reforms was to increase the propensity of small firms to offer health insurance. However, because of the way these regulations were crafted, an unintended consequence of the reforms may have been to affect the size of small firms around the legislative threshold. Several studies have examined the effect of health insurance mandates on the propensity of small firms to offer health insurance. These studies generally find little to no effect of the mandates. In this paper, the authors examine the effect of small group reforms on small business size and find some evidence that firms that were near the threshold adjusted their size. 44 pages. References.

This study examines the impact of malpractice reforms on physician behavior using a new measure of liability risk and a nationally representative, individual-level dataset on physician behavior. The authors first develop a theoretic model in which physicians are unable to fully insure against liability risk. They then match their liability measure to data on physician behavior from the Physician Practice Costs and Income Survey (PPCIS). Data from the PPCIS bracket a period of substantial state-level legal reform between 1983 and 1988, which provides identifying variation in their liability measure. They estimate the impact of liability reform on hours worked. They find an estimated elasticity of hours worked to liability exposure of -0.285 for the full sample of physicians. The interpretation is that a 10 percent increase in expected liability costs (not necessarily malpractice premiums) is associated with a 2.85 percent decrease in hours worked. The effect for physicians age 55 or older is much larger: They find an elasticity of -1.224 for this category. They also examine the link between their ‘pure’ liability measure and malpractice premiums. They find that an increase in $1 of expected liability is associated with a $0.699 to $1.05 increase in malpractice premiums, although there remains substantial unexplained variation in premiums after accounting for expected liability and observable demographic characteristics of physicians. 42 pages. References.


California’s workers’ compensation system has been the center of intense debate and legislative activity over the past several years. The California Commission on Health and Safety and Workers’ Compensation and the California Division of Workers’ Compensation asked RAND to examine the cost and quality issues affecting medical care provided to California’s injured workers and to assess strategies to improve the quality and efficiency of that care. The study involved several interrelated tasks, the first of which was to identify the most important utilization and cost drivers and quality-related issues. This paper discusses the findings from this task, which are based on a review of the literature and interviews with stakeholders regarding their perceptions of the program and the likely impact of recent legislative changes on the access, cost, and quality of medical care. The paper also contains the product of a second task, which was to develop a conceptual framework for an ongoing monitoring system. 138 pages. References.


Beginning in the 1990s, states permitted law firms to organize as Limited Liability Partnerships and Limited Liability Companies. These organizational forms preserve many of the attractive features of a partnership while shielding each of a firm’s owners from liability for the malpractice of other owners. Some observers have asserted that this liability shield should be especially helpful to small law firms. If so, the authors would expect small partnerships to reorganize under the new forms and grow. This paper examines how the availability of these new organizational forms affected the organization of law firms during the period 1993-1999. It also explores how growth (measured in terms of number of lawyers) has varied between firms that reorganized into one of the new firms and those that did not. They find that smaller firms were much less likely to reorganize compared to larger firms, but small partnerships that reorganized grew faster than those that did not. Limited liability appears to be modestly beneficial to the owners of small law firms. 60 pages. Bibliography.


This working paper provides the survey instruments that were used in the RAND monograph Insurance Class Actions in the United States. 60 pages. Bibliography.
States (MG-587-1-ICJ), which describes the important characteristics of insurance class actions, including what types of classes are sought, where the cases are being filed, what allegations are made, how the cases are resolved, and how much time it takes to bring them to resolution. 64 pages.


Small firms in the United States that seek to offer health insurance to their employees have historically reported problems with the availability and affordability of their options. The cost of health insurance has been the primary concern of small business owners for several decades. This paper examines the effect to date of two types of policy initiatives that could have substantial benefits for small business: state health insurance mandates and key components of CDHPs-HSAs, HRAs and high deductible health plans. It summarizes the key policy issues, reviews existing research evidence on the effect of these initiatives on small business and offer some conclusions for policymakers. 40 pages. References.


The Intelligence Reform and Terrorism Prevention Act of 2004 requires that the Secretary of Homeland Security develop a plan for reliably evaluating the identity and citizenship of people entering the U.S. In response, the U.S. Customs and Border Protection (CBP) and U.S. Department of State are proposing a regulation specifying documentation requirements for people entering the U.S. via land borders from countries in the Western Hemisphere, referred to as the Western Hemisphere Travel Initiative (WHTI-L). The White House Office of Management and Budget directs agencies to use benefit-cost analyses to evaluate proposed regulations during the regulatory review process. However, data and methods for estimating the benefits of terrorism security regulations like the WHTI-L are inadequate to support benefit-cost analysis. This report introduces a framework for using probabilistic terrorism risk modeling in a break-even analysis of a regulatory action, demonstrates an application of the framework on the regulatory analysis of WHTI-L, and discusses how this type of analysis can be further integrated into the regulatory review process. 62 pages. References.


An effort to move beyond the rhetoric and firmly establish an understanding of corporate culture would greatly contribute to any attempts to describe, measure, or alter culture in a corporate setting. This paper is prepared as part of an ongoing project on “Corporate Cultures: Meaning and Measurement” under the LRN-RAND Center on Corporate Law, Ethics, and Governance. While the project will eventually develop a framework through which it is possible to measure corporate culture, the first step was to develop a clear and concise definition of the frequently used and sometimes obscure concept of “culture” in various social science literatures. This literature review was conducted in an effort to clarify and improve understanding of this terminology. 44 pages. References.


Over the past few years, nonoccupational health-insurance programs and group health plans have implemented initiatives to improve the quality and efficiency of care through incentive programs, typically called “pay for performance,” or P4P. In addition, Medicare program administrators are evaluating how P4P incentives might be incorporated into Medicare payment systems. A workers’ compensation (WC) P4P program could
be an effective strategy to improve the quality and efficiency of care, increase patient satisfaction, and improve work-related outcomes provided it is integrated with other initiatives to improve the WC medical treatment system. The program could reward only high-performing physicians or reward improvement from any physician, and payer and provider participation could be voluntary or mandatory. Challenges to implementation include lack of clinical measures for WC conditions, multiple payers, and multiple physicians treating few WC patients and the high level of contention among stakeholders. This paper assesses the options, challenges, and potential benefits of adopting P4P incentives for physician services in California’s WC program, offering three models of programs for consideration. 92 pages. References.


Cost has deterred the majority of small businesses from providing health insurance to their workers. Consumer-directed health plans (CDHPs), which are potentially less costly than traditional health plans, may be well suited to workers in small businesses. The authors study the factors that are associated with CDHP offering, determine the variation in CDHP offering among large and small firms, and develop models of persistence in CDHP offering. Their analysis of the Kaiser-HRET survey shows that small firms have been no quicker in their uptake of CDHPs than larger firms, and appear to display somewhat more churning in CDHP offering than large firms. Small firms that employ between three and 49 workers are less likely to offer health reimbursement account (HRA)/health savings account (HSA) plans than large firms. Furthermore, firms that employ 200 to 499 workers appear to be less likely to offer both HRA/HSA plans and HD plans compared to larger firms. Their results suggest a limited role for the current incarnation of consumer-directed health plans in encouraging small business to provide insurance. 40 pages. References.
DOCUMENTED BRIEFINGS


Escalating auto insurance premiums have set off heated policy debates in most states. A shared concern of all is the fear that excess claims may be a major contributor to auto insurance costs, but it has been unclear how much excess claiming there is and how much it costs. This documented briefing describes an analysis of the pattern of excess medical claiming across the states to estimate the extent of excess medical claiming and the costs of excess claims to consumers. The authors found that (1) 35 to 42 percent of medical costs claimed by auto accident victims appear to be in excess; (2) approximately $4 billion in unnecessary health care costs were incurred as a consequence of excess claims; (3) these excess claims also cost insurers an additional $9–13 billion in compensation for noneconomic losses and other costs; and (4) if insurers pass these increased costs on to consumers in the form of proportional increases in premiums, then in 1993 excess medical claims cost auto insurance purchasers across the country anywhere from $13–18 billion.


This documented briefing summarizes the preliminary findings of an Institute for Civil Justice study of the economic and social effects of class action litigation. The study found that the landscape of class action activity has shifted dramatically in the past several years. Litigation is increasing rapidly, especially in the state courts, and most of the growth is taking place in the consumer area, with burgeoning claims alleging fraud, deceptive advertising, and improper calculation of fees and other charges. Plaintiffs, claims, remedies, and damages are all becoming more diverse. The authors caution about proposals to alter the federal court rules governing certification of class actions based on dollar value of individual claims or on specific types of cases. Such reforms will be difficult to implement, they say, because the new kinds of class actions identified in the study don’t map easily by case type, dollar value, or other features.


Asbestos personal-injury litigation is now the longest-running mass tort litigation in United States history. The number of claims arising from both deadly and nonmalignant diseases has risen sharply in recent years. This briefing documents the first phrase of a new study on asbestos litigation. It offers preliminary answers to questions on a number of lingering issues: How well is asbestos litigation serving injured workers on whose behalf the claims are filed? What is the balance between the compensation that is paid out and the cost to deliver it? What economic costs does asbestos litigation impose on the country, and who bears those costs? Do strategies exist for resolving asbestos suits that would be more efficient and more equitable? 60 pages.


The number of asbestos claims filed annually, the number and types of firms named as defendants in asbestos litigation, and the costs of the litigation for those defendants have all risen sharply in recent years. These trends have led many individuals to question whether compensation for asbestos-related injuries is being divided among claimants fairly and in proportion to need, and whether responsibility for paying compensation is being allocated among defendants fairly and in proportion to culpability. In this briefing, the authors examine the dimensions of asbestos litigation today: How many claims have been filed? By whom? Against whom? For what kinds of conditions? At what cost and with what economic effects? If current trends continue, what will be the future costs of the litigation? To answer these questions, the authors describe the
dimensions of the litigation through the year 2000, the changing composition of claims, the number of defendants and the spread of litigation across industries, the total costs of the litigation to insurers and defendants, and the potential effects of the litigation on the U.S. economy now and in the future. This briefing concludes by outlining various policy alternatives to the current litigation regime.


In a series of studies for the California Commission on Health and Safety and Workers' Compensation, the Institute for Civil Justice has examined the adequacy of permanent partial disability (PPD) benefits, the workers' compensation court system, and medical fee schedules. In this study, the authors focus on California's system for evaluating permanent disabilities—the permanent disability rating schedule. This schedule, which is used to determine eligibility for PPD benefits as well as the amount of benefits, is at the center of legislative debates on how to reduce the costs of the California workers' compensation system. Here, the authors address several pertinent questions: Does the system ensure that the highest compensation goes to the most severely disabled individuals? Do injured workers with impairments to different parts of the body but similar employment outcomes receive similar compensation? Will different physicians evaluating the same injury produce similar ratings? And finally, how can the rating system be changed to improve outcomes for California's injured workers and their employers? 56 pages. References.


This documented briefing presents interim findings from a RAND Center for Terrorism Risk Management Policy project that aims to inform the debate over extending the Terrorism Risk Insurance Act of 2002 (TRIA), as modified in 2005. The study uses analytic tools for identifying and assessing key trade-offs among strategies under conditions with considerable uncertainty to assess three alternative government interventions in the market for terrorism insurance: TRIA; no government terrorism insurance program; and extending TRIA without other changes in the program to required insurers to offer coverage for chemical, biological, radiological, or nuclear (CBRN) attacks. The results suggest that TRIA performs better on the outcome measures examined for conventional attacks than letting the program expire but does not effectively address the risks CBRN attacks present to either businesses or taxpayers. The research also shows that requiring insurers to offer CBRN coverage without other program changes has little upside for CBRN attacks and can have significant unintended consequences in dealing with conventional attacks. 132 pages. References.
CONFERENCE PROCEEDINGS


The papers in these proceedings were selected from those presented at a May 2003 research colloquium on the workers’ compensation medical benefit delivery system and workers’ return to work after treatment. The colloquium was held at a time when California’s workers’ compensation program was at the center of intense debate and legislative activity: While coverage and expenditures for eligible workers had increased, California’s injured workers were expressing greater dissatisfaction with the quality of their care. The colloquium brought together national experts and California stakeholders with an interest in workers’ compensation medical benefits and ways in which initiatives in other health programs might be used to improve the delivery of high-quality services to injured workers. The colloquium was intended to foster dialogue, to further research, and to spur reform of the California workers’ compensation medical benefit delivery system. The papers in these proceedings provide an overview of the access, cost, and quality issues confronting the workers’ compensation medical benefits delivery system and identify mechanisms that might be used to improve the quality and efficiency of the medical care provided to injured workers. 124 pages.
Lloyd S. Dixon, a RAND economist, testified before the U.S. House of Representatives Committee on Public Works and Transportation regarding the transaction costs involved in the cleanup of hazardous waste sites. Transaction costs are those costs that do not contribute directly to the analysis or cleanup of a site. Insurer transaction costs, he stated, were high: 88 percent of the total expenditures. They were split between coverage disputes and defense of policyholders. For large firms that were potentially responsible parties (PRPs), the transaction costs, primarily for legal counsel, averaged 21 percent of total outlays, but decreased proportionally as cleanup progressed. These costs varied across sites, averaging 7 percent of the total when only a single PRP was involved and 39 percent when multiple PRPs were involved. Dixon concluded his testimony by suggesting that these facts may not tell much about the future because (1) insurance coverage issues are still unresolved; (2) PRPs involved in cleanup may yet sue non-participating PRPs; and (3) insurers may pursue their reinsurers as their own losses mount.

This publication contains the written statement of Lloyd S. Dixon submitted on November 4, 1993, to the Subcommittee on Superfund, Recycling, and Solid Waste of the U.S. Senate Environment and Public Works Committee. The author addresses the following questions: What is our best estimate of transaction-cost share at Superfund sites to date? What will the transaction-cost share likely be when cleanup is complete? How does transaction-cost share vary by size of firm? What reforms might be considered to reduce transaction costs?

This publication contains the written statement of Lloyd S. Dixon, submitted on March 10, 1995, to the Subcommittee on Superfund, Waste Control, and Risk Assessment of the United States Senate Environment and Public Works Committee. The author summarizes previous RAND estimates of private-sector and government transaction costs at Superfund sites to date and when cleanup is complete. The author then considers what various liability reforms imply for transaction costs and site cleanup.

This publication, the text of a written statement submitted by the author on July 27, 1995, to the Judiciary Committee of the California State Senate, evaluates seven proposals for improving juror performance: revised jury instructions, juror note-taking, question-asking, juror discussion during trial, minimum education requirements, complexity requirements, and guidance in determining awards.

This publication contains the written statement of Lloyd S. Dixon and Steven Garber delivered on March 28, 1996, to the California Air Resources Board. The statement is based on a recently completed RAND Institute for Civil Justice study of California’s ozone-reduction strategy for light-duty vehicles. The authors drew on the study results to comment on the proposed revision to the Zero-Emission Vehicle mandate that was under consideration by the California Air Resources Board.


This publication contains the written statement of Stephen Carroll delivered on March 19, 1997, to the Joint Economic Committee of the United States Congress. The statement is based on several RAND Institute for Civil Justice studies of alternative approaches to compensating automobile accident victims for their personal injuries. The author summarizes previous RAND estimates of the effects of an automobile insurance plan that offers drivers a choice between their state’s current automobile insurance plan and an absolute no-fault plan.


This publication contains the written statement of Stephen Carroll delivered on June 24, 1997, to the Judiciary Committee of the United States Senate. The statement is based on a RAND Institute for Civil Justice study of punitive damages in financial injury cases. The author summarizes RAND estimates of the frequency and size of punitive damage awards in financial injury cases. He also presents estimates of what percentage of the financial injury punitive awards in the study’s database would have been affected by caps of various sizes and how the caps would have affected the total amount of punitive damages awarded in such cases.


This publication contains the written statement of Stephen Carroll delivered on July 17, 1997, to the Commerce, Science, and Transportation Committee of the United States Senate. The statement is based on several RAND Institute for Civil Justice studies of alternative approaches to compensating automobile accident victims for their personal injuries. The author summarizes previous RAND estimates of the effects of an automobile insurance plan that offers drivers a choice between their state’s current automobile insurance plan and an absolute no-fault plan.


This publication contains the written testimony of Barbara O. Wynn, RAND Corporation Senior Health Policy Analyst, delivered on January 15, 2003, during a California Senate Labor and Industrial Relations Committee hearing to review the billing practices of hospitals owned by Tenet Health and the implications for the California workers’ compensation program. Tenet hospitals are under investigation by the Medicare program for inflating their charges to generate allegedly excessive payments for high-cost inpatients. RAND was asked to provide an assessment of the potential vulnerabilities that excessive charge inflation poses for the California workers’ compensation system. Wynn testified that the largest risks are related to payments for extremely high-cost inpatients and for outpatient services.
DRA"NTS


The ICJ is currently updating its jury verdict database, which includes information on civil jury outcomes and punitive damage awards, for Cook County, Illinois, and San Francisco, California, for the period 1960 to 1994. This paper presents the preliminary results of the analyses of trends in punitive damage awards in these state trial court jurisdictions. Changes in the number of awards reflect, in part, changes in the number of cases tried to verdict in each of these jurisdictions; these changes, in turn, reflect changes in court jurisdiction, statutory and case law, and, probably, litigation strategies. Changes in the percentages of cases in which punitive damages were awarded are, therefore, a better indicator of the likelihood of punitive damages being awarded over time. The results suggest that the likelihood of such awards has varied over time, rising significantly during the 1980s, and falling back more recently. They also show that punitive damages are awarded more frequently in some cases than others: From 1960 to 1994, punitive damages were most likely to be awarded in intentional tort cases and business and contract disputes.


This paper presents the preliminary results of the ICJ’s analyses of trends in punitive damage awards in California. The data are drawn from Jury Verdicts Weekly, which reports verdicts in California Superior Court jurisdictions. The findings indicate that the actual number of punitive damage awards in each jurisdiction was quite modest, punitive damages are awarded more frequently in some types of cases than others (punitive damages were most likely to be awarded in intentional tort cases and business and contract disputes), and the number of punitive damage awards varies over time. Median and mean awards rose in San Francisco County from 1985 to 1989, but the maximum award and total amount of punitive damages awarded decreased. Finally, the proportion of total dollars awarded to plaintiffs that is attributable to punitive damages increased between the 1980 to 1984 and 1985 to 1989 periods.


It is generally accepted that some, and perhaps many, claimants obtain medical care for nonexistent injuries in order to gain access to compensation for pain and suffering. It is also generally accepted that some, and perhaps many, claimants with valid injury claims consume more health care than appropriate either because they want to increase the amount of compensation they receive for pain and suffering or because a health professional recommended that treatment. However, there has been no empirical evidence about how excessive claims, in the aggregate, affect the costs of the health care system, or to what extent such claims impose other costs on society, such as claims-handling, legal and other transaction costs, and increased prices and insurance costs. This study provides a first-order estimate of these effects. Drawing on several ICJ analyses of claiming behavior, the authors characterize the nature of the liability incentives to exaggerate medical claims and develop estimates of the total costs of the excess medical care consumed. They examine the rate of excess medical claiming for automobile personal injuries and estimate the amount of medical care resources consumed by all other injury liability claims. Then apply to that estimate the excess claiming rate derived from the analysis of auto injuries to get an estimate of the cost of excess medical costs incurred for non-auto injuries in response to liability system incentives. These calculations are based on the critical assumption that the rate of excess claiming for non-auto injuries is about the same as for auto personal injuries. The authors suggest three areas to examine for appropriate policy responses that may reduce this excess
consumption of health care resources: (1) Examine our auto insurance systems; (2) schedule general damages for some or all cases; and (3) change the rules governing admissibility of medical cost information in courts.


The federal Clean Air Act Amendments of 1990 established national ambient air quality standards, and each state not in attainment must develop a plan for meeting them. California’s strategy includes strict emissions standards for mobile and stationary sources and for area sources such as solvents, paints, and consumer products. The cost and efficacy of California’s plan have generated substantial debate. Studies by various interest groups and by government agencies have produced wide ranging estimates of the cost and emissions reductions associated with various elements of the plan, and little commonly accepted empirical information exists on which to base policy decisions. The ICJ undertook an analysis of the existing estimates of the cost and effectiveness of California’s plan. This preliminary briefing focuses on one element of the plan—the zero emission vehicle mandate.


At the request of the Joint Economic Committee of the United States Congress, the RAND Institute for Civil Justice staff drew on previously published Institute studies of choice automobile personal injury insurance systems, as well as a special analysis, to estimate the effects of a specific choice automobile personal injury insurance plan. This draft report describes the analysis submitted to the Joint Economic Committee.


Awards for pain and suffering and other non-economic losses amount to 65 percent of all damages awarded under auto insurance bodily injury settlements. This draft report presents the hypothesis that insurers use general damage awards to reduce claimants’ incentives to submit exaggerated claims for specific damages for injuries and lost wages. Consistent with this hypothesis, this study finds evidence, using data on more than 20,000 closed bodily injury claims, that special damage claims that exceed their expected value receive proportionally lower general damage awards than claims that do not. Among the implications of this study is that the aggregate cost of auto insurance fraud may be less than what is typically estimated because insurers appear to compensate for suspected fraud by lowering general damage awards.
REPRINTS


Policy and scholarly debates over the wisdom of mandating arbitration for civil lawsuits usually focus on differences between arbitration and trial, and on values that litigants may forfeit if the court requires them to arbitrate their disputes, rather than take them to trial. Critics often view the requirement that litigants arbitrate as a denial of adjudicatory process or, at least, as an obstacle to obtaining adjudicated resolutions of disputes. This article argues that in many metropolitan courts in the U.S. today, arbitration is the only adjudicatory mechanism actually available to most litigants with ordinary civil cases. Because litigants must wait from two to five years for cases to reach trial, and because many lawyers are unwilling to invest their time in trying smaller-value cases, litigants' real choice in courts that offer arbitration is between arbitration and settlement. Therefore, more attention should be given to the differences between these two dispute resolution mechanisms. This article describes court-ordered arbitration and distinguishes it from other dispute resolution procedures; summarizes the development of court arbitration programs and places this development within the context of the alternative dispute resolution (ADR) movement; and reviews policy and scholarly concerns that have been expressed about the expanding role of court-mandated arbitration. Finally, it draws on evaluations of arbitration programs and procedural justice research, and details empirical findings on: (1) the consequences of adopting court ordered arbitration programs; (2) litigants' standards of due process; and (3) litigants' assessments of the degree to which various court processes, including arbitration, satisfy these standards. The author urges that rather than opposing arbitration as a matter of principle, legal scholars consider how to modify arbitration rules to strengthen due process. At the same time, she cautions those who are interested in improving the arbitration process to resist what might otherwise be their natural impulse: to make arbitration hearings increasingly resemble trials.


Most contemporary procedures for mass litigation were developed in a slow, reasoned fashion and were the result of professional study, scholarly discourse, judicial decisionmaking, and appellate review. Claims resolution facilities, in contrast, are creatures of necessity. They emerged from a specific litigation, and are the product of compromising the competing interests of parties, attorneys, judges, and other court actors. This article proposes an agenda for research on claims resolution facilities, the results of which could assist in improving the current set of facilities and fashioning better alternatives for the future. The objectives of the proposed research are to (1) describe the outcomes of different facilities; (2) examine the differences in outcomes among and between claims facilities and other compensation systems (including the tort liability system); and (3) develop a better understanding of the relationship between key design and implementation decisions and these outcomes. This article discusses the outcomes of interest and the relationships between design and outcomes that merit further investigation, considers the feasibility of collecting systematic empirical data on the claims resolution facilities, and discusses the public interest in research on claims facilities.


Claims resolution facilities are created to provide efficient means to distribute money to claimants, primarily by reducing participation in the litigation system. Existing claims facilities differ in their emphasis on these and other objectives, and have had varying success. It is still too early to assess these facilities definitively; some have not
become fully operational, while others have already been reorganized. Nevertheless, their experiences suggest that certain features may make claims facilities more or less successful in achieving their basic objectives. This article considers how the structures and operations of these facilities related to their relative success. Claims facilities seem productive in the most contentious of situations. They are also successful in the least contentious situations. The success of claims facilities is more clouded where their objectives are most ambitious, that is, where the facility has been substituted for litigation of great stakes to claimants. Claims facilities present a complex array of legal issues, litigation strategies, and administrative difficulties that affect many parties with varying interests. The novel problems facing these facilities will be resolved most successfully if parties have the flexibility to let the facilities evolve and are willing to cooperate to achieve sensible solutions.


As a result of changes in legal doctrine and litigation practices there has been a recent explosion of tort cases (for example, medical liability and product liability cases) for which scientific questions are central. Although many reasons exist for the problematic character of this litigation, some observers have suggested that the problems associated with these types of cases could be mitigated by modifying court procedures for dealing with the scientific questions on which most cases turn. Coincidentally, while these substantive developments in tort liability have been taking place, a significant procedural change has occurred in the civil litigation process. Increasingly, alternative dispute resolution (ADR) mechanisms (for example, arbitration and mediation) are being substituted for traditional court decisionmaking processes, such as the jury trial. Many proponents of ADR are primarily interested in reducing the transaction costs of civil case processing. But some have asked whether ADR might remedy perceived problems in court procedures for dealing with scientific questions in court cases. This article examines this question. It reviews the concerns that have been raised about court resolution of scientific issues and the criticisms that have been voiced regarding medical malpractice, product liability, and toxic tort litigation. It reviews the objectives of the ADR movement, describes the major forms of ADR in use today, discusses their use in medical malpractice, products liability, and mass toxic tort cases, and summarizes the empirical evidence on the consequences of utilizing each of these forms for key aspects of dispute resolution. Finally, it considers whether and how ADR can contribute to improving court procedures for dealing with scientific questions.


This article documents changes in attitude and practice about the propriety of resolving cases in groups. It makes five key points: (1) Participants and commentators have changed their attitudes substantially over the last three decades about the propriety of cases proceeding in the aggregate; (2) the change in attitude dovetails with changing practices that enable much more aggregative processing in federal courts than there was a few decades ago; (3) aggregation has been imposed as a means of enabling claims that would otherwise not be pursued or as a means of expediting cases already filed; however, in practice, these two functions are not so distinct; (4) the increase in aggregative processing has changed the way cases about individuals are viewed and has influenced contemporary debates about the allocation of authority between state and federal courts and Article III and Article I judges; and (5) aggregation poses a challenge to the civil justice system, which has been largely animated by individual claims of wrongdoing, to which government-empowered judges and juries respond in a relatively visible and litigant-specific way.

This article considers the Council on Competitiveness’s agenda for reform of the U.S. civil justice system. Citing the lack of evidence to support many of its assertions, the author suggests that the council is on shaky ground in blaming U.S. economic problems on the legal system. In favoring corporate defendants over individual plaintiffs, the council appears to have a political agenda.


In this article, the author responds to Professor Lester Brickman’s analysis of the asbestos litigation problem, as well as to his proposal for a national administrative solution to the problem. While the author shares Professor Brickman’s view that the process for resolving asbestos-related personal injury claims has gone awry, and that the time has come for a national resolution policy, the author disagrees with the underlying thrust of his analysis of asbestos litigation. Current options for a national policy include a federal statute-based administrative compensation program, and a judicially mediated settlement of pending federal and state court claims, with provision for payments to future claimants through a national trust. Neither one of these options is optimal. Each approach would disadvantage some of the current and future parties to the litigation, and would diverge substantially from our idealized vision of a civil justice system that uses carefully crafted procedures to match individual disputes. The current asbestos litigation process also diverges substantially from that idealized vision. The procedures are more aggregative than they are individualized and real outcomes are more generic than case-specific. The author believes it is time to confront the realities of asbestos litigation and to assess proposals for a national resolution of the litigation against a standard that admits to those realities, rather than a standard based on our aspirations for individualized dispute resolution. This paper contributes to a rethinking of the asbestos litigation problem. It critiques Professor Brickman’s perspective and offers in its stead the author’s assessment of the roles of the parties to the litigation. It describes the status and history of the litigation. It comments on the difficulties of designing administrative compensation programs, and discusses specific aspects of Professor Brickman’s proposal.


The tort system has become the object of a mounting chorus of complaints. Some critics argue the system is inadequate to the task of resolving particular types of cases—that in some situations it is too expensive, compensation is not fairly distributed, it inhibits the production of valued goods and services, and justice is poorly served by its allocation of costs and benefits. Others see these problems as so pervasive that they espouse more sweeping reforms. Although the outcome of the debate is not yet apparent, this appears to be a crucial time in the evolution of liability compensation. It must, however, be remembered that liability compensation is but one thread in the fabric of compensation policy. The criticisms of the tort system and the reform proposals they have spawned are best examined and evaluated in the context of society’s overall concern for compensating the injured and spreading risks. When seen in this broader framework, it is possible to develop a more coherent understanding of the purposes, options, limitations, and interrelationships of compensation programs in general, and of the tort system and alternatives to it, in particular. This article offers a way to organize our thinking from a larger perspective by developing a conceptual framework for all publicly mandated compensation systems or programs that can account for structure, coherence, and the wide
variations in acceptable outcomes that we observe in these arrangements. The article treats several general issues that relate to the design of all compensation programs. It characterizes the circumstances under which this society chooses to compensate those who are injured or who otherwise suffer loss, and describes the design requirements and design objectives shared by all compensation systems and how adjustments in design alter program outcomes. Next, the article identifies the trade-offs between valued objectives that design choices inevitably impose on those crafting these systems and develops the three paradigms that provide essential rationales for making the difficult trade-offs. Finally, it characterizes and discusses the current instability in a number of compensation programs, attributing much of that instability to certain unresolved tensions that flow from the trade-off imperative.


The proliferation of mass litigation in which many plaintiffs sue a common defendant or defendants for injuries from the same accident, or from exposure to the same product or substance, reflects the increasingly collective nature of life in the second half of the twentieth century. This article examines the impact of aggregative procedures on mass tort litigation. It draws on a series of case studies of 17 mass tort litigations that vary across important dimensions such as: (1) the type of formal and informal aggregative procedure used; (2) the type of product, exposure or incident that generated the litigation; (3) the types of injuries that resulted; and (4) the geographical scope of the litigation and aggregative procedure. The authors focus on the role of courts in mass tort litigation. They first describe courts’ interests in such cases and then consider the power that courts have to aggregate claims, describing limits on that power and the flexibility that courts have to get around limits. Finally, they examine how courts’ interests in resolving mass tort litigation interfere with judicial promulgation and consistent application of legal rules. The characteristics of mass litigation have often forced courts far from the ideal of carefully and fairly considering the merits of each case, balancing the interests of parties, and articulating and applying rules for society. The traditional legal process cannot determine the individual merits of tens or hundreds of thousands of claims against scores of defendants. Courts have no special expertise in balancing the interests of present and future claimants, a tradeoff that is present in every mass tort involving latent injuries. Finally, when faced with mass torts, courts are not simply disinterested administrators of justice. Rather, the extraordinary burdens of mass litigation make them deeply interested participants. Even though judicial concerns are both worthy and reasonable, we must still be concerned about how courts balance their own interests against the interests of others as they wield their enormous power to shape mass tort cases. The courts’ interests might compromise the essential judicial duties to articulate sensible legal rules and to apply those rules in a consistent manner.


This study reviews the available research on seven major court-administered alternative dispute resolution (ADR) procedures that appear to be particularly popular and representative of the broader range of alternatives: fee-shifting rules, small-claims mediation, victim-offender mediation, judicially mediated plea bargaining, judicial settlement conferences, court-annexed arbitration, and summary jury trials. The authors discuss potential consequences of ADR in the courts, including reductions in costs and delays, litigant satisfaction and procedural fairness, a sense of legitimacy and acceptance of ADR outcomes and preservation and enhancement of existing relationships. A growing body of research and theory can guide the design of future ADR procedures. The next round of innovation should take advantage of what is now known to optimize all
the criteria that ADR programs seek to meet. Basic social-psychological laboratory experiments on dispute processing can also play an important role in informing the conduct of applied field research on ADR programs.


Arbitration programs are expected to reduce delays and costs by providing a more efficient substitute for trial. But because most disputes are already resolved without adjudication, an arbitration program is likely to divert more cases from settlement than from trial. The net effect can be an increase in delay and congestion in the courts. This pattern is illustrated by a recent study of court-annexed automobile arbitration in New Jersey. Following the introduction of arbitration, there was a significant reduction in the percentage of cases settled without third-party intervention, but no reliable decrease in the trial rate, and a significant increase in filing-to-termination time for auto cases assigned to the program.

Arbitration programs appear to meet a demand for fair, adjudicative third-party hearings, but in doing so, they don’t always improve court efficiency.


The recent presidential campaign controversy about the state of the civil justice system provides an incentive for revisiting the question of how to properly characterize the tort litigation system. How many tort cases are there? What is the aggregate rate of growth in tort filings? How different or alike are filing patterns, trial outcomes, and costs for different types of torts? A review of the available data suggests that the liability system comprises multiple “worlds” of litigation, but raise questions about what is actually going on in each of these worlds. Current data are inadequate for answering these questions. Without a program of sustained research on litigation behavior and outcomes, we will be forced to rely on “reading the tea leaves” to assess trends in the civil justice system.


This study estimates the effects of a broad range of alternative no-fault auto insurance plans as compared with the traditional tort system. A simulation model relating accident victims’ injuries and losses to their expected auto insurance compensation under a specified no-fault plan is applied to a representative sample of auto accident victims in the tort states. Their estimated compensation under each of several no-fault alternatives is then compared to their actual compensation. The results indicated that no-fault insurance can yield substantial savings over the traditional system, or may increase costs substantially, depending on the no-fault plan’s provisions. Regardless of plan provisions, all no-fault plans reduce transaction costs, match compensation more closely with economic loss, reduce the amounts paid in compensation for noneconomic loss to less seriously injured people, and speed up compensation.


This article discusses the potential contribution to the policymaking process of systematic empirical research on the behavior of civil juries. It provides a brief primer on methods of jury research; summarizes some of the major patterns in liability, compensatory, and punitive jury judgments; and attempts to explain how civil juries reach such judgments, drawing heavily on research on mock juries and describing the effects of extralegal variables on jury judgment.

This article summarizes an analysis of how a plan that offers a choice between tort and absolute no-fault personal injury insurance would affect the costs of auto insurance in states that now have the traditional tort system. The authors estimate that the cost of compensating people on behalf of drivers who elect no-fault will be about 60 to 65 percent less than what they would have been if those drivers had been insured under the traditional tort system. These savings include both the compensation paid to accident victims from all forms of auto insurance and all transaction costs incurred in making such payments. Assuming that the savings are passed in full to consumers, these insurer savings translate into lower premiums for motorists. Those who had only the mandatory coverage under tort save the most—about half of their former premium under tort. Those who had fuller coverage—for example, including collision/comprehensive—save about 30 percent. Premiums are unchanged for motorists who choose to remain in the traditional tort system. Nationwide, motorists would save anywhere from $5 to $15 billion, depending on the percentage of individuals who switch from tort to no-fault.


In this article, four leading civil justice scholars argue that systematic collection of data on the civil justice system is needed for reasoned and effective policymaking.


This article explores patterns of blaming identified in a nationally representative survey of traumatic-injury victims in the United States, conducted by RAND’s Institute for Civil Justice in 1991. More than half of all respondents who attributed at least partial causation for their injury to human behavior blamed themselves. But there were significant differences across accident types. Respondents injured in product-related or slip-and-fall accidents blamed themselves, and those injured in work-related incidents were equally likely to blame themselves or someone else. But in motor vehicle accidents, a full 75 percent of victims blamed someone else for their injuries. One possible explanation for the behavior of auto accident victims is the psychological notion of “scripts”—we blame others for auto accidents because newspaper ads and commercials, among other influences, make blaming the other driver the default behavior for this situation.


The 1980s was the era of mass personal injury litigation. Hundreds of thousands of people sued scores of corporations for losses due to injuries or diseases that they attributed to catastrophic events, pharmaceutical products, medical devices, or toxic substances. The civil justice system has not responded well to the challenge of handling mass torts, and many innovations have been proposed to improve processing of these cases. This article examines the broader context in which these innovations must function. The analysis suggests that current proposals for improving mass tort processing are not promising because they do not deal directly with the uncertainties that flow from the factual and legal complexity of the cases, do not address the inherent conflicts of interest between attorneys and their clients in mass tort cases, ignore the fact that the asymmetric risks facing plaintiffs’ attorneys and defendants drive the litigation forward, and do not offer clear solutions to issues associated with future claimants—those who may discover sometime in the future that they were harmed by exposure to the product.
This article reviews the evidence regarding claims that alternative dispute resolution can reduce the public costs of civil case disposition and lower litigants’ legal bills. The evidence is mixed. In most of the jurisdictions that adopted court-administered arbitration, too few cases are diverted from trial to balance the public costs of implementing an arbitration program. Moreover, court-administered arbitration programs have had mixed success in reducing litigants’ costs for legal fees and expenses. The author suggests two lessons with application beyond the court-administered arbitration context: (1) inserting any new procedure in the litigation process is likely to produce unanticipated outcomes, and (2) litigants’ and attorneys’ disputing behavior are influenced by non-economic as well as economic factors. Therefore, in the long run, whether public or private ADR programs achieve cost savings will probably depend in large measure on how much they change patterns of disputing and lawyering.

At the request of the Judicial Conference of the United States, RAND’s Institute for Civil Justice is evaluating the pilot program of the Civil Justice Reform Act of 1990. This article reviews the design of the evaluation and presents RAND’s preliminary observations about the implementation of the pilot program. RAND’s primary interim conclusions are that case-management procedures vary greatly among the various district courts, and that one result of the pilot program has been to increase this variation. Some districts have moved aggressively to implement the policies of the pilot program, while others remain more cautious. However, the authors note that even in those districts whose explicit policies have changed the least under the pilot program, the implementation process has heightened the sensitivity of lawyers, judges, and clerks to the problems of litigation costs and delay.

This article identifies three reasons why we know less about the civil justice system than about many public policy issues: First, most of the costs of the civil justice system are borne by private parties; second, no federal government agency has a clear mandate to conduct or support civil justice policy research and analysis; and third, there is no statistical infrastructure to support ongoing investigation of the civil justice system. The author suggests that it is possible to do a better job of measuring how the civil justice system operates and the consequences of changes in substantive and procedural rules, and outlines factors that must be considered in designing a civil justice indicators series. She urges that we begin to define the crucial information needed to monitor the processes and outcomes of the civil justice system.

A number of issues surround the question of whether a court should vacate either its own decision or the decision of a lower court at parties’ request so that, with such “vacatur on consent,” settlement will occur. These issues include the value that should be accorded adjudication; the limits, if any, that should be placed on courts’ encouragement and facilitation of settlement; who owns lawsuits, the risks they entail, and the decisions generated in their wake; the meaning of the words “public” and “private” in the context of court decisions; and the proper balance between litigants’ autonomy and third-party interests in litigation. This article examines three recent cases in which the judges grapple with the problem of vacatur, considers ways the case law on vacatur illuminates contemporary values about the utility
and desirability of adjudication, and describes and appraises the tensions among competing judicial trends. Finally, the author evaluates the current celebration of alternative dispute resolution, and particularly of settlement, and its impact on the understanding of the judicial role.


This study explores the ramifications of the influence of the Court of Appeals for the Federal Circuit (CAFC) on the doctrinal stability and certainty of the patent law, and provides evidence that patentees (and their intellectual property counsel) have read the signals and responded by using the courts to enforce the patent rights. Whether the CAFC's bolstering the value of patents has in turn led to greater patenting activity remains largely unanswered, although the motivations are clear. Patenting is an expensive activity for inventors and their assignees, and, unless the courts are going to recognize and enforce patent rights, maintaining technological advances as trade secrets (when possible) may be a better alternative.


This paper maps the changing attitudes toward alternative dispute resolution (ADR) and the claims made on behalf of ADR, as well as changing attitudes toward adjudication and its attributes. The author (1) presents historical background on the call for alternative forms of dispute resolution; (2) outlines the various forms of ADR and groups them into modes defined by the nature of the work done by the third party brought in to handle a dispute; (3) reviews some of the ways in which ADR proposals have become law and been institutionalized; and (4) considers the relationship between claims made for ADR and views of adjudication. Finally, she uses this background to define some issues that may affect ADR and adjudication in the future: We can observe the melding of ADR into adjudication, and then the narrowing of ADR and its refocusing as a tool to produce contractual agreements among disputants—in short, the focus is shifting from adjudication to resolution.


Traditional tort liability for personal injury from auto accidents has long been criticized on the grounds that its costs are too high and that any compensation it provides is inefficient, unfair, and dilatory. This article examines a reform system that replaces current no-fault proposals, focusing on the cost savings that would result. The new reform would give motorists the option of forgoing claims for noneconomic loss without forcing them to do so. Thus, motorists would be given the option of purchasing PIP (personal injury protection) coverage at the financial responsibility level required by state law for personal injury liability. The authors estimate the effect of the plan on the costs of personal, private passenger auto insurance in every state currently without a PIP plan limiting recovery for noneconomic losses. They estimate the percentage reductions in premiums for motorists choosing the new coverage and the anticipated dollar savings as well. They conclude that the merits of allowing motorists to opt out of payment for pain and suffering and other noneconomic loss, in return for lower costs and receipt of automatic payment for economic loss, are worthy of consideration in every state.


To determine whether the use of alternative dispute resolution (ADR) might help the civil justice system deal with the increasing amount of
mass personal injury litigation, the author briefly surveys the many forms of ADR (conciliation, mediation, arbitration, and other nonadjudicative or quasi-adjudicative mechanisms to resolve cases). For purposes of this discussion, she defines ADR as comprising procedures for resolving disputes that, compared with the traditional litigation process of adversarial negotiation and trial, enhance parties’ (the real parties, not their legal representatives) control over litigation outcomes or processes. The author then discusses various problems that courts face as they deal with mass personal injury litigation, highlighting the issues of scale, uncertainty, asymmetrical risks between plaintiffs’ attorneys and defendants, estimating the number and characteristics of future claimants, conflicts of interest between and among attorneys and their clients, and equitable distribution of compensation. Finally, she considers the extent to which the procedural responses to mass personal injury litigation can be characterized as ADR and how well they have dealt with the special problems of mass tort litigation. She suggests that, to determine how well dispute resolution procedures—ADR or any others—serve mass tort claimants, it will be necessary to bring plaintiffs into the dialogue on mass personal injury litigation.


This article presents estimates of the effects of a “choice” auto insurance plan on the costs of private passenger auto insurance in each of the 50 states. The choice plan would allow drivers the option of switching from their state’s current insurance system to a no-fault system in which they waive their rights to tort claims for non-economic loss in return for assured compensation for their economic loss and lower premiums. For each state, the authors first estimate what auto insurers would have to charge the average insured motorist in order to recover the costs incurred in compensating accident victims under the current auto insurance system. They then develop corresponding estimates for motorists who elect to retain the status quo and for motorists who choose the optional no-fault plan. They next compare these estimates to determine how the adoption of the plan allowing choice would affect the costs of auto insurance to both motorists who elect their state’s current system and those who elect the no-fault option. The authors estimate that the costs of insuring drivers who elected the no-fault option would be reduced by roughly 20 to 40 percent in almost every state, which translates into reductions in premiums of about 10 to 20 percent for the average driver who purchases the average combination of personal injury and property damage coverages. Drivers who purchase only those coverages mandated in each state would realize greater savings under the choice plan.


Over the past decade, aggregate litigation has become more commonplace. Through various statutory, rule-based, and informal means, judges and lawyers consolidate large groups of individual litigants and claims. The paradigm of a class action, however, continues to dominate the literature, and with it, the assumption that a single set of lead lawyers represents all of the plaintiffs in the assembled group. This article addresses the problems raised when, in contrast to that paradigm, aggregation brings together mass attorneys, who perform tasks in addition to those done by a court-appointed plaintiffs’ steering committee. The authors’ central questions are about the roles of the many lawyers within the aggregate and the potential for policymakers to use procedural tools and the law of attorneys’ fees to structure incentives to enhance the experience of individual litigants within the aggregate.

A content analysis of 249 articles from *Time*, *Newsweek*, *Fortune*, *Forbes*, and *Business Week* during 1980 to 1990 were used to examine popular media coverage of tort litigation. Compared with objective data on tort cases, the magazine articles considerably overrepresented the relative frequency of controversial forms of litigation (product liability and medical malpractice), the proportion of disputes resolved by trial (rather than settlement), the plaintiff victory rate at trial, and the median and mean jury awards. Psychological mechanisms by which biases in media coverage could affect the decisionmaking of potential litigants are discussed. The results highlight the need for more systematic monitoring and dissemination of reliable data on tort outcomes.


Evidence that juries treat corporate defendants less favorably than individual defendants is often cited in support of the widely held view that juries are biased against wealthy “deep-pocket” defendants. Such evidence confounds defendant wealth and defendant identity. In two simulation experiments involving citizens on jury duty, these factors were separated by manipulating whether the defendant was described as a poor individual, a wealthy individual, or a corporation; the defendant’s assets were described identically with the latter two conditions. In Experiment 1, liability was significantly more likely, and awards were significantly greater, for corporate defendants than for wealthy individual defendants, but verdicts against poor versus wealthy individuals did not differ. In Experiment 2, awards were larger against wealthy individuals who engaged in commercial rather than personal activities, and awards in the personal activity condition were larger against corporations than they were against wealthy individuals. There was little evidence that a defendant’s wealth has an effect on juror judgments. While juries do appear to treat corporations differently, the explanation may have more to do with citizens’ views about the special risks and responsibilities of commercial activity.


This article summarizes RAND’s evaluation of the Civil Justice Reform Act of 1990 (CJRA). The CJRA required each federal district court to develop a case management plan to reduce costs and delay. The legislation also created a pilot program to test six principles of case management, and required an independent evaluation to assess their effects. Study results appear in four volumes: MR-800-ICJ, the executive summary, describes the purpose of the CJRA, the basic design of the evaluation, the key findings, and their policy implications; MR-801-ICJ traces the implementation of the CJRA in the study districts; MR-802-ICJ presents the main descriptive and statistical findings related to cost, time to disposition, and participants’ satisfaction and views of fairness; and MR-803-ICJ describes the results of an evaluation of mediation and neutral evaluation designed to supplement the alternative dispute resolution assessment contained in the main CJRA evaluation.


This book chapter compares the idealized vision of tort litigation that lawyers and policymakers hold out with the realities of the tort liability system, focusing on the perspective of individual litigants. In principle, tort law provides compensation to injured individuals that is commensurate with loss and sends deterrent signals to potential wrongdoers by visiting the costs of injuries on those best in the position to reduce it—manufacturers, service providers,
individuals, drivers, and the like. In principle, also, civil legal procedures enable individual plaintiffs and defendants to participate fully in the dispute resolution process and ensure access to the courts when parties cannot settle disputes themselves. Drawing on surveys of litigants and autobiographical accounts of their experiences in ordinary and mass tort litigation, Hensler describes a rather different process—one that generally fails to compensate those with the most serious losses and that sends deterrent signals to potential wrongdoers that are difficult, if not impossible, to interpret. As perceived by individual litigants, the dispute resolution process is controlled by lawyers who are distant from their clients, and disputes are settled according to rules of thumb that bear little relationship to the compensation or deterrent objectives of the tort liability system. Courts are often closed to citizens; judges and lawyers are deaf to litigants’ desires to air their grievances, which the latter often articulate in terms of justice and fairness norms.


This article updates an earlier study estimating the effects of a choice automobile insurance plan on the costs of compensating auto accident victims if the no-fault option was absolute no-fault (ANF). The authors assumed that 50 percent of the consumers who would have purchased auto insurance under their state’s current system would switch to ANF under the choice plan. The earlier study, requested by the Joint Economic Committee of the U.S. Senate and using data from 1987, estimated how a variant of that plan would affect the cost of private passenger auto insurance if all currently insured drivers elected the no-fault option. The present report uses recently obtained data for a representative sample of people who were compensated for auto accident injuries in 1992. With these data, the authors have replicated their analyses for 46 states. They find that the choice plan could substantially reduce the costs of compensating people injured in auto accidents.


The Civil Justice Reform Act of 1990 (CJRA) required each federal district court to develop a case management plan to reduce costs and delay. The legislation also created a pilot program to test six principles of case management, and required an independent evaluation to assess their effects. This report reviews earlier RAND studies evaluating the CJRA and its effects and offers results from a follow-up study examining the amount of time attorneys spent on discovery over a broad sample of federal cases disposed in 1992 to 1993. The results show that, although attorneys spend increasing amounts of time in discovery proportional to the length of disposition time a case requires, the percentage of time spent on discovery per case is relatively stable and does not constitute a majority of lawyer time in virtually any case. Imposition of CJRA-based discovery reforms tends to reduce disposition time, but this effect is often inseparable from the case-management style of the presiding judge.


This article examines whether allowing motorists to choose auto insurance policies that waive rights to recovery for noneconomic losses actually save money for the insureds. The authors studied compensation claims paid and closed in several states during 1992. They calculated what the costs would have been had personal injury protection (PIP) insurance plans, which restrict noneconomic recovery and are alternatives to typical fault and no-fault based coverages, been available as policy options. Comparing their findings with those from their study in 1987, they report that the choice plan could reduce insurer costs for paid claims in most states, lowering the cost of premiums an average of 20 percent for the typical insured driver electing PIP coverage. However, they note
that this percentage has fallen drastically from the levels they reported in 1987 because of a sizable increase in economic loss due to accidents during the intervening years and a concurrent failure by insured drivers to modify their policies to cover that increase.


There is considerable debate, but very little empirical information, regarding the use of mandatory binding arbitration agreements in health care. Using California as its reference, this study determines the prevalence of arbitration agreements between health plans and their enrollees and providers and their patients. The authors examine how decisions regarding the use of such agreements are made by plans and providers, and assess the prospects of their future use.


Product price, safety, and innovation are determined primarily by business decisions. In many industries, product liability costs and risks can significantly influence such decisions. In addition to direct liability costs (for example, costs of defending claims and lawsuits, negotiating and paying settlements and awards), product liability litigation can lead to indirect costs such as negative publicity, reduced product sales, and costly reactions by safety regulators. Potential for punitive damages is a major reason that, unlike most business risks, product liability risks are effectively unlimited. This article reports empirical findings concerning how product liability, and the threat of punitive damages, affect business decisions and economic outcomes in the pharmaceutical, medical device, and automobile industries. The article also discusses social benefits and costs of product liability, the sources of potential undesirable behavioral effects, and how the policy debates about product liability and punitive damages might be improved.


Superfund liability may impose financial risk on investors and thereby increase firms’ costs of capital. Monthly stock returns are analyzed for 73 chemical companies using several measures of Superfund exposure. Additional exposure appears to increase costs of capital for larger firms, but perhaps not for smaller firms. From 1988 to 1992, an average increase in the cost of capital of between 0.25 to 0.40 percentage points per year is estimated for 23 larger firms. The social cost of Superfund-related financial risk in the chemical industry may be as high as $800 million annually, or enough to clean up about 20 sites.


Claims about detrimental economic effects of product liability are a cornerstone of efforts by tort reformers to rally support. It seems fair to say, however, that existing evidence about economic effects of product liability is sketchy. In this paper, the authors attempt to develop information about a narrow but important piece of a very complex puzzle. In particular, they develop quantitative evidence about a component of automobile manufacturers’ incentives stemming from product liability by examining effects of trial verdicts on company stock prices and on new vehicle sales.


Judicial independence is under attack—and has been since the birth of the republic. Whether empirical research regarding the nature and health of judicial independence is needed.
constitutes a question that requires consideration from several different angles. Agreement about what judicial independence, or a lack thereof, actually means is a difficult and necessary first determination to be made before any analysis could begin. Categorizing the nature of attacks upon independence, examining the public’s attitude and knowledge regarding courts, and evaluating the methods by which judges attain appointment are all worthy approaches for research about judicial independence.


Media coverage of litigation may affect people’s perceptions and therefore the behavior of litigants, judges, juries, legislators and business decision-makers. Their behavior in turn influences various legal, social, political, and economic outcomes. For product liability verdicts during 1983 to 1996 involving automobile manufacturers, the authors examine the extent of coverage in several dozen newspapers. They find almost no articles reporting on any of 259 verdicts for the defendant. Econometric analysis focuses on determinants of the amount of coverage of 92 verdicts for plaintiffs, 16 of which include punitive damages. Key determinants include the award amount, the nature of injuries, the vehicle’s recall history, and especially the existence of a punitive component of damages regardless of its size.


Over the past 15 years, automobile insurance premiums, particularly for personal injury coverage, have grown rapidly. Furthermore, these increases are nationwide. Stiff increases in insurance premiums are burdensome for everyone. High insurance premiums are an incentive for people to drive uninsured, exacerbating the uninsured motorist problem.

Debates over auto insurance costs generally feature clashing perspectives, but nearly everyone agrees that when insurance companies pay compensation for nonexistent injuries, the costs are reflected in higher insurance bills for everyone. But how much excess claiming is there? This study analyzes the patterns of personal injury claims submitted across the states to estimate the extent of “excess claiming,” claims for alleged injuries that are either nonexistent or unrelated to the accident. The study confirms that the United States’ tort liability system provides incentives to submit excess claims for auto injuries, and provides empirically based estimates of how much excess claiming exists.


*Direct contracts* are arrangements for the provision of health care services between a provider-sponsored organization and an entity not licensed to insure, typically a self-insured employer. Although delivery systems built around a health plan intermediary have clearly emerged as the dominant model, several legal and market developments portend greater interest in the use of direct contracts. This article explores threats posed to patient privacy by these direct contracts. Economic incentives to avoid sick individuals become concentrated at the physician group level. Employers, when involved in analysis of detailed utilization data, may face heightened incentives and new opportunities to ensure that their workforce contains few employees with high medical expenditures. Neither the existing legal protections nor the privacy reforms under consideration in Congress appear to offer adequate protection against these particular threats. One potentially effective protection would reinsert a third party—a “health information trustee”—between purchaser and provider for purposes of guarding sensitive data; however, such a requirement could chill interest in direct contracts.
Recent tort reform debates have been hindered by a lack of knowledge about how jurors assess damages. Two studies investigated whether jurors are able to appropriately compartmentalize compensatory and punitive damages. In Study I, mock jurors read a trial summary and were asked to assess compensatory and punitive damages in one of three conditions: (a) compensatory damages only; (b) punitive damages for the plaintiff; or (c) punitive damages for the state treasury. Results suggest that jurors who did not have the option to award punitive damages inflated compensatory damages via pain and suffering awards. Jurors were marginally more likely to award punitive damages when the plaintiff was the recipient. Mock jurors in Study 2 read a similar case summary and were asked to assess compensatory and punitive damages. Two factors were varied in Study 2: (a) egregiousness of the defendant’s conduct, and (b) the recipient of any punitive damages (the plaintiff versus a consortium of state funds). Jurors were more likely to award punitive damages when the defendant’s conduct was more egregious and when the plaintiff was the recipient. The results suggest overlap between compensatory and punitive damage judgments, contrary to the law’s mandate.

Little is known about how well individuals are compensated for injuries. Data from a 1989 survey are analyzed to estimate both lifetime costs and compensation. The results indicate that about 55 percent of the cost is compensated by public or private programs. Compensation rates are lower for disabling injuries and injuries of a long duration. The results also suggest that compensation system reforms that would place stricter limits on maximum compensation might not be a distributionally fair solution. The reasons are that costs are highly skewed, and the share of costs recovered by compensation programs is currently lowest for injuries that are long term, disabling, and the most expensive.

Policymakers are considering legislative changes that would increase managed care organizations’ exposure to civil liability for withholding coverage or failing to deliver needed care. Using a combination of empirical information and theoretical analysis, the authors assess the likely responses of health plans and Employee Retirement Income Security Act (ERISA) plan sponsors to an expansion of liability, and they evaluate the policy impact of those moves. They conclude that the direct costs of liability are uncertain but that the prospect of litigation may have other important effects on coverage decisionmaking, information exchange, risk contracting, and the extent of employers’ involvement in health coverage.

The Civil Justice Reform Act of 1990 (CJRA) required each federal district court to develop a case management plan to reduce costs and delay. The legislation also created a pilot program to test six principles of case management, and required an independent evaluation to assess their effects. This executive summary provides an overview of the purpose of the CJRA, the basic design of the evaluation, the key findings, and their policy implications. Detailed results appear in three other reports: MR-801-ICJ, which traces the stages in the implementation of the CJRA in the study districts; MR-802-ICJ, which presents the main descriptive and statistical evaluation of how the CJRA case management principles implemented
in the study districts affected cost, time to disposition, and participants’ satisfaction and views of fairness; and MR-803-ICJ, which describes the results of an evaluation of mediation and neutral evaluation designed to supplement the alternative dispute resolution assessment contained in the main CJRA evaluation.


The increasing integration of alternative therapies in medical treatments has raised concerns about liability implications among the health care professionals who deliver such therapies. The analysis in this article focuses on the type and frequency of claims brought against health care practitioners who deliver alternative therapies and the standard of care to which they are held when sued. When courts decide cases at the intersection of conventional and alternative medicine, they are encouraged to judge conduct according to standards enunciated by alternative medicine practitioners who regularly deliver the treatment at issue; physicians who have established similar practices; and conventional practitioners. Patients need to be fully informed about the alternative procedures and possible outcomes, and the practitioners should obtain express consent from the patient for the treatment, ideally in writing.


The authors estimate the effects of offering the drivers in each state a choice between their state’s current insurance system and an absolute no-fault plan in which motorists neither recover nor are liable for noneconomic loss for any auto accident injury. If insurance premiums are proportional to compensation costs, drivers who choose absolute no-fault should save about 45 percent on their premiums for personal injury coverage. This translates to approximately 21 percent savings on their total auto insurance bill. Drivers who choose to stay in their state’s current insurance plan will generally realize a small amount of savings.

**RP-871-ICJ—**A Research Agenda: What We Need to Know about Court-Connected ADR. D. Hensler. 2000. (Reprinted from *Dispute Resolution Magazine, Vol. 6, No. 1, Fall 1999.*)

Although practitioners of alternative dispute resolution (ADR) have long emphasized the benefits of substituting problem-solving processes for adjudication, empirical studies indicate that ADR may not save litigation costs or time. Litigants may prefer ADR because they believe it saves them money that they would have spent if they went to trial; they may prefer mediation because of its process of conciliatory problem-solving or because they feel it gives them their due as citizens. Lawyers may prefer mediation either for lawyerly reasons, or because the task of informing the client of a less than fully satisfactory outcome is shifted to a third person. Measuring and understanding litigants’ and lawyers’ preferences for different forms of dispute resolution will require diverse research techniques and numerous studies. New research may indicate that the spread of ADR has more to do with the economics of legal practice than the ideology of transformation. Producing quantitative changes in legal dispute resolution may require more, and not less, money.


Previous studies relating incidents of negligent medical care to malpractice lawsuits were based on data collected during a volatile period in malpractice legislation (1984) from two of the most populous states (New York and California). To see if those studies would be generalizable, the authors performed a similar analysis that linked medical malpractice claims data from Utah and Colorado in 1992 with clinical data from a review of almost 15,000 medical records. They found that the poor correlation between medical negligence
and malpractice claims that was present in New York is also present in Utah and Colorado. Paradoxically, the incidence of negligent adverse events exceeds the incidence of malpractice, but when a physician is sued there exists a high probability that it will be for rendering nonnegligent care. The elderly and the poor are especially likely to be among those who suffer negligence and do not sue, perhaps because their socioeconomic status limits opportunities to secure legal representation.


Florida’s Birth-Related Neurological Injury Compensation Plan (NICA) is the most significant experiment in compensation for medical injury undertaken to date in the United States. As NICA enters its second decade of operation, maintaining its jurisdictional integrity has emerged as a key challenge for policymakers in Florida. In this article, the authors explore the relationship that has developed between NICA and the tort system as competing avenues for families to obtain compensation for severe birth-related neurological injury. By linking NICA claims with data on malpractice claims filed in Florida, the authors found a persistence of “bad baby” litigation despite NICA’s implementation, with many families pursuing claims in both forums. An explanation for these results can be traced to key features of the plan’s design—primarily, the way in which “exclusive” jurisdiction over injuries is determined and the restrictive nature of the compensation criteria that are used. The findings of this study may help efforts to consolidate NICA’s role in injury compensation and inform future design of alternative compensation systems.


Patient injuries are thought to have a substantial financial impact on the health care system, but recent studies have been limited to estimating the costs of adverse drug events in teaching hospitals. This analysis estimated the costs of all types of patient injuries from a representative sample of hospitals in Utah and Colorado. The authors detected 459 adverse events (of which 265 were preventable) by reviewing the medical records of 14,732 randomly selected 1992 discharges from 28 hospitals. The total costs (all results are in discounted 1996 dollars) were $661,889,000 for adverse events and $308,382,000 for preventable adverse events. Health care costs totaled $348,081,000 for all adverse events and $159,245,000 for the preventable adverse events. Fifty-seven percent of the adverse-event health care costs and 46 percent of the preventable adverse-event costs were attributed to outpatient medical care. Surgical complications, adverse drug events, and delayed or incorrect diagnoses and therapies were the most expensive types of adverse events. The costs of adverse events were similar to the national costs of caring for people with HIV/AIDS, and totaled 4.8 percent of per capita health care expenditures in these states.


This article traces the development of empirical research on alternative dispute resolution and its impact on the legal system. In the 1980s, legislators, judges, court administrators, and lawyers acted largely as interested onlookers in the research process. But, as the author notes, research on court ADR—especially with an evaluative component—has become unwelcome in some quarters. The author recalls RAND’s report on the results of ADR under the controversial Civil Justice Reform Act of 1996 and the surprising level of criticism the study received.
from the ADR community. The author cites other examples of hostility regarding ADR research directed at the academic community at large, and notes that empirical research nevertheless continues apace. The author offers several explanations for the current attitudes on evaluative ADR research, and concludes by posing questions on the future of this research.


In this article, the author comments on Professor Viscusi’s analysis regarding a threat that punitive damages pose to economic efficiency (Kip W. Viscusi, “Corporate Risk Analysis: A Reckless Act?” *Stanford Law Review*, Vol. 52, No. 3). The author discusses Viscusi’s implicit assumption that promotion of economic efficiency is the only legitimate social goal of punitive damages, and comments on the strength of Viscusi’s historical evidence that punitive damages are often assessed because companies perform risk or cost-benefit analysis. The author also sketches a theory of why the threat of such assessments is likely to deter socially worthwhile analysis in many cases and comments on potential policy responses.


When a workplace injury leaves a worker with a physical impairment that reduces his or her ability to work, the worker is eligible for permanent partial disability (PPD) benefits in California. In this article, the author estimates the lost earnings of PPD claimants in California over the four to five years following an injury, and estimates the fraction of the earnings loss that is replaced by workers’ compensation indemnity benefits. To examine the long-term wage losses of injured workers, the study employed a unique database of workers’ compensation claims that was linked to quarterly wage data, before and after injury, maintained by the California state agency administering unemployment insurance. The author reports the research results on earnings loss and wage replacement for a full sample of PPD claimants and reports the results by severity of the disability as measured by disability rating.


The labor-market consequences of disability can include job loss, reduced income, earlier retirement, and greater reliance on private and social insurance systems to provide income security. In this article, the authors examine the labor-market consequences of work-related disabling injuries and their relationship to the age of injured workers in three states: California, Washington, and Wisconsin. They also report estimates of the adequacy of workers’ compensation income benefits received for workplace injuries. The authors present evidence that older workers suffer proportionately more injuries with permanently disabling consequences and the losses suffered by older workers are greater, on average, than those of younger workers. They also find that injury-related non-employment is higher among older workers and, moreover, the older workers in the states that were studied appear to recover a smaller proportion of their losses from workers’ compensation than do other injured workers.


In this article, the authors explore alternative strategies for class-action reform aimed at improving the cost-benefit ratio of damage class
actions. They sought to identify mechanisms for enhancing the court system’s capacity to screen out non-meritorious suits, while preserving access to the courts for meritorious actions. Among other findings, the authors recommend that judges use their existing authority to regulate class action more strictly by more vigorously reviewing and approving settlements and fee-award requests. The authors also recommend further scholarly investigation of the merits and demerits of two-way, loser-pays fee shifting with liability on the plaintiffs’ side borne by class counsel. 32 pages.


The evaluation of programs and policies to reduce the incidence of workplace injuries requires that the consequences of those injuries are estimated correctly. Workplace injuries are complex events, and the availability of data that reflects that complexity is the largest obstacle to accurate estimation. In this article, the authors review the literature on the consequences of workplace injuries for both workers and employers. They focus on data sources, particularly linked administrative data from various public agencies. The authors also review other approaches to obtaining data to examine the consequences of workplace injuries, including public-use longitudinal survey data, primary data collection, and linked employee-employer databases. The authors found that longitudinal survey databases, including the National Longitudinal Survey of Youth and the Health and Retirement Survey, are very promising although largely untapped sources of data on workplace injuries. They also found that linked employee-employer databases are well suited for the study of consequences for employers.


In previous studies, the author has examined the challenges that mass torts pose to the legal system. In this article, she extends her consideration of mass tort litigation to include what she terms “the new social policy torts”: suits against tobacco companies, firearms manufacturers, and managed care organizations that are intended to change public policy. This article presents an analysis of the present nature of class action and other large-scale litigation in the United States. The author discusses varieties of large-scale litigation and presents data on patterns of usage of devices for pursuing such litigation, focusing on damage class actions. The author concludes by offering comments on likely future trends and notes that in order to choose appropriate procedures for resolving the issues surrounding large-scale litigation, careful consideration must be given to the practical consequences of alternative procedures.


Over the past decade and a half, automobile insurance premiums, particularly for personal injury coverages, have grown rapidly across the country. This article analyzes auto personal injury claims across states to estimate the frequency of claims for nonexistent or preexisting injuries. The authors developed a series of hypotheses regarding the specific claiming patterns that would signal the presence of excess claims. They drew on a nationally representative sample of auto accident injury claims that were closed during 1987 to test these hypotheses. The results strongly support the authors’ hypotheses. They conclude that approximately 42 percent of reported “soft-injury” claims in the dollar-threshold and tort states are for nonexistent or preexisting injuries.

Courts and administrative agencies have clashed over issues raised by gene patenting. In this article, the authors first offer a synopsis of the historical problems that the patent system has encountered in dealing with innovations such as those flowing from the Human Genome Project. The authors then discuss the prohibitions on the patenting of naturally occurring phenomena and the patenting of preexisting products that have merely been isolated, purified, or otherwise altered in some way. The authors then analyze the doctrine as it relates to the 1952 Patent Act. The authors go on to discuss the differences between biochemical innovations and other types of innovations and present the “substantial transformation test” as a bridge between proper patent doctrine and omissions in the current Patent Act. The authors demonstrate how the test can be used to distinguish new biotechnology inventions from unpatentable discoveries of natural phenomena.


Although private arbitration has long been used in commercial transactions and labor-management relations, specifying arbitration for disputes arising from consumer contracts is relatively recent. Many are concerned that consumers do not fully understand the “small print” in such agreements, which are offered on a take-it-or-leave-it basis. The authors found that although businesses seem to be placing consumers on equal footing with themselves in resolving future disputes, appearances may be deceptive. More than one-third of the clauses do not inform consumers that they are waiving their right to litigate disputes in court; many do not tell consumers what their expenses might be in an arbitration, that the outcome is final and binding, or what the key aspects of the arbitration process are. Additionally, the nature of any interim relief provided is more suited to the business than to the consumer. In short, given the lack of available information for consumers in these arbitration clauses and the difficulty of obtaining and deciphering them, most consumers only become aware of what rights they retain and what rights they have waived after disputes arise. There are thus grounds for concern about how consumers actually fare in arbitration.


Federal courts are now required by law to offer some form of alternative dispute resolution (ADR), and many state courts require parties to attempt to resolve their cases through mediation before they can obtain a trial date. The author notes that there are reasons to believe that the ADR movement has had some success over the past 25 years in changing business and legal decisionmakers’ views on how best to resolve legal disputes. In this article, the author presents a personal critical perspective on one part of the history of the dispute resolution movement in the United States—the evolution of ADR in the legal world. The author presents historical antecedents, discusses the “community justice movement,” the business community’s joining of the ADR movement, and offers final thoughts on the dispute resolution movement’s contribution to changes in the view of the justice system.
Much research and policy on terrorism insurance compares terrorism to natural catastrophes, but this obscures the national security dimension of terrorism insurance. In this paper, we argue that government support of terrorism insurance and compensation can impact national security in several ways. It can increase resilience after terrorist attacks, demonstrate solidarity with victims, and affect incentives for security precautions. Thus, terrorism insurance policy may be an important element of the strategy against terrorism, particularly as terrorists increasingly focus on economic targets.

Electronic prescribing offers the prospect of safer medication management, but fulfillment of that promise depends on ready access to personal health information from many sources, thus raising new concerns about information privacy and security. Federal privacy regulations under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) limit the sharing of health information by providers, and particularly may discourage information sharing over distributed computer networks. This analysis finds that although HIPAA has only a limited effect on current e-prescribing practices, future electronic prescribing systems will likely fall short of their potential benefits, absent policy refinements designed to encourage clinically appropriate, networked sharing of patient health information.

Much of the discussion around Terrorism Risk Insurance Act (TRIA) has focused on the failure of the terrorism insurance markets, but this chapter argues that the connection between terrorism insurance and compensation policy and national security provides another rationale for public intervention in insurance markets. High take-up rates for terrorism insurance or other forms of compensation for terrorism losses can enhance economic resilience after an attack and encourage national cohesion and solidarity post-event. Doing so thwarts the aims of terrorists and, over the long run, may deter future attacks.
at least on first blush, imperil the entire profession. On the other hand, if one predicts historical liability exposure patterns into the future, the risk of another firm exiting due to liability concerns appears to be more than trivial. Whether this risk is large enough to justify liability limitations or other significant legal reforms, however, turns on a number of factors that have thus far gone unexamined by either advocates or opponents, including the presence of market mechanisms of deterrence, the effectiveness of current regulation, the likely welfare effects of further contraction of the industry, and the likelihood of new entry after a contraction.
**JOURNAL ARTICLES AND BOOK CHAPTERS**


Vaccines against drug addiction may represent the hope of the future for many addicted individuals who are eager to access state-of-the-art treatment. They may also be a promising solution for a society seeking to lower the social and economic costs of addiction among populations such as recidivist drug offenders. Given the medical and socio-economic benefits, this Article explores the legal and public policy aspects of a potential use of vaccines to fight drug addiction. The following is the core question: Will current law support the coercive use of vaccines against drug addiction? Authority to coerce treatment is derived from the state’s parens patriae and police powers, but is constrained by the countervailing right to self-determination in medical treatment. That right typically assumes the competence of the individuals making the self-determination. Even given competence, however, the interests of the state may prevail over the rights of individuals within certain classes in society. This article reviews pertinent statutes and case law bearing on the state’s ability to just the use of coercion. The argument presented is that for some classes of individuals, and in some situations, coerced immunotherapy is likely to be legal, subject to the constraints of due process and establishment of the modality’s safety and effectiveness. Assuming a situation in which immunotherapy may be legally coerced, this article concludes by offering some reflections for policy makers and clinicians on fairness in implementing a policy of coercion.


This chapter explores the implications of behavioral economics for research in the field of occupational safety. Behavioral economics challenges many of the standard assumptions that economists make about how individuals respond to risk and uncertainty, such as the risk of suffering a workplace illness or injury. Most economic research in occupational safety uses the basic framework of a perfect rationality model and introduces a relatively small perturbation to the model. We incorporate some of the richer and more complex elements of behavioral economics into the analysis to isolate some areas where current research might provide either misleading or incomplete conclusions about the role of occupational risk in employment and safety decisions.


Disability has high societal and personal costs. Various disparate federal and state programs attempt to address the economic and social needs of people with disabilities. Presumably workplace injuries and accidents are an important source of disability. Yet separate public policies and research literatures have evolved for these two social problems—disability and workplace injuries—despite their relatedness. This article seeks to document the overlap between these two phenomena in estimating the proportion of the disabled population whose disability was caused by workplace injury, accident, or illness using the Health and Retirement Study of 1992. The results point toward the need for initiatives to reduce disability that focus on work-related causes, which are a common pathway to disability, and that may result in substantial savings in federal programs.

The authors used claims data from a large U.S. employer that introduced changes in its medical and drug coverage offerings in 2002 for non-Medicare eligible retirees. In addition to the existing plans, the employer introduced two new plans in 2002 that were less generous both in terms of medical and drug coverage. Further, one of the new plans had an annual benefit limit of $2,500 on prescription drugs, similar to the “doughnut hole” in the standard Medicare Part D benefit. The authors examined beneficiaries switching behavior in response to the new choice set and estimated the independent effects of medical and drug benefits on plan selection. They found that beneficiaries in better health were more likely to switch to the new, less generous plans. While the generosity of the medical benefit played a more important role in choosing a plan, choices did not vary significantly by health status. In contrast, sicker individuals were more likely to enroll in plans with generous drug benefits. This suggests that drug coverage may be more susceptible to adverse selection than medical insurance.


The authors estimate auto accident externalities (more specifically insurance externalities) using panel data on state-average insurance premiums and loss costs. Externalities appear to be substantial in traffic-dense states: in California, for example, they find that the increase in traffic density from a typical additional driver increases total statewide insurance costs of other drivers by $1,725–$3,239 per year, depending on the model. High–traffic density states have large economically and statistically significant externalities in all specifications we check. In contrast, the accident externality per driver in low–traffic states appears quite small. On balance, accident externalities are so large that a correcting Pigouvian tax could raise $66 billion annually in California alone, more than all existing California state taxes during the study period, and over $220 billion per year nationally.


Prescription drugs have been shown to be very cost-effective treatments for chronic illness, but with recent increases in pharmacy spending, benefit managers have adopted policies designed to reduce use of pharmaceuticals. Usually, these policies involve increasing patient copayments for brand medications. Although such policies several may reduce health plan payments and overall drug spending, they may adversely affect the health of plan enrollees. A more promising approach links the patient copayment to therapeutic benefit. Such plans offer reduced copayments for patients who are most likely to benefit from a drug or class of drugs, as determined by using the best available clinical evidence. Patients for whom the therapeutic benefit is modest—or the evidence is mixed—face higher copayments. By linking copayments with individual clinical need, plans can encourage cost-effective care without unpopular utilization controls such as prior authorization. Cholesterol-lowering (CL) drugs, the most commonly prescribed class of medications in the United States, are well suited for a benefit-based–copayment (BBC) scheme. In this paper, the authors modeled a BBC for CL therapy wherein copayments are allowed to vary by clinical status. They found that eliminating copayments for patients with high CHD risk—and raising them for low-risk patients to offset the higher cost to plans—would reduce hospitalizations and emergency department visits overall among the privately insured and Medicare-insured populations on CL therapy.

Physician evaluations of impairment severity have a significant impact on the size of permanent disability benefits awarded to injured workers in workers’ compensation. This gives both parties in a disputed claim the incentive to “shop” for physicians who will provide them with sympathetic evaluations. In this article the authors use data from the California workers’ compensation system on competing physician evaluations for the same injury to study the extent to which the ability to select a physician results in a more favorable disability rating. They find that disability ratings based on evaluations from physicians selected by the applicant are 23 percent higher than those based on a neutral evaluation, while ratings based on a defense physician’s evaluation tend to be about 5 percent lower. Moreover, they match these data to earnings loss data and estimate the extent to which applicant, defense, or neutral ratings best predict the outcomes of injured workers. The neutral ratings appear to do the best job of predicting earnings losses overall, though not by a substantial margin.


About half of injured workers choose not to file workers’ compensation claims. This is thought to result from their use of health insurance instead of workers’ compensation. However, the data suggest that insured workers are actually less likely to file than their more vulnerable uninsured counterparts. The authors found that this relationship emerges as the result of employer characteristics and, in particular, that employers who offer health insurance to employees are more likely to have workers who file claims; this is much more important than the insurance status of workers themselves or fixed worker characteristics.


Some states use physicians’ histories of medical malpractice payments to try to reduce the incidence of medical malpractice (and for other reasons). At least two types of policies fall into this category: using payments to decide which physicians will be investigated, and possibly sanctioned, by the state medical board; and making information about individual physicians’ payment histories available to the public. Previous literature suggests that such policies will not be very effective because the link between medical malpractice and medical malpractice payments appears weak. Unlike previous researchers, the authors examine this issue directly and quantitatively. To do so, the authors develop a micro-simulation model of the random processes determining medical outcomes, claiming rates, and payment rates, using information from several strands of literature to calibrate its parameters. To examine sensitivity of our predictions to changes in assumptions, the authors also consider 14 alternative models. For each of the 15 cases, the authors simulate data for a population of 100,000 physicians and analyze the simulated data. The authors find that neither type of policy will substantially reduce the population rate of malpractice and that the policy of publicizing payment histories could, in principle, backfire.


This paper examines medication use among retirees with employer-sponsored drug coverage both with and without annual benefit limits. The authors find that pharmacy benefit caps are associated with higher rates of medication discontinuation across the most common therapeutic classes and that only a minority of those who discontinue use reinitiate therapy once...
coverage resumes. Plan members who reach their cap are more likely than others to switch plans and increase their rate of generic use; however, in most cases, the shift is temporary. Given the similarities between these plans and Part D, the authors make some inferences about reforms for Medicare.


Regulation and consumer class actions can complement, duplicate, or oppose each other, depending, among others, on the leanings of regulatory objective functions towards the industry or consumers. In particular, pro-consumer regulators would like to see consumers benefit from class actions while pro-industry regulators would like to prevent regulated firms from being harmed by them. However, because pro-consumer regulators are already doing their best for consumers and pro-industry regulators their best for firms, they are both usually constrained in their policies. The result is that class actions tend to be less efficient under pro-consumer regulators and more efficient under pro-industry regulators.


Cost has deterred many small businesses from providing health insurance to their workers. Consumer-directed health plans (CDHPs), which are potentially less costly than traditional health plans, may be well suited to workers in small businesses. The authors studied the factors that are associated with CDHP offering, determined the variation in CDHP offering among large and small firms, and developed models of persistence in CDHP offering. Their analysis of the Kaiser-HRET survey shows that small firms have been no quicker in their uptake of CDHPs than larger firms and appear to display somewhat more churning in CDHP offering than large firms. Small firms that employ between 3 and 49 workers are less likely to offer health reimbursement arrangement (HRA)/health savings account (HAS) plans conditional on offering high-deductible (HD) plans than large firms. Furthermore, conditional on offering some health insurance, firms that employ 200 to 499 workers appear to be less likely to offer both HRA/HSA plans and HD plans compared to larger firms. These results suggest a limited role for the current incarnation of CDHPs in encouraging small business to provide insurance.


The Health Insurance Portability and Accountability Act (HIPAA) of 1996 mandated the development of a unique patient identifier (UPI) for “every individual, employer, health plan, and health care provider.” Originally, UPI was intended to serve as a central building block for new health information technologies, and to enable physicians, hospitals, and other authorized users to pass clinical and administrative records with greatly improved efficiency. But in the years since 1996, Congress has consigned the UPI to legislative limbo, responding to concerns that federal privacy policies are not adequate to protect the personal health information associated with a UPI. RAND analysts Michael Greenberg and Susan Ridgely examined the privacy implications of UPI, in the context of the emerging National Health Information Network (NHIN). They suggest that UPI plausibly might be privacy-enhancing rather than privacy-degrading. More important, they assert that the controversy over a UPI distracts from the key privacy issues connected with the NHIN: namely, the need to strengthen HIPAA Privacy Rules appropriately, and to reconcile current state laws on health information privacy.
ABRAHAMSE, A. F.

MR-540-ICJ
The Effects of a Choice Auto Insurance Plan on Insurance Costs ....................... p. 2

MR-970-ICJ
The Effects of a Choice Automobile Insurance Plan On Insurance Costs and Compensation: An Updated Analysis .............. p. 6

MR-1134-ICJ

MR-1199-ICJ
The Effects of Third-Party Bad Faith Doctrine on Automobile Insurance Costs and Compensation .......................... p. 7

MG-162-ICJ
Asbestos Litigation ....................... p. 13

R-3999-HHS/ICJ
Compensation for Accidental Injuries in the United States ......................... p. 34

R-3999/1-HHS/ICJ
Compensation for Accidental Injuries in the United States: Executive Summary ...... p. 35

N-3230-HHS/ICJ
Compensation for Accidental Injuries: Research Design and Methods .................. p. 44

IP-146-1

IP-157
The Effects of Proposition 213 on the Costs of Auto Insurance in California ........ p. 55

IP-174
The Effects of a No-Pay/No-Play Plan on the Costs of Auto Insurance in California........ p. 55

DB-139-ICJ
The Costs of Excess Medical Claims for Automobile Personal Injuries ........ p. 67

DB-397-ICJ
Asbestos Litigation Costs and Compensation: An Interim Report ....................... p. 67

DRU-1264-ICJ
Liability System Incentives to Consume Excess Medical Care ......................... p. 73

DRU-1609-ICJ
The Effects of a Choice Automobile Insurance Plan Under Consideration by the Joint Economic Committee of the United States Congress ...... p. 74

RP-254
Consumer Choice in the Auto Insurance Market ........................................ p. 80

RP-442
The Costs of Consumer Choice for Auto Insurance in States Without No-Fault Insurance ...... p. 82

RP-518
The Comparative Costs of Allowing Consumer Choice for Auto Insurance in All Fifty States ........................................ p. 83

RP-707
The Effects of a Choice Auto Insurance Plan on Insurance Costs and Compensation ...... p. 85
| RP-745 | The Effect of Allowing Motorists to Opt Out of Tort Law in the United States | p. 85 |
| RP-810 | The Frequency of Excess Claims for Automobile Personal Injuries | p. 87 |
| RP-863 | The Effects of a Choice Auto Insurance Plan on Insurance Costs and Compensation | p. 89 |
| RP-983 | The Frequency of Excess Auto Personal Injury Claims | p. 92 |
| **ACTON, J. P.** |  |
| R-3838-ICJ | Understanding Superfund: A Progress Report | p. 33 |
| R-4132-ICJ | Superfund and Transaction Costs: The Experiences of Insurers and Very Large Industrial Firms | p. 36 |
| **ADAMS, J. L.** |  |
| R-4019-ICJ | No-Fault Approaches to Compensating People Injured in Automobile Accidents | p. 35 |
| RP-794 | Product and Stock Market Responses to Automotive Product Liability Verdicts | p. 86 |
| **Journal Article** |  |
|  | Reducing Medical Malpractice by Targeting Physicians Making Medical Malpractice Payments | p. 99 |
| **ADAMSON, D. M.** |  |
| R-4019/1-ICJ | No-Fault Automobile Insurance: A Policy Perspective | p. 35 |
| **OP-135-ICJ** | Issues and Options for Government Intervention in the Market for Terrorism Insurance | p. 57 |
| **ADLER, J. W.** |  |
| R-2922-ICJ | The Pace of Litigation: Conference Proceedings | p. 23 |
| R-3071-ICJ | Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program | p. 26 |
| **N-1965-ICJ** | Court-Administered Arbitration: An Alternative for Consumer Dispute Resolution | p. 41 |
| **ANDERSON, M. C.** |  |
| RP-830 | Goal Conflict in Juror Assessments of Compensatory and Punitive Damages | p. 88 |
| **ANDERSON, R. H.** |  |
| OP-183-ICJ | The Legal and Economic Implications of Electronic Discovery: Options for Future Research | p. 57 |
| **ARLINGTON, J.** |  |
| OP-135-ICJ | Issues and Options for Government Intervention in the Market for Terrorism Insurance | p. 57 |
| **ASCH, S.** |  |
| MG-400-ICJ | Evaluating Medical Treatment Guideline Sets for Injured Workers in California | p. 14 |
| **WR-203-ICJ** | Evaluating Medical Treatment Guideline Sets for Injured Workers in California | p. 59 |
ASHWOOD, S.
DB-397-ICJ
Asbestos Litigation Costs and Compensation: An Interim Report ................. p. 67

MG-162-ICJ
Asbestos Litigation .................. p. 13

BAILIS, D.S.
RP-606
Estimating Liability Risks with the Media as Your Guide ...................... p. 84

BARTH, P. S.
MR-920-ICJ
Compensating Permanent Workplace Injuries: A Study of the California System .... p. 5

BELL, D. S.
RP-1175
Electronic Prescribing and HIPAA Privacy Regulation ....................... p. 94

BERREBI, C.
TR-556-USSEC
Investor and Industry Perspectives on Investment Advisers and Broker-Dealers .......... p. 39

BERRY, S. H.
R-3999-HHS/ICJ
Compensation for Accidental Injuries in the United States .................... p. 34

R-3999/1-HHS/ICJ
Compensation for Accidental Injuries in the United States: Executive Summary ...... p. 35

N-3230-HHS/ICJ
Compensation for Accidental Injuries: Research Design and Methods ............... p. 44

BETANCOURT, D. R.
N-2257-ICJ
Court-Annexed Arbitration: The National Picture ................................ p. 42

BHATTACHARYA, J.
RP-972-ICJ
New Methods and Data Sources for Measuring Economic Consequences of Workplace Injuries .................................................. p. 92

BIDDLE, J. E.
MR-1414-ICJ
An Evaluation of New Mexico Workers’ Compensation Permanent Partial Disability and Return to Work ........................................ p. 9

RP-939
Permanent Partial Disability from Occupational Injuries: Earnings Losses and Replacement in Three States ....................... p. 91
**BODEN, L. I.**

**MR-1414-ICJ**

An Evaluation of New Mexico Workers’ Compensation Permanent Partial Disability and Return to Work ........................................ p. 9

**RP-939**

Permanent Partial Disability from Occupational Injuries: Earnings Losses and Replacement in Three States ......................... p. 91

**Book Chapter**


**BORUM, R.**

**MR-1340-CSCR**

The Effectiveness of Involuntary Outpatient Treatment: Empirical Evidence and the Experience of Eight States ......................... p. 8

**BOWER, A.**

**RP-809**

Newspaper Coverage of Automotive Product Liability Verdicts ................... p. 87

**BRADLEY, M.A.**

**TR-483-EOUST**


**TR-484-EOUST**


**BRENNAN, T. A.**

**RP-885**

Negligent Care and Malpractice Claiming Behavior in Utah and Colorado .......... p. 89

**RP-886**

The Jury Is Still In: Florida’s Birth-Related Neurological Injury Compensation Plan After a Decade ................................................. p. 90

**RP-896**

Costs of Medical Injuries in Utah and Colorado ................................ p. 90

**BRYANT, D. L.**

**R-3676-ICJ**

Alternative Adjudication: An Evaluation of the New Jersey Automobile Arbitration Program ................................................. p. 32

**N-2909-ICJ**

Judicial Arbitration in California: An Update ...................................... p. 44

Burstain, J. M.

**TR-484-EOUST**


**BURSTIN, H. R.**

**RP-885**

Negligent Care and Malpractice Claiming Behavior in Utah and Colorado .......... p. 89

**BURTON, J.F., JR.**

**MG-258-ICJ**

An Evaluation of California’s Permanent Disability Rating System ................ p. 13

**CARROLL, S. J.**

**MR-540-ICJ**

The Effects of a Choice Auto Insurance Plan on Insurance Costs .................. p. 2

**MR-888-ICJ**

Punitive Damages in Financial Injury Jury Verdicts ................................. p. 4
MR-889-ICJ
Punitive Damages in Financial Injury Jury Verdicts: Executive Summary .......... p. 5

MR-970-ICJ
The Effects of a Choice Automobile Insurance Plan On Insurance Costs and Compensation: An Updated Analysis ................. p. 6

MR-1134-ICJ

MR-1199-ICJ
The Effects of Third-Party Bad Faith Doctrine on Automobile Insurance Costs and Compensation .................................. p. 7

MG-162-ICJ
Asbestos Litigation ........................ p. 7

MG-427-CTRMP
Distribution of Losses from Large Terrorist Attacks Under the Terrorism Risk Insurance Act ........................................ p. 13

MG-587-1-ICJ
Insurance Class Actions in the United States ........................................ p. 15

R-3554-ICJ
Assessing the Effects of Tort Reforms ...... p. 30

R-4019-ICJ
No-Fault Approaches to Compensating People Injured in Automobile Accidents ...... p. 35

R-4019/1-ICJ
No-Fault Automobile Insurance: A Policy Perspective ........................ p. 35

TR-483-EOUST

TR-484-EOUST

N-1994-ICJ
Jury Awards and Prejudgment Interest in Tort Cases ............................ p. 41

IP-146-1
The Effects of a Proposed No-Fault Plan on the Costs of Auto Insurance in California: An Updated Analysis ..................... p. 55

IP-157
The Effects of Proposition 213 on the Costs of Auto Insurance in California ........ p. 55

IP-174
The Effects of a No-Pay/No-Play Plan on the Costs of Auto Insurance in Texas ...... p. 55

OP-135-ICJ
Issues and Options for Government Intervention in the Market for Terrorism Insurance .... p. 57

DB-139-ICJ
The Costs of Excess Medical Claims for Automobile Personal Injuries .......... p. 67

DB-362.0-ICJ
Asbestos Litigation in the U.S.: A New Look at an Old Issue ............... p. 67

WR-405-ICJ
Survey Instruments: Insurance Class Actions in the United States ................ p. 63

DB-397-ICJ
Asbestos Litigation Costs and Compensation: An Interim Report .............. p. 67

CT-141-1
Effects of an Auto-Choice Automobile Insurance Plan on Costs and Premiums .......... p. 72

CT-143
Punitive Damages in Financial Injury Jury Verdicts ......................... p. 72

September 2008
CT-144

DRU-1264-ICJ
Liability System Incentives to Consume Excess Medical Care p. 73

DRU-1609-ICJ
The Effects of a Choice Automobile Insurance Plan Under Consideration by the Joint Economic Committee of the United States Congress p. 74

RP-229
No-Fault Approaches to Compensating Auto Accident Victims p. 79

RP-254
Consumer Choice in the Auto Insurance Market p. 80

RP-442
The Costs of Consumer Choice for Auto Insurance in States Without No-Fault Insurance p. 82

RP-518
The Comparative Costs of Allowing Consumer Choice for Auto Insurance in All Fifty States p. 83

RP-707
The Effects of a Choice Auto Insurance Plan on Insurance Costs and Compensation p. 85

RP-745
The Effect of Allowing Motorists to Opt Out of Tort Law in the United States p. 85

RP-810
The Frequency of Excess Claims for Automobile Personal Injuries p. 87

RP-863
The Effects of a Choice Auto Insurance Plan on Insurance Costs and Compensation p. 89

RP-983-ICJ
The Frequency of Excess Auto Personal Injury Claims p. 92

Journal Article
An Economic Analysis of Consumer Class Actions in Regulated Industries p. 100

CHALK, P.
MG-393-CTRMP

MG-520-CTRMP
Maritime Terrorism: Risk and Liability p. 15

CHIN, A. W.
R-3249-ICJ
Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials p. 27

CHOW, B. G.
MG-427-CTRMP
Distribution of Losses from Large Terrorist Attacks Under the Terrorism Risk Insurance Act p. 15

CLANCY, N.
TR-300-FEMA
The National Flood Insurance Program’s Market Penetration Rate: Estimates and Policy Implications p. 37

TR-468-FEMA
The Lender-Placed Flood Insurance Market for Residential Properties p. 38

TR-483-EOUST
TR-484-EOUST

TR-556-USSEC
Investor and Industry Perspectives on Investment Advisers and Broker-Dealers .......... p. 39

COHEN, L. R.
R-2918-ICJ
Workers’ Compensation and Workplace Safety: Some Lessons from Economic Theory .... p. 23

CULHANE, M.
TR-483-EOUST

CURTIS, D. E.
RP-584
Individuals Within the Aggregate: Relationships, Representation, and Fees ............ p. 83

DANZON, P. M.
R-2458-HCFA
Contingent Fees for Personal Injury Litigation .................................................. p. 19
R-2622-HCFA
The Disposition of Medical Malpractice Claims .............................................. p. 19
R-2623-HCFA
Why Are Malpractice Premiums So High or So Low? ...................................... p. 19
R-2792-ICJ
The Resolution of Medical Malpractice Claims: Modeling the Bargaining Process .... p. 21

R-2793-ICJ
The Resolution of Medical Malpractice Claims: Research Results and Policy Implications .... p. 21

R-2870-ICJ/HCFA
The Frequency and Severity of Medical Malpractice Claims ............................ p. 21

R-3410-ICJ
New Evidence on the Frequency and Severity of Medical Malpractice Claims ........ p. 18

P-6800
Settlement Out of Court: The Disposition of Medical Malpractice Claims ............ p. 47

P-7211-ICJ
The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims: A Summary of Research Results ........................... p. 49

DARLING-HAMMOND, L.
R-2716-ICJ
The Law and Economics of Workers’ Compensation ........................................ p. 19
R-2716/1-ICJ
The Law and Economics of Workers’ Compensation: Executive Summary .......... p. 20

DAUGHERTY, L.
WR-499-ICJ
Defining Corporate Culture: How Social Scientists Define Culture, Values and Tradeoffs Among Them ................................................................. p. 64

DEMAINE, L. J.
RP-1049-ICJ
Reinventing the Double Helix: A Novel and Nonobvious Reconceptualization of the Biotechnology Patent ...................................................... p. 93

RP-1156
"Volunteering" to Arbitrate through Predispute Arbitration Clauses: The Average Consumer’s Experience ......................................................... p. 93

September 2008
DEMBE, A. E.
WR-394-ICJ
Medical Care Provided California’s Injured Workers: An Overview of the Issues ........ p. 63
CF-214-ICJ
Research Colloquium on Workers’ Compensation Medical Benefit Delivery and Return to Work ............................................ p. 69

DERTOUZOS, J. N.
R-3602-ICJ
The Legal and Economic Consequences of Wrongful Termination ...................... p. 31
R-3989-ICJ
Labor Market Responses to Employer Liability ................................................... p. 34
OP-183-ICJ
The Legal and Economic Implications of Electronic Discovery: Options for Future Research ................................................. p. 57

DIXON, L. S.
MR-204-EPA/RC
Private-Sector Cleanup Expenditures and Transaction Costs at 18 Superfund Sites ........ p. 1
MR-455-ICJ
Fixing Superfund: The Effect of the Proposed Superfund Reform Act of 1994 on Transaction Costs ............................................. p. 1
MR-695-ICJ
California’s Ozone-Reduction Strategy for Light-Duty Vehicles: Direct Costs, Direct Emission Effects, and Market Responses ........ p. 3
MR-695/1-ICJ
California’s Ozone-Reduction Strategy for Light-Duty Vehicles: An Economic Assessment .......... p. 3
MR-1171-EPA
The Financial Implications of Releasing Small Firms and Small-Volume Contributors from Superfund Liability ................................. p. 37

MR-1256-ICJ/PPIC
Fighting Air Pollution in Southern California by Scraping Old Vehicles ................. p. 8
MR-1439-ICJ
Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision ..................................... p. 10
MG-264-ICJ
Compensation for Losses from the 9/11 Attacks .................................................... p. 14
MG-679-CTRMP
The Federal Role in Terrorism Insurance: Evaluating Alternatives in an Uncertain World ......................................................... p. 16
R-4132-ICJ
Superfund and Transaction Costs: The Experiences of Insurers and Very Large Industrial Firms ................................................ p. 36
TR-300-FEMA
The National Flood Insurance Program’s Market Penetration Rate: Estimates and Policy Implications ........................................ p. 37
TR-468-FEMA
The Lender-Placed Flood Insurance Market for Residential Properties ................ p. 38
TR-476-CTRMP
Economically Targeted Terrorism: A Review of the Literature and a Framework for Considering Defensive Approaches ................ p. 39
OP-135-ICJ
Issues and Options for Government Intervention in the Market for Terrorism Insurance .... p. 57
OP-190-ICJ
Commercial Wind Insurance in the Gulf States: Developments Since Hurricane Katrina and Challenges Moving Forward ........ p. 58
WR-317-ICJ
The Impact of Regulation and Litigation on Small Business and Entrepreneurship: An Overview ................................................. p. 62
DB-525-CTRMP
Trade-Offs Among Alternative Government Interventions in the Market for Terrorism Insurance: Interim Results ................ p. 68

CT-102
Superfund and Transaction Costs: The Experiences of Insurers and Very Large Industrial Firms ......................... p. 71

CT-111
RAND Research on Superfund Transaction Costs: A Summary of Findings to Date ........ p. 71

CT-125
Superfund Liability Reform: Implications for Transaction Costs and Site Cleanup ...... p. 71

CT-137
Economic Perspectives on Revising California’s Zero-Emission Vehicle Mandate ........ p. 72

DRU-1266-1-ICJ
Making ZEV Policy Despite Uncertainty: An Annotated Briefing for the California Air Resources Board ....................... p. 74

RP-1168
National Security and Compensation Policy for Terrorism Losses ...................... p. 94

RP-1233
National Security and Private-Sector Risk Management for Terrorism ................ p. 94

DOMINITZ, E.
TR-556-USSEC
Investor and Industry Perspectives on Investment Advisers and Broker-Dealers ........ p. 39

DREZNER, D. S.
MR-204-EPA/RC
Private-Sector Cleanup Expenditures and Transaction Costs at 18 Superfund Sites ........ p. 1

R-4132-ICJ
Superfund and Transaction Costs: The Experiences of Insurers and Very Large Industrial Firms ................................ p. 36

DUNWORTH, T.
MR-800-ICJ
Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act ..................... p. 3

MR-801-ICJ
Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts ........ p. 4

MR-802-ICJ
An Evaluation of Judicial Case Management Under the Civil Justice Reform Act ........ p. 4

MR-803-ICJ
An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act .................................................. p. 4

R-3668-ICJ
Product Liability and the Business Sector: Litigation Trends in Federal Courts ........ p. 31

R-3885-ICJ
Statistical Overview of Civil Litigation in the Federal Courts .............................. p. 34

RP-361
Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990 ................................. p. 81
RP-861

EADS, G. C.
R-3022-ICJ
Designing Safer Products: Corporate Responses to Product Liability Law and Regulation . . . . p. 24
P-7089-ICJ
Designing Safer Products: Corporate Responses to Product Liability Law and Regulation . . . p. 48

EBENER, P. A.
MR-259-ICJ
Private Dispute Resolution in the Banking Industry ......................... p. 1
R-2732-ICJ
Court Efforts to Reduce Pretrial Delay: A National Inventory ................ p. 20
R-2732/1-ICJ
Court Efforts to Reduce Pretrial Delay: A National Inventory. Executive Summary .......... p. 20
R-3042-ICJ
Costs of Asbestos Litigation ................. p. 25
R-3132-ICJ
Variation in Asbestos Litigation Compensation and Expenses ......................... p. 27
R-3165-ICJ
Managing the Unmanageable: A History of Civil Delay in the Los Angeles Superior Court . . p. 27
R-3324-ICJ
Asbestos in the Courts: The Challenge of Mass Toxic Torts ......................... p. 28

R-3421-ICJ
Costs and Compensation Paid in Aviation Accident Litigation ....................... p. 28
R-3602-ICJ
The Legal and Economic Consequences of Wrongful Termination ...................... p. 31
R-3676-ICJ
Alternative Adjudication: An Evaluation of the New Jersey Automobile Arbitration Program ......................... p. 32
R-3684-ICJ
Executive Summaries of the Aviation Accident Study .......................... p. 32
R-3708-ICJ
The Perception of Justice: Tort Litigants’ Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences ......................... p. 32
R-3999-HHS/ICJ
Compensation for Accidental Injuries in the United States ....................... p. 34
R-3999/1-HHS/ICJ
Compensation for Accidental Injuries in the United States: Executive Summary ...... p. 35
N-2257-ICJ
Court-Annexed Arbitration: The National Picture .......................... p. 42
N-2773-ICJ
Aviation Accident Litigation Survey: Data Collection Forms ......................... p. 43
N-3230-HHS/ICJ
Compensation for Accidental Injuries: Research Design and Methods ................ p. 44

EDLIN, P.
Journal Article
The Accident Externality from Driving . . . p. 98
EHRLER, P. K.
TR-468-FEMA
The Lender-Placed Flood Insurance Market for Residential Properties p. 38

EIBNER, C.
TR-559-EMKF

ETTEDGUI, E.
MR-1122/1-ICJ
Safety in the Skies: Personnel and Parties in NTSB Aviation Accident Investigations: Master Volume p. 6
MR-1122-ICJ
Safety in the Skies: Personnel and Parties in NTSB Aviation Accident Investigations p. 7

FARLEY, D. O.
MG-280-ICJ
Assessment of 24-Hour Care Options for California p. 14
WR-163-1-ICJ
Assessment of 24-Hour Care Options for California p. 59
CF-214-ICJ
Research Colloquium on Workers’ Compensation Medical Benefit Delivery and Return to Work p. 61

FELLMETH, A. X.
RP-1049-ICJ
Reinventing the Double Helix: A Novel and Nonobvious Reconceptualization of the Biotechnology Patent p. 93

FELSTINER, W. L. F.
R-2922-ICJ
The Pace of Litigation: Conference Proceedings p. 23
R-3042-ICJ
Costs of Asbestos Litigation p. 25
R-3132-ICJ
Variation in Asbestos Litigation Compensation and Expenses p. 27
R-3324-ICJ
Asbestos in the Courts: The Challenge of Mass Toxic Torts p. 28
R-3708-ICJ
The Perception of Justice: Tort Litigants’ Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences p. 32
P-7180-ICJ
The Impact of Fee Arrangement on Lawyer Effort p. 48

FRITZ, L. A.
RP-886
The Jury Is Still In: Florida’s Birth-Related Neurological Injury Compensation Plan After a Decade p. 90

FULTON, B. D.
WR-351-ICJ
Do Small Group Health Insurance Regulations Influence Small Business Growth? p. 62

GALANTER, M.
RP-282
How to Improve Civil Justice Policy p. 80
GALWAY, L.
MR-1425-ICJ
Improving Dispute Resolution for California’s Injured Workers .................. p. 9
MR-1425/1-ICJ
Improving Dispute Resolution for California’s Injured Workers: Executive Summary .... p. 10

GARBER, S.
MR-695-ICJ
MR-695/1-ICJ
California’s Ozone-Reduction Strategy for Light-Duty Vehicles: An Economic Assessment . p. 3

MR-1256-ICJ/PPIC
Fighting Air Pollution in Southern California by Scraping Old Vehicles .............. p. 8
R-4285-ICJ
Product Liability and the Economics of Pharmaceuticals and Medical Devices ........ p. 36

CT-137
Economic Perspectives on Revising California’s Zero-Emission Vehicle Mandate p. 72

DRU-1266-1-ICJ
Making ZEV Policy Despite Uncertainty: An Annotated Briefing for the California Air Resources Board ...................... p. 74

RP-747
Product Liability, Punitive Damages, Business Decisions, and Economic Outcomes .... p. 86

RP-755
Risk Premiums for Environmental Liability: Does Superfund Increase the Cost of Capital? .. p. 86

RP-794
Product and Stock Market Responses to Automotive Product Liability Verdicts ...... p. 86

RP-809
Newspaper Coverage of Automotive Product Liability Verdicts ....................... p. 87

RP-920
Punitive Damages and Deterrence of Efficiency-Promoting Analysis: A Problem Without a Solution .................................. p. 91

Journal Article
Reducing Medical Malpractice by Targeting Physicians Making Medical Malpractice Payments .................................. p. 99

GARLAND, R. H.
MG-400-ICJ
Evaluating Medical Treatment Guideline Sets for Injured Workers in California ........ p. 14

GARTH, B. G.
RP-282
How to Improve Civil Justice Policy .... p. 80

GATES, S. M.
MG-663-EMKF
In the Name of Entrepreneurship? The Logic and Effects of Special Regulatory Treatment for Small Business ...................... p. 16

WR-292-ICJ
Criteria Used to Define a Small Business in Determining Thresholds for the Application of Federal Statutes on Litigation .......... p. 61

WR-317-ICJ
The Impact of Regulation and Litigation on Small Business and Entrepreneurship: An Overview .................................. p. 62

WR-351-ICJ
Do Small Group Health Insurance Regulations Influence Small Business Growth? .... p. 62
WR-450-ICJ
State Health Insurance Mandates, Consumer Directed Health Plans and Health Savings Accounts: Are They a Panacea for Small Businesses? .................. p. 64

WR-520-EMKF
Consumer-Directed Health Plans and Health Savings Accounts: Have They Worked for Small Businesses? .................. p. 65

Journal Article
Consumer-Directed Health Plans and Health Savings Accounts: Have They Worked for Small Businesses? .................. p. 99

GELLER, A. B.
MR-1425-ICJ
Improving Dispute Resolution for California’s Injured Workers .................. p. 9

MR-1425/1-ICJ
Improving Dispute Resolution for California’s Injured Workers: Executive Summary .................. p. 10

GIDDENS, E.
MR-969-ICJ
Class Action Dilemmas: Pursuing Public Goals for Private Gain .................. p. 6

MR-969/1-ICJ
Class Action Dilemmas: Pursuing Public Goals for Private Gain: Executive Summary .................. p. 6

MR-1268-ICJ
Permanent Disability at Private, Self-Insured Firms: A Study of Earnings Loss, Replacement, and Return to Work for Workers’ Compensation Claimants .................. p. 8

GILL, B.
MR-1439-ICJ
Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision .................. p. 10

GOLDSMITH, D. P.
Journal Article
Adverse Selection in Retiree Prescription Drug Plans ........................ p. 97

Journal Article
Varying Pharmacy Benefits with Clinical Status: The Case of Cholesterol-Lowering Therapy ........................ p. 98

Journal Article
Pharmacy Benefit Caps and the Chronically Ill ........................ p. 99

GOLINELLI, D.
MG-234-ICJ
Capping Non-Economic Awards in Medical Malpractice Trials: California Jury Verdicts Under MICRA .................. p. 14

GREENBERG, M. D.
MG-280-ICJ
Assessment of 24-Hour Care Options for California .................. p. 13

MG-258-ICJ
An Evaluation of California’s Permanent Disability Rating System .................. p. 15

MG-520-CTRMP
Maritime Terrorism: Risk and Liability .................. p. 58

OP-216-PA
Issues and Performance in the Pennsylvania Workers’ Compensation System .................. p. 59

WR-163-1-ICJ
Assessment of 24-Hour Care Options for California .................. p. 76

RP-1175
Electronic Prescribing and HIPAA Privacy Regulation .................. p. 94
Journal Article
Patient Identifiers and the National Health Information Network: Debunking a False Front in the Privacy Wars .................. p. 100

GREENFIELD, V. A.
TR-476-CTRMP
Economically Targeted Terrorism: A Review of the Literature and a Framework for Considering Defensive Approaches ................ p. 39

GRESENZ, C. R.
MR-969/1-ICJ
Class Action Dilemmas: Pursuing Public Goals for Private Gain .................. p. 6
IP-184
A Flood of Litigation? Predicting the Consequences of Changing Legal Remedies Available to ERISA Beneficiaries .................. p. 56
RP-860

GROSS, J.
MR-969-ICJ
Class Action Dilemmas: Pursuing Public Goals for Private Gain .................. p. 6
MR-969/1-ICJ
Class Action Dilemmas: Pursuing Public Goals for Private Gain: Executive Summary ........ p. 6
MG-162-ICJ
Asbestos Litigation ......................... p. 7
DB-220-ICJ
Preliminary Results of the RAND Study of Class Action Litigation .................. p. 67
DB-362.0-ICJ
Asbestos Litigation in the U.S.: A New Look at an Old Issue ......................... p. 67

DB-397-ICJ
Asbestos Litigation Costs and Compensation: An Interim Report ..................... p. 67

HAGGSTROM, G. W.
MR-204-EPA/RC
Private-Sector Cleanup Expenditures and Transaction Costs at 18 Superfund Sites ...... p. 1
R-3050-ICJ
R-3051-ICJ
Automobile Accident Compensation: Vol. 2, Payments by Auto Insurers ............. p. 25
R-3053-ICJ
Automobile Accident Compensation: Vol. 4, State Rules .......................... p. 26
R-3132-ICJ
Variation in Asbestos Litigation Compensation and Expenses ....................... p. 27
N-2418-ICJ
Limiting Liability for Automobile Accidents: Are No-Fault Tort Thresholds Effective? .... p. 42
RP-755
Risk Premiums for Environmental Liability: Does Superfund Increase the Cost of Capital? ... p. 86

HAMMITT, J. K.
R-3050-ICJ
R-3051-ICJ
Automobile Accident Compensation: Vol. 2, Payments by Auto Insurers ............. p. 25
R-3053-ICJ
Automobile Accident Compensation: Vol. 4, State Rules .......................... p. 26
N-2418-ICJ
Limiting Liability for Automobile Accidents: Are No-Fault Tort Thresholds Effective? ........................................ p. 42

HARBER, P.
MG-400-ICJ
Evaluating Medical Treatment Guideline Sets for Injured Workers in California .............................................. p. 14

WR-203-ICJ
Evaluating Medical Treatment Guideline Sets for Injured Workers in California .............................................. p. 59

HARRIS, J. S.
CF-214-ICJ
Research Colloquium on Workers' Compensation Medical Benefit Delivery and Return to Work .............................................. p. 69

HASENFELD, R.
WR-203-ICJ
Evaluating Medical Treatment Guideline Sets for Injured Workers in California .............................................. p. 59

HAVILAND, A. M.
TR-371-ICJ
Small Businesses and Workplace Fatality Risk: An Exploratory Analysis .............................................. p. 37

OP-216-PA
Issues and Performance in the Pennsylvania Workers' Compensation System .............................................. p. 58

WR-293-1-ICJ
A Description and Analysis of Evolving Data Resources on Small Business .............................................. p. 61

HAWKEN, A.
MR-1199-ICJ
The Effects of Third-Party Bad Faith Doctrine on Automobile Insurance Costs and Compensation .............................................. p. 7

HAYDEN, O.
MR-1425-ICJ
Improving Dispute Resolution for California's Injured Workers .............................................. p. 9

MR-1425/1-ICJ
Improving Dispute Resolution for California's Injured Workers: Executive Summary .............................................. p. 10

HELLAND, E.
WR-384-ICJ
The Impact of Liability on the Physician Labor Market .............................................. p. 63

HENNING, G.
MR-1122/1-ICJ
Safety in the Skies: Personnel and Parties in NTSB Aviation Accident Investigations: Master Volume .............................................. p. 6

MR-1122-ICJ
Safety in the Skies: Personnel and Parties in NTSB Aviation Accident Investigations .............................................. p. 2

HENSLER, D. R.
MR-528-ICJ
California Lawyers View the Future: A Report to the Commission on the Future of the Legal Profession and the State Bar .............................................. p. 2

MR-941-ICJ
Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data .............................................. p. 5

MR-969-ICJ
Class Action Dilemmas: Pursuing Public Goals for Private Gain .............................................. p. 6

MR-969/1-ICJ
Class Action Dilemmas: Pursuing Public Goals for Private Gain: Executive Summary .............................................. p. 6

MG-162-ICJ
Asbestos Litigation .............................................. p. 1
R-2733-ICJ
Judicial Arbitration in California: The First Year ........................................ p. 20
R-2733/1-ICJ
Judicial Arbitration in California: The First Year: Executive Summary ............ p. 20
R-2922-ICJ
The Pace of Litigation: Conference Proceedings ........................................... p. 23
R-3071-ICJ
Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program ...... p. 26
R-3324-ICJ
Asbestos in the Courts: The Challenge of Mass Toxic Torts .......................... p. 28
R-3583-ICJ
Trends in Tort Litigation: The Story Behind the Statistics ............................ p. 31
R-3676-ICJ
Alternative Adjudication: An Evaluation of the New Jersey Automobile Arbitration Program ..................................................... p. 32
R-3708-ICJ
The Perception of Justice: Tort Litigants’ Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences ................... p. 32
R-3999-HHS/ICJ
Compensation for Accidental Injuries in the United States ........................... p. 34
R-3999/1-HHS/ICJ
Compensation for Accidental Injuries in the United States: Executive Summary .... p. 35
N-1965-ICJ
Court-Administered Arbitration: An Alternative for Consumer Dispute Resolution ........ p. 41
N-2186-ICJ
Court-Ordered Arbitration: The California Experience ............................... p. 41
N-2444-ICJ
What We Know and Don’t Know About Court-Administered Arbitration ........ p. 42
N-3230-HHS/ICJ
Compensation for Accidental Injuries: Research Design and Methods .......... p. 44
P-6963
Court-Annexed Arbitration in the State Trial Court System ........................ p. 47
P-7027-ICJ
Reforming the Civil Litigation Process: How Court Arbitration May Help .......... p. 47
P-7210-ICJ
Summary of Research Results on the Tort Liability System ......................... p. 48
P-7271-ICJ
Summary of Research Results on Product Liability ........................................ p. 49
P-7287-ICJ
Trends in California Tort Liability Litigation .............................................. p. 50
P-7604
Researching Civil Justice: Problems and Pitfalls ......................................... p. 51
P-7631-ICJ
Resolving Mass Toxic Torts: Myths and Realities ........................................ p. 51
P-7775-ICJ
What We Know and Don’t Know About Product Liability ......................... p. 51
P-7776-ICJ
Asbestos Litigation in the United States: A Brief Overview: Statement .......... p. 52
IP-184
A Flood of Litigation? Predicting the Consequences of Changing Legal Remedies Available to ERISA Beneficiaries ........................ p. 56
**DB-220-ICJ**

Preliminary Results of the RAND Study of Class Action Litigation .................................. p. 67

**DB-362.0-ICJ**

Asbestos Litigation in the U.S.: A New Look at an Old Issue ....................................... p. 67

**DB-397-ICJ**

Asbestos Litigation Costs and Compensation: An Interim Report .................................. p. 67

**DRU-1014-ICJ**

Trends in Punitive Damages: Preliminary Data from Cook County, Illinois, and San Francisco, California .......................................................... p. 73

**RP-103**

Court-Ordered Arbitration: An Alternative View .............................................................. p. 75

**RP-107**

Assessing Claims Resolution Facilities: What We Need to Know .................................. p. 75

**RP-109**

Science in the Court: Is There a Role for Alternative Dispute Resolution? ...................... p. 76

**RP-113**

Taking Aim at the American Legal System: The Council on Competitiveness’s Agenda for Legal Reform ......................................................... p. 77

**RP-114**

Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman ......................................................... p. 77

**RP-226**

Reading the Tort Litigation Tea Leaves: What’s Going on in the Civil Liability System ...... p. 79

**RP-282**

How to Improve Civil Justice Policy ............................................................... p. 80

**RP-311**

Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis ......................... p. 80

**RP-327**

Does ADR Really Save Money? The Jury’s Still Out ....................................................... p. 87

**RP-363**

Why We Don’t Know More About the Civil Justice System and What We Could Do About It ......................................................... p. 87

**RP-446**

A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation ......................................................... p. 82

**RP-584**

Individuals Within the Aggregate: Relationships, Representation, and Fees ..................... p. 83

**RP-702**

The Real World of Tort Litigation ............................................................... p. 84

**RP-808**

Do We Need and Empirical Research Agenda on Judicial Independence? ....................... p. 86

**RP-860**


**RP-871-ICJ**

A Research Agenda: What We Need to Know About Court-Connected ADR ..................... p. 89

**RP-915-ICJ**

ADR Research at the Crossroads ............................................................... p. 90

**RP-951-ICJ**

Beyond “It Just Ain’t Worth It”: Alternative Strategies for Damage Class Action Reform ......................................................... p. 91

**RP-979-ICJ**

Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation .................................................................................. p. 92

**RP-1090**

Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System ......................................................... p. 93
RP-1156
"Volunteering" to Arbitrate through Predispute Arbitration Clauses: The Average Consumer's Experience ................. p. 93

HILL, L. A.
MR-800-ICJ
Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act ......................... p. 3

MR-801-ICJ
Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts .......... p. 3

MR-802-ICJ
An Evaluation of Judicial Case Management Under the Civil Justice Reform Act ...... p. 4

MR-803-ICJ
An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act ................................................ p. 4

MR-1425-ICJ
Improving Dispute Resolution for California's Injured Workers .................. p. 9

MR-1425/1-ICJ
Improving Dispute Resolution for California's Injured Workers: Executive Summary .... p. 10

R-4132-ICJ
Superfund and Transaction Costs: The Experiences of Insurers and Very Large Industrial Firms ................................................ p. 36

RP-861

HILL, P. T.
R-2904-ICJ
Educational Policymaking Through the Civil Justice System ....................... p. 22

HOFFMAN, B.
MG-393-CTRMP

HOLLAND, E.
R-3602-ICJ
The Legal and Economic Consequences of Wrongful Termination ........ p. 31

HOROWITZ, M.
RP-254
Consumer Choice in the Auto Insurance Market ........................................ p. 80

RP-442
The Costs of Consumer Choice for Auto Insurance in States Without No-Fault Insurance .... p. 82

RP-518
The Comparative Costs of Allowing Consumer Choice for Auto Insurance in All Fifty States .................................................. p. 83

RP-745
The Effect of Allowing Motorists to Opt Out of Tort Law in the United States ........ p. 85

HOUCHENS, R. L.
R-3050-ICJ

R-3052-ICJ
Automobile Accident Compensation: Vol. 3, Payments from All Sources ............ p. 26

R-3053-ICJ
Automobile Accident Compensation: Vol. 4, State Rules ............................ p. 26
HOWARD, K. M.
RP-896
Costs of Medical Injuries in Utah and Colorado .................................. p. 90

HUNG, A. A.
TR-556-USSEC
Investor and Industry Perspectives on Investment Advisers and Broker-Dealers ........ p. 39

IGUCHI, M. Y.
Journal Article
Coercive Use of Vaccines Against Drug Addiction: Is It Permissible and Is It Good Public Policy? ........................................... p. 97

JACKSON, B. A.
TR-476-CTRMP
Economically Targeted Terrorism: A Review of the Literature and a Framework for Considering Defensive Approaches .................. p. 39

JAMIESON, P.
RP-518
The Comparative Costs of Allowing Consumer Choice for Auto Insurance in All Fifty States ............................................... p. 83

JOHNSON, L. L.
R-2882-ICJ

JONES, G. S.
MG-427-CTRMP
Distribution of Losses from Large Terrorist Attacks Under the Terrorism Risk Insurance Act .................................. p. 15

JOYCE, G.
Journal Article
Adverse Selection in Retiree Prescription Drug Plans ................................... p. 97

Journal Article
Varying Pharmacy Benefits with Clinical Status: The Case of Cholesterol-Lowering Therapy ........................................... p. 98

Journal Article
Pharmacy Benefit Caps and the Chronically Ill ........................................... p. 99

KAGANOFF STERN, R.
MG-264-ICJ
Compensation for Losses from the 9/11 Attacks ........................................... p. 14

KAISER, D.
RP-442
The Costs of Consumer Choice for Auto Insurance in States Without No-Fault Insurance .... p. 82

KAKALIK, J. S.
MR-800-ICJ
Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act ........................... p. 3

MR-801-ICJ
Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts ........ p. 4

MR-802-ICJ
An Evaluation of Judicial Case Management Under the Civil Justice Reform Act .......... p. 4

MR-803-ICJ
An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act ........................................... p. 4
WR-450-ICJ
State Health Insurance Mandates, Consumer Directed Health Plans and Health Savings Accounts: Are They a Panacea for Small Businesses? ...................... p. 64

Journal Article
Consumer-Directed Health Plans and Health Savings Accounts: Have They Worked For Small Businesses? ...................... p. 65

KARACA-MANDIC, P.
WR-300-2-EMKF

WR-351-ICJ
Do Small Group Health Insurance Regulations Influence Small Business Growth? .... p. 62

WR-450-ICJ
State Health Insurance Mandates, Consumer Directed Health Plans and Health Savings Accounts: Are They a Panacea for Small Businesses? ...................... p. 64

WR-520-EMKF
Consumer-Directed Health Plans and Health Savings Accounts: Have They Worked For Small Businesses? ...................... p. 65

Journal Article
Adverse Selection in Retiree Prescription Drug Plans ........................................ p. 97

Journal Article
The Accident Externality from Driving ... p. 98

Journal Article
Varying Pharmacy Benefits with Clinical Status: The Case of Cholesterol-Lowering Therapy ........................................ p. 98

Journal Article
Pharmacy Benefit Caps and the Chronically Ill ................................................. p. 99

Journal Article
Consumer-Directed Health Plans and Health Savings Accounts: Have They Worked for Small Businesses? ...................... p. 99

KARAN, A.
RP-745
The Effect of Allowing Motorists to Opt Out of Tort Law in the United States .......... p. 85

KAROLY, L. A.
R-3989-ICJ
Labor Market Responses to Employer Liability ................................................. p. 34

KASUPSKY, A-B.
MG-393-CTRMP

KEEFE, R.
WR-292-ICJ
Criteria Used to Define a Small Business in Determining Thresholds for the Application of Federal Statutes in Tant Litigation .......... p. 61

KHILKO, I.
MG-520-CTRMP
Maritime Terrorism: Risk and Liability ... p. 15

KING, E. M.
R-3421-ICJ
Costs and Compensation Paid in Aviation Accident Litigation ......................... p. 29
R-3549-ICJ
Computing Economic Loss in Cases of Wrongful Death ................................ p. 30

R-3551-ICJ
Economic Loss and Compensation in Aviation Accidents .............................. p. 30

R-3585-ICJ
Dispute Resolution Following Airplane Crashes ........................................... p. 31

R-3684-ICJ
Executive Summaries of the Aviation Accident Study .................................. p. 32

N-2773-ICJ
Aviation Accident Litigation Survey: Data Collection Forms ......................... p. 43

KLEIN, B. H.
R-3032-ICJ
The Selection of Disputes for Litigation ................................... p. 35

KNIESNER, T. J.
R-2716-ICJ
The Law and Economics of Workers’ Compensation ................................... p. 19

R-2716/1-ICJ
The Law and Economics of Workers’ Compensation: Executive Summary ...... p. 20

KO, K.
TR-371-ICJ
Small Businesses and Workplace Fatality Risk: An Exploratory Analysis .......... p. 37

KRAVITZ, R. L.
N-3448/1-RWJ
Malpractice Claims Data as a Quality Improvement Tool: I. Epidemiology of Error in Four Specialties ........................................... p. 45

N-3448/2-RWJ
Malpractice Claims Data as a Quality Improvement Tool: II. Is Targeting Effective? .... p. 45

KRITZER, H. M.
P-7180-ICJ
The Impact of Fee Arrangement on Lawyer Effort ........................................ p. 48

LAKDAWALLA, D.
OP-135-ICJ
Issues and Options for Government Intervention in the Market for Terrorism Insurance .... p. 57

WR-171-ICJ
Insurance, Self-Protection and the Economics of Terrorism ......................... p. 59

WR-205-1-ICJ
How Does Health Insurance Affect Workers’ Compensation Filing? ................. p. 59

Journal Article
How Does Health Insurance Affect Workers’ Compensation Filing? ................. p. 99

LATOUrette, T.
MG-427-CTRMP
Distribution of Losses from Large Terrorist Attacks Under the Terrorism Risk Insurance Act ........................................... p. 15

MG-679-CTRMP
The Federal Role in Terrorism Insurance: Evaluating Alternatives in an Uncertain World ........................................... p. 16

WR-487-IEC
Using Probabilistic Terrorism Risk Modeling for Regulatory Benefit-Cost Analysis: Application to the Western Hemisphere Travel Initiative Implemented in the Land Environment ........................................... p. 64

September 2008
DB-525-CTRMP
Trade-Offs Among Alternative Government Interventions in the Market for Terrorism Insurance: Interim Results ............ p. 68

LEBOW, C. C.
MR-1122/1-ICJ
Safety in the Skies: Personnel and Parties in NTSB Aviation Accident Investigations: Master Volume ................................ p. 6

MR-1122-ICJ
Safety in the Skies: Personnel and Parties in NTSB Aviation Accident Investigations ........ p. 7

LEMPERT, R. J.
MG-679-CTRMP
The Federal Role in Terrorism Insurance: Evaluating Alternatives in an Uncertain World ........................................ p. 16

DB-525-CTRMP
Trade-Offs Among Alternative Government Interventions in the Market for Terrorism Insurance: Interim Results ............ p. 68

LEUSCHNER, K. J.
MG-663-EMKF
In the Name of Entrepreneurship? The Logic and Effects of Special Regulatory Treatment for Small Business ................ p. 16

LEWIS, E. G.
R-3999-HHS/ICJ
Compensation for Accidental Injuries in the United States ........... p. 34

R-3999/1-HHS/ICJ
Compensation for Accidental Injuries in the United States: Executive Summary ...... p. 35

N-3230-HHS/ICJ
Compensation for Accidental Injuries: Research Design and Methods ................ p. 44

P-7812
The Bad Apples? Malpractice Claims Experience of Physicians with a Surplus Lines Insurer ........................................ p. 52

LILLARD, L. A.
R-2792-ICJ
The Resolution of Medical Malpractice Claims: Modeling the Bargaining Process ........ p. 21

R-2793-ICJ
The Resolution of Medical Malpractice Claims: Research Results and Policy Implications .... p. 21

P-6800
Settlement Out of Court: The Disposition of Medical Malpractice Claims ............ p. 47

LIM, Y-W.
MG-400-ICJ
Evaluating Medical Treatment Guideline Sets for Injured Workers in California ........ p. 14

LIND, E. A.
R-3676-ICJ
Alternative Adjudication: An Evaluation of the New Jersey Automobile Arbitration Program ........................................ p. 32

R-3708-ICJ
The Perception of Justice: Tort Litigants’ Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences .......... p. 32

R-3809-ICJ
Arbitrating High-Stakes Cases: An Evaluation of Court-Annexed Arbitration in a United States District Court .................. p. 33

R-3999-HHS/ICJ
Compensation for Accidental Injuries in the United States ........... p. 34

R-3999/1-HHS/ICJ
Compensation for Accidental Injuries in the United States: Executive Summary ...... p. 58
N-3230-HHS/ICJ
Compensation for Accidental Injuries: Research Design and Methods ................ p. 44

RP-117
Alternative Dispute Resolution in Trial and Appellate Courts ...................... p. 78

LIPSON, A. J.
R-2733-ICJ
Judicial Arbitration in California: The First Year ........................................ p. 20

R-2733/1-ICJ
Judicial Arbitration in California: The First Year: Executive Summary ............. p. 20

N-2096-ICJ
California Enacts Prejudgment Interest: A Case Study of Legislative Action .......... p. 41

LOUGHRAN, D. S.
MR-1384-ICJ
The Effect of No-Fault Automobile Insurance on Driver Behavior and Automobile Accidents in the United States .................... p. 9

TR-450-ICJ
Estimating the Accident Risk of Older Drivers ......................................... p. 38

OP-189-ICJ
Regulating Older Drivers: Are New Policies Needed? ................................. p. 57

DRU-2832-ICJ
Deterring Fraud: The Role of General Damage Awards in Automobile Insurance Settlements ....................................................... p. 74

MACCOUN, R. J.
R-3676-ICJ
Alternative Adjudication: An Evaluation of the New Jersey Automobile Arbitration Program ......................................................... p. 32

R-3708-ICJ
The Perception of Justice: Tort Litigants’ Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences ................. p. 32

R-3832-ICJ
Experimental Research on Jury Decision-Making ........................................ p. 33

R-3999-HHS/ICJ
Compensation for Accidental Injuries in the United States .............................. p. 34

R-3999/1-HHS/ICJ
Compensation for Accidental Injuries in the United States: Executive Summary .......... p. 35

N-2671-ICJ
Getting Inside the Black Box: Toward a Better Understanding of Civil Jury Behavior .... p. 43

N-3230-HHS/ICJ
Compensation for Accidental Injuries: Research Design and Methods ................ p. 44

IP-130
Is There a “Deep Pocket” Bias in the Tort System? The Concern over Biases Against Deep-Pocket Defendants ................................. p. 55

CT-136
Improving Jury Comprehension in Criminal and Civil Trials ........................ p. 71

RP-117
Alternative Dispute Resolution in Trial and Appellate Courts ...................... p. 78

RP-134
Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey .......... p. 79

RP-238
Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries ......................................................... p. 79

RP-286
Blaming Others to a Fault? ................................................................. p. 80

September 2008
RP-606
Estimating Liability Risks with the Media as Your Guide ........................................ p. 84

RP-607
Differential Treatment of Corporate Defendants by Juries: An Examination of the “Deep-Pockets” Hypothesis ........................................ p. 84

RP-830
Goal Conflict in Juror Assessments of Compensatory and Punitive Damages .............. p. 88

MACDONALD, J. W.
OP-190-ICJ
Commercial Wind Insurance in the Gulf States: Developments Since Hurricane Katrina and Challenges Moving Forward .............. p. 58

MACLEAN, C.
MG-400-ICJ
Evaluating Medical Treatment Guideline Sets for Injured Workers in California .......... p. 14

WR-203-ICJ
Evaluating Medical Treatment Guideline Sets for Injured Workers in California .......... p. 59

MADEY, D. L.
R-2904-ICJ
Educational Policymaking Through the Civil Justice System ..................................... p. 22

MANNING, W. G.
R-3999-HHS/ICJ
Compensation for Accidental Injuries in the United States ....................................... p. 34

R-3999/1-HHS/ICJ
Compensation for Accidental Injuries in the United States: Executive Summary ........ p. 35

N-3230-HHS/ICJ
Compensation for Accidental Injuries: Research Design and Methods .................... p. 44

RP-858
Lifetime Costs and Compensation for Injuries ........................................................... p. 88

MARDISCH, C.
MR-1414-ICJ
An Evaluation of New Mexico Workers’ Compensation Permanent Partial Disability and Return to Work .................................................. p. 9

MR-1425-ICJ
Improving Dispute Resolution for California’s Injured Workers ................................ p. 9

MR-1425/1-ICJ
Improving Dispute Resolution for California’s Injured Workers: Executive Summary .... p. 10

MARQUIS, M. S.
R-3999-HHS/ICJ
Compensation for Accidental Injuries in the United States ....................................... p. 34

R-3999/1-HHS/ICJ
Compensation for Accidental Injuries in the United States: Executive Summary ........ p. 35

N-3230-HHS/ICJ
Compensation for Accidental Injuries: Research Design and Methods .................... p. 44

CT-103
Economic Consequences of Work-Related Injuries ...................................................... p. 71

DRU-1264-ICJ
Liability System Incentives to Consume Excess Medical Care .................................... p. 73

RP-858
Lifetime Costs and Compensation for Injuries ........................................................... p. 88
MARTIN, C.
MR-1457-ICJ
Trends in Earnings Loss from Disabling Workplace Injuries in California: The Role of Economic Conditions ...................... p. 10

MG-427-CTRMP
Distribution of Losses from Large Terrorist Attacks Under the Terrorism Risk Insurance Act ........................................ p. 15

MARTIN, J. W., JR.
P-8048
Establishing a Good-Faith Defense to Punitive-Damage Claims .................. p. 52

MATTKE, S.
MG-400-ICJ
Evaluating Medical Treatment Guideline Sets for Injured Workers in California .......... p. 14
WR-203-ICJ
Evaluating Medical Treatment Guideline Sets for Injured Workers in California .......... p. 59
WR-394-ICJ
Medical Care Provided California’s Injured Workers: An Overview of the Issues ...... p. 63

MCCAFFREY, D.
MR-800-ICJ
Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act ..................... p. 3
MR-801-ICJ
Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts ........ p. 4
MR-802-ICJ
An Evaluation of Judicial Case Management Under the Civil Justice Reform Act ...... p. 4

MR-803-ICJ
An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act ........................................ p. 4

MR-941-ICJ
Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data . . p. 5

RP-861

MCGUILGAN, K. A.
N-3448/1-RWJ
Malpractice Claims Data as a Quality Improvement Tool: I. Epidemiology of Error in Four Specialties ......................... p. 45
N-3448/2-RWJ
Malpractice Claims Data as a Quality Improvement Tool: II. Is Targeting Effective? .... p. 45

MCKENNEY, S. D.
R-4132-ICJ
Superfund and Transaction Costs: The Experiences of Insurers and Very Large Industrial Firms ........................................ p. 36

MEADE, C.
TR-391-CTRMP
Considering the Effects of a Catastrophic Terrorist Attack .............................................. p. 37

MENDELOFF, J.
TR-371-ICJ
Small Businesses and Workplace Fatality Risk: An Exploratory Analysis ................ p. 37
MERZ, J. F.

RP-426

MOLANDER, R. C.

TR-391-CTRMP
Considering the Effects of a Catastrophic Terrorist Attack . p. 37

MOLLER, E.

MR-259-ICJ
Private Dispute Resolution in the Banking Industry . p. 1

MR-472-JRHD/ICJ
Escaping the Courthouse: Private Alternative Dispute Resolution in Los Angeles . p. 2

MR-534-ACUS/ICJ
Evaluating Agency Alternative Dispute Resolution Programs: A Users’ Guide to Data Collection and Use . p. 2

MR-694-ICJ
Trends in Civil Jury Verdicts Since 1985 . p. 3

MR-888-ICJ
Punitive Damages in Financial Injury Jury Verdicts . p. 4

MR-889-ICJ
Punitive Damages in Financial Injury Jury Verdicts: Executive Summary . p. 5

MR-969-ICJ
Class Action Dilemmas: Pursuing Public Goals for Private Gain . p. 6

MR-969/1-ICJ
Class Action Dilemmas: Pursuing Public Goals for Private Gain: Executive Summary . p. 6

DB-220-ICJ
Preliminary Results of the RAND Study of Class Action Litigation . p. 67

DRU-1014-ICJ
Trends in Punitive Damages: Preliminary Data from Cook County, Illinois, and San Francisco, California . p. 73

DRU-1059-ICJ
Trends in Punitive Damages: Preliminary Data from California . p. 73

RP-746
Arbitration Agreements in Health Care: Myths and Reality . p. 86

MOORE, N. Y.

TR-442-SBA
The Utilization of Women-Owned Small Businesses in Federal Contracting . p. 38

NELSON, C.

MG-280-ICJ
Assessment of 24-Hour Care Options for California . p. 14

R-3071-ICJ
Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program . p. 26

TR-371-ICJ
Small Businesses and Workplace Fatality Risk: An Exploratory Analysis . p. 37

WR-163-1-ICJ
Assessment of 24-Hour Care Options for California . p. 59

NEUHAUSER, F. W.

MR-1425-ICJ
Improving Dispute Resolution for California’s Injured Workers . p. 9

MR-1425/1-ICJ
Improving Dispute Resolution for California’s Injured Workers: Executive Summary . p. 10
MG-258-ICJ
An Evaluation of California’s Permanent Disability Rating System .......... p. 13

WR-214-ICJ
Data for Adjusting Disability Ratings to Reflect Diminished Future Earnings and Capacity in Compliance with SB 899 .......... p. 60

DB-443-ICJ
Evaluation of California’s Permanent Disability Rating Schedule: Interim Report .... p. 68

NEUHAUSER, F.
Journal Article

NEWHOUSE, J. P.
RP-896
Costs of Medical Injuries in Utah and Colorado .......... p. 90

NICOSIA, N.
TR-442-SBA
The Utilization of Women-Owned Small Businesses in Federal Contracting .... p. 38

NUCKOLS, T. K.
MG-400-ICJ
Evaluating Medical Treatment Guideline Sets for Injured Workers in California .......... p. 14

WR-203-ICJ
Evaluating Medical Treatment Guideline Sets for Injured Workers in California .......... p. 59

O’CONNELL, J.
RP-254
Consumer Choice in the Auto Insurance Market .......... p. 80

RP-442
The Costs of Consumer Choice for Auto Insurance in States Without No-Fault Insurance .......... p. 82

RP-518
The Comparative Costs of Allowing Consumer Choice for Auto Insurance in All Fifty States .......... p. 83

RP-745
The Effect of Allowing Motorists to Opt Out of Tort Law in the United States .......... p. 85

ORAV, E. J.
RP-885
Negligent Care and Malpractice Claiming Behavior in Utah and Colorado .......... p. 89

ORTIZ, D. S.
MG-520-CTRMP
Maritime Terrorism: Risk and Liability .......... p. 15

OSHIRO, M.
MR-800-ICJ
Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act .......... p. 3

MR-801-ICJ
Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts .......... p. 4

MR-802-ICJ
An Evaluation of Judicial Case Management Under the Civil Justice Reform Act .......... p. 4

MR-803-ICJ
An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act .......... p. 4

MR-941-ICJ
Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data .......... p. 5
RP-861

OVERTON, A.
TR-300-FEMA

PACE, N. M.
MR-800-ICJ
Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act .................... p. 3
MR-801-ICJ
Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts ........ p. 4
MR-802-ICJ
An Evaluation of Judicial Case Management Under the Civil Justice Reform Act .......... p. 4
MR-803-ICJ
An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act ................................... p. 4
MR-888-ICJ
Punitive Damages in Financial Injury Jury Verdicts ....................... p. 4
MR-889-ICJ
Punitive Damages in Financial Injury Jury Verdicts: Executive Summary ........ p. 5
MR-941-ICJ
Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data . . . p. 5
MR-969-ICJ
Class Action Dilemmas: Pursuing Public Goals for Private Gain ....................... p. 6

MR-969/1-ICJ
Class Action Dilemmas: Pursuing Public Goals for Private Gain: Executive Summary .... p. 6

MR-1425-ICJ
Improving Dispute Resolution for California’s Injured Workers ................ p. 9

MR-1425/1-ICJ
Improving Dispute Resolution for California’s Injured Workers: Executive Summary .... p. 10

MG-234-ICJ
Capping Non-Economic Awards in Medical Malpractice Trials: California Jury Verdicts Under MICRA ......................... p. 13

MG-587-1-ICJ
Insurance Class Actions in the United States ................................ p. 16

R-3391-ICJ
Costs and Compensation Paid in Tort Litigation ................................ p. 28

R-3554-ICJ
Assessing the Effects of Tort Reforms ........ p. 30

R-3762-ICJ
Averting Gridlock: Strategies for Reducing Civil Delay in the Los Angeles Superior Court .. p. 32

R-3885-ICJ
Statistical Overview of Civil Litigation in the Federal Courts ..................... p. 34

R-4019-ICJ
No-Fault Approaches to Compensating People Injured in Automobile Accidents ........ p. 35

N-2988-ICJ
Strategies for Reducing Civil Delay in Los Angeles Superior Court: Technical Appendixes ... p. 44

P-7243-ICJ
Costs and Compensation Paid in Tort Litigation: Testimony Before the Joint Economic Committee of the U.S. Congress .................. p. 49
IP-184
A Flood of Litigation? Predicting the Consequences of Changing Legal Remedies Available to ERISA Beneficiaries ............. p. 56

OP-183-ICJ
The Legal and Economic Implications of Electronic Discovery: Options for Future Research .................................................. p. 57

WR-405-ICJ
Survey Instruments: Insurance Class Actions in the United States .................. p. 63

DB-220-ICJ
Preliminary Results of the RAND Study of Class Action Litigation .................. p. 67

RP-426

RP-861

Journal Article
An Economic Analysis of Consumer Class Actions in Regulated Industries .......... p. 100

PETERSEN, L.
MR-472-JRHD/ICJ
Escaping the Courthouse: Private Alternative Dispute Resolution in Los Angeles ...... p. 2

PETERSON, M. A.
MR-919-ICJ
Findings and Recommendations on California’s Permanent Partial Disability System: Executive Summary ......................... p. 5

MR-920-ICJ
Compensating Permanent Workplace Injuries: A Study of the California System ...... p. 5

R-2717-ICJ
Models of Legal Decisionmaking ............ p. 20

R-2881-ICJ

R-2881/1-ICJ

R-2922-ICJ
The Pace of Litigation: Conference Proceedings ........................................ p. 23

R-3006-ICJ

R-3011-ICJ
Compensation of Injuries: Civil Jury Verdicts in Cook County ......................... p. 24

R-3013-I24

R-3249-ICJ
Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials ................ p. 27

R-3311-ICJ
Punitive Damages: Empirical Findings ... p. 28

R-3466-ICJ
Civil Juries in the 1980s: Trends in Jury Trials and Verdicts in California and Cook County, Illinois ........................................ p. 29

R-3511-ICJ
Posttrial Adjustments to Jury Awards .... p. 30

R-3583-ICJ
Trends in Tort Litigation: The Story Behind the Statistics ............................... p. 31

N-2342-ICJ
Punitive Damages: Preliminary Empirical Findings ................................. p. 42
N-2805-ICJ
Resolution of Mass Torts: Toward a Framework for Evaluation of Aggregative Procedures .... p. 43

P-7073-ICJ

P-7222-ICJ
A Summary of Research Results: Trends and Patterns in Civil Jury Verdicts. .......... p. 49

RP-108
Giving Away Money: Comparative Comments on Claims Resolution Facilities ........ p. 75

RP-116
Mass Justice: The Limited and Unlimited Power of Courts ................ p. 78

RP-311
Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis ............ p. 80

PETRILA, J.
MR-1340-CSCR
The Effectiveness of Involuntary Outpatient Treatment: Empirical Evidence and the Experience of Eight States ...................... p. 8

PEVAR, J.
TR-483-EOUST

TR-484-EOUST

PHELPS, C. E.
R-2918-ICJ
Workers’ Compensation and Workplace Safety: Some Lessons from Economic Theory .... p. 23

PICUS, L. O.
R-3421-ICJ
Costs and Compensation Paid in Aviation Accident Litigation ................... p. 29

R-3479-ICJ
The Debate over Jury Performance: Observations from a Recent Asbestos Case .......... p. 29

R-3684-ICJ
Executive Summaries of the Aviation Accident Study .............................. p. 32

N-2773-ICJ
Aviation Accident Litigation Survey: Data Collection Forms ........................ p. 32

POLICH, S.
MR-1268-ICJ
Permanent Disability at Private, Self-Insured Firms: A Study of Earnings Loss, Replacement, and Return to Work for Workers’ Compensation Claimants ....................... p. 8

MR-1425-ICJ
Improving Dispute Resolution for California’s Injured Workers ..................... p. 9

MR-1425/1-ICJ
Improving Dispute Resolution for California’s Injured Workers: Executive Summary .... p. 10

POLIN, S. S.
R-3050-ICJ

R-3053-ICJ
Automobile Accident Compensation: Vol. 4, State Rules ............................ p. 26
PRIEST, G. L.
R-2881-ICJ
R-2881/1-ICJ
R-3032-ICJ
The Selection of Disputes for Litigation p. 25
R-3084-ICJ
Regulating the Content and Volume of Litigation: An Economic Analysis p. 26

RAMPHAL, N.
Journal Article
An Economic Analysis of Consumer Class Actions in Regulated Industries p. 100

REARDON, N.
TR-442-SBA
The Utilization of Women-Owned Small Businesses in Federal Contracting p. 38

REDDY, M.
MR-528-ICJ
California Lawyers View the Future: A Report to the Commission on the Future of the Legal Profession and the State Bar p. 2

RESNIK, J.
R-3002-ICJ
Managerial Judges p. 23
R-3708-ICJ
The Perception of Justice: Tort Litigants’ Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences p. 32

RP-110
From “Cases” to “Litigation” p. 76

RP-364
Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century p. 81

RP-439
Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication p. 82

RP-584
Individuals Within the Aggregate: Relationships, Representation, and Fees p. 83

P-7272-ICJ
Failing Faith: Adjudicatory Procedure in Decline p. 50

P-7418-ICJ
Due Process: A Public Dimension p. 50

P-7419-ICJ
Judging Consent p. 50

REST, G. J.
R-3071-ICJ
Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program p. 26

N-1965-ICJ
Court-Administered Arbitration: An Alternative for Consumer Dispute Resolution p. 41

REUTER, P. H.
R-3022-ICJ
Designing Safer Products: Corporate Responses to Product Liability Law and Regulation p. 24

N-2807-ICJ
The Economic Consequences of Expanded Corporate Liability: An Exploratory Study p. 43

P-7089-ICJ
Designing Safer Products: Corporate Responses to Product Liability Law and Regulation p. 48
REVILLE, R. T.
MR-919-ICJ
Findings and Recommendations on California’s Permanent Partial Disability System: Executive Summary ........................ p. 5
MR-920-ICJ
Compensating Permanent Workplace Injuries: A Study of the California System ........ p. 5
MR-1268-ICJ
Permanent Disability at Private, Self-Insured Firms: A Study of Earnings Loss, Replacement, and Return to Work for Workers’ Compensation Claimants ................................. p. 8
MR-1414-ICJ
An Evaluation of New Mexico Workers’ Compensation Permanent Partial Disability and Return to Work .................................. p. 9
MR-1425-ICJ
Improving Dispute Resolution for California’s Injured Workers .......................... p. 9
MR-1425/1-ICJ
Improving Dispute Resolution for California’s Injured Workers: Executive Summary .... p. 10
MR-1457-ICJ
Trends in Earnings Loss from Disabling Workplace Injuries in California: The Role of Economic Conditions ..................... p. 10
MG-258-ICJ
An Evaluation of California’s Permanent Disability Rating System ...................... p. 13
MG-393-CTRMP
MG-679-CTRMP
The Federal Role in Terrorism Insurance: Evaluating Alternatives in an Uncertain World ................................................ p. 16
OP-135-ICJ
Issues and Options for Government Intervention in the Market for Terrorism Insurance .... p. 57
WR-205-1-ICJ
How Does Health Insurance Affect Workers’ Compensation Filing? ................... p. 59
WR-214-ICJ
Data for Adjusting Disability Ratings to Reflect Diminished Future Earnings and Capacity in Compliance with SB 899 ................. p. 60
DB-525-CTRMP
Trade-Offs Among Alternative Government Interventions in the Market for Terrorism Insurance: Interim Results ................. p. 68
DB-443-ICJ
Evaluation of California’s Permanent Disability Rating Schedule: Interim Report ........ p. 68
RP-921
The Impact of a Disabling Workplace Injury on Earnings and Labor Force Participation .... p. 91
RP-939
Permanent Partial Disability from Occupational Injuries: Earnings Losses and Replacement in Three States ............................... p. 91
RP-972-ICJ
New Methods and Data Sources for Measuring Economic Consequences of Workplace Injuries ................................................. p. 92
RP-1168
National Security and Compensation Policy for Terrorism Losses ........................ p. 94
RP-1233
National Security and Private-Sector Risk Management for Terrorism ................. p. 94
Journal Article
The Fraction of Disability Caused at Work .................................................. p. 97
Journal Article

Journal Article
How Does Health Insurance Affect Workers’ Compensation Filing? ............... p. 99

Book Chapter

RHODES, H. J.

Book Chapter

RIDGELY, S.

MR-1340-CSCR
The Effectiveness of Involuntary Outpatient Treatment: Empirical Evidence and the Experience of Eight States ................. p. 8

RP-1175
Electronic Prescribing and HIPAA Privacy Regulation ......................... p. 94

Journal Article
Coercive Use of Vaccines Against Drug Addiction: Is It Permissible and Is It Good Public Policy? ................................... p. 97

Journal Article
Patient Identifiers and the National Health Information Network: Debunking a False Front in the Privacy Wars ......................... p. 100

ROBYN, A.

R-2888-ICJ
Costs of the Civil Justice System: Court Expenditures for Processing Tort Cases .... p. 22

ROGOWSKI, J. R.

R-3999-HHS/ICJ
Compensation for Accidental Injuries in the United States ......................... p. 34

R-3999/1-HHS/ICJ
Compensation for Accidental Injuries in the United States: Executive Summary .... p. 35

N-3230-HHS/ICJ
Compensation for Accidental Injuries: Research Design and Methods ............ p. 44

ROLPH, E. S.

MR-259-ICJ
Private Dispute Resolution in the Banking Industry ................................ p. 1

MR-472-JRHD/ICJ
Escaping the Courthouse: Private Alternative Dispute Resolution in Los Angeles .... p. 2

MR-534-ACUS/ICJ
Evaluating Agency ADR Programs: A Users’ Guide to Data Collection and Use .... p. 2

R-2733-ICJ
Judicial Arbitration in California: The First Year ......................................... p. 20

R-2733/1-ICJ
Judicial Arbitration in California: The First Year: Executive Summary .............. p. 20

R-3167-ICJ
Introducing Court-Annexed Arbitration: A Policy-maker’s Guide .................... p. 27

N-2186-ICJ
Court-Ordered Arbitration: The California Experience ................................ p. 41

N-3524-ICJ
<table>
<thead>
<tr>
<th>Index Number</th>
<th>Title</th>
<th>Author</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>RP-115</td>
<td>Framing the Compensation Inquiry</td>
<td></td>
<td>877</td>
</tr>
<tr>
<td>RP-746</td>
<td>Arbitration Agreements in Health Care: Myths and Reality</td>
<td></td>
<td>86</td>
</tr>
<tr>
<td>R-3053-ICJ</td>
<td>Automobile Accident Compensation: Vol. 4, State Rules</td>
<td>ROLPH, J. E.</td>
<td>26</td>
</tr>
<tr>
<td>N-1725-HHS</td>
<td>Some Statistical Evidence on Merit Rating in Medical Malpractice</td>
<td></td>
<td>41</td>
</tr>
<tr>
<td>N-2418-ICJ</td>
<td>Limiting Liability for Automobile Accidents: Are No-Fault Tort</td>
<td></td>
<td>42</td>
</tr>
<tr>
<td>N-3426-MT/RWJ/RC</td>
<td>Merit Rating for Physicians’ Malpractice Premiums: Only a Modest Deterrent</td>
<td></td>
<td>44</td>
</tr>
<tr>
<td>N-3448/1-RWJ</td>
<td>Malpractice Claims Data as a Quality Improvement Tool: I. Epidemiology</td>
<td></td>
<td>45</td>
</tr>
<tr>
<td>N-3448/2-RWJ</td>
<td>Malpractice Claims Data as a Quality Improvement Tool: II. Is Targeting</td>
<td></td>
<td>45</td>
</tr>
<tr>
<td>P-7812</td>
<td>The Bad Apples? Malpractice Claims Experience of Physicians with a</td>
<td>SARMEY, J. A.</td>
<td>62</td>
</tr>
<tr>
<td>RP-746</td>
<td>Arbitration Agreements in Health Care: Myths and Reality</td>
<td>SARMEY, J. A.</td>
<td>86</td>
</tr>
<tr>
<td>WR-302-ICJ</td>
<td>Uncorporated Professionals</td>
<td>ROMLEY, J. A.</td>
<td>62</td>
</tr>
<tr>
<td>WR-403-ICJ</td>
<td>Do the Owners of Small Law Firms Benefit from Limited Liability?</td>
<td>ROMLEY, J. A.</td>
<td>63</td>
</tr>
<tr>
<td>WR-2985-ICJ</td>
<td>Costs of the Civil Justice System: Court Expenditures for Various</td>
<td>ROSS, R. L.</td>
<td>23</td>
</tr>
<tr>
<td>SAGER WEINSTEIN, L. R.</td>
<td>New Methods and Data Sources for Measuring Economic Consequences of Workplace Injuries</td>
<td>SAGER WEINSTEIN, L. R.</td>
<td>92</td>
</tr>
<tr>
<td>SARM, S.</td>
<td>Punitive Damages: Empirical Findings</td>
<td>SARMA, S.</td>
<td>28</td>
</tr>
</tbody>
</table>
SARSFIELD, L. P.
MR-1122/1-ICJ
Safety in the Skies: Personnel and Parties in NTSB Aviation Accident Investigations: Master Volume ............................... p. 6
MR-1122-ICJ
Safety in the Skies: Personnel and Parties in NTSB Aviation Accident Investigations ........ p. 7

SAVYCH, B.
WR-293-1-ICJ
A Description and Analysis of Evolving Data Resources on Small Business ............... p. 61
WR-403-ICJ
Do the Owners of Small Law Firms Benefit from Limited Liability? ................... p. 63

SCHOENI, R. F.
MR-1457-ICJ
Trends in Earnings Loss from Disabling Workplace Injuries in California: The Role of Economic Conditions ...................... p. 10
Journal Article
The Fraction of Disability Caused at Work .................................. p. 97

SCHONLAU, M.
MG-162-ICJ
Asbestos Litigation ......................... p. 13

SEABURY, S.
MR-1268-ICJ
Permanent Disability at Private, Self-Insured Firms: A Study of Earnings Loss, Replacement, and Return to Work for Workers’ Compensation Claimants ............................. p. 8
MG-280-ICJ
Assessment of 24-Hour Care Options for California .............................. p. 14

MG-258-ICJ
An Evaluation of California’s Permanent Disability Rating System .................... p. 13

TR-300-FEMA
The National Flood Insurance Program’s Market Penetration Rate: Estimates and Policy Implications ......................... p. 37

TR-450-ICJ
Estimating the Accident Risk of Older Drivers ................................ p. 38

OP-189-ICJ
Regulating Older Drivers: Are New Policies Needed? ............................... p. 57

WR-163-1-ICJ
Assessment of 24-Hour Care Options for California ................................. p. 59

WR-205-1-ICJ
How Does Health Insurance Affect Workers’ Compensation Filing? .................. p. 59

WR-214-ICJ
Data for Adjusting Disability Ratings to Reflect Diminished Future Earnings and Capacity in Compliance with SB 899 .......... p. 60

WR-317-ICJ
The Impact of Regulation and Litigation on Small Business and Entrepreneurship: An Overview ...................................... p. 62

DB-443-ICJ
Evaluation of California’s Permanent Disability Rating Schedule: Interim Report .... p. 68

Journal Article

Journal Article

Book Chapter

September 2008
<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
<th>Volume/Year</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>SELVIN, M.</td>
<td>Court Efforts to Reduce Pretrial Delay: A National Inventory</td>
<td>R-2732-ICJ</td>
<td>p. 20</td>
</tr>
<tr>
<td></td>
<td>Court Efforts to Reduce Pretrial Delay: A National Inventory. Executive Summary</td>
<td>R-2732/1-ICJ</td>
<td>p. 20</td>
</tr>
<tr>
<td></td>
<td>Managing the Unmanageable: A History of Civil Delay in the Los Angeles Superior Court</td>
<td>R-3165-ICJ</td>
<td>p. 27</td>
</tr>
<tr>
<td></td>
<td>Asbestos in the Courts: The Challenge of Mass Toxic Torts</td>
<td>R-3324-ICJ</td>
<td>p. 28</td>
</tr>
<tr>
<td></td>
<td>The Debate over Jury Performance: Observations from a Recent Asbestos Case</td>
<td>R-3479-ICJ</td>
<td>p. 29</td>
</tr>
<tr>
<td></td>
<td>Averting Gridlock: Strategies for Reducing Civil Delay in the Los Angeles Superior Court</td>
<td>R-3762-ICJ</td>
<td>p. 32</td>
</tr>
<tr>
<td></td>
<td>Resolution of Mass Torts: Toward a Framework for Evaluation of Aggregative Procedures</td>
<td>N-2805-ICJ</td>
<td>p. 43</td>
</tr>
<tr>
<td></td>
<td>Strategies for Reducing Civil Delay in Los Angeles Superior Court: Technical Appendixes</td>
<td>N-2988-ICJ</td>
<td>p. 44</td>
</tr>
<tr>
<td></td>
<td>Costs of Asbestos Litigation</td>
<td>R-3042-ICJ</td>
<td>p. 25</td>
</tr>
<tr>
<td></td>
<td>Variation in Asbestos Litigation Compensation and Expenses</td>
<td>R-3132-ICJ</td>
<td>p. 27</td>
</tr>
<tr>
<td></td>
<td>Punitive Damages: Empirical Findings</td>
<td>R-3311-ICJ</td>
<td>p. 28</td>
</tr>
<tr>
<td></td>
<td>Posttrial Adjustments to Jury Awards</td>
<td>R-3511-ICJ</td>
<td>p. 30</td>
</tr>
<tr>
<td>SHAW, R.</td>
<td>Evaluating Medical Treatment Guideline Sets for Injured Workers in California</td>
<td>MG-400-ICJ</td>
<td>p. 14</td>
</tr>
<tr>
<td></td>
<td>Evaluating Medical Treatment Guideline Sets for Injured Workers in California</td>
<td>WR-203-ICJ</td>
<td>p. 59</td>
</tr>
<tr>
<td>SHUBERT, G. H.</td>
<td>Some Observations on the Need for Tort Reform</td>
<td>P-7189-ICJ</td>
<td>p. 48</td>
</tr>
<tr>
<td></td>
<td>Changes in the Tort System: Helping Inform the Policy Debate</td>
<td>P-7241-ICJ</td>
<td>p. 49</td>
</tr>
<tr>
<td></td>
<td>Asbestos Litigation</td>
<td>MG-162-ICJ</td>
<td>p. 13</td>
</tr>
</tbody>
</table>
SMITH, J. P.
R-3549-ICJ
Computing Economic Loss in Cases of Wrongful Death ........................................ p. 30
R-3551-ICJ
Economic Loss and Compensation in Aviation Accidents ........................................ p. 30
R-3585-ICJ
Dispute Resolution Following Airplane Crashes ..................................................... p. 31
R-3684-ICJ
Executive Summaries of the Aviation Accident Study ............................................ p. 32

SOOD, N.
Journal Article
Adverse Selection in Retiree Prescription Drug Plans .............................................. p. 97

SORBERO, ME E.
WR-512-ICJ
Pay-for-Performance in California’s Workers’ Compensation Medical Treatment System: An Assessment of Options, Challenges and Potential Benefits ........................................ p. 64

STANLEY, W. L.
MR-1122/1-ICJ
Safety in the Skies: Personnel and Parties in NTSB Aviation Accident Investigations: Master Volume ........................................ p. 6
MR-1122-ICJ
Safety in the Skies: Personnel and Parties in NTSB Aviation Accident Investigations ...... p. 7

STEINBERG, P.
DB-525-CTRMP
Trade-Offs Among Alternative Government Interventions in the Market for Terrorism Insurance: Interim Results ........................................ p. 68

STERN, R. K.
MR-919-ICJ
Findings and Recommendations on California’s Permanent Partial Disability System: Executive Summary ........................................ p. 5
MR-920-ICJ
Compensating Permanent Workplace Injuries: A Study of the California System ........ p. 5

STUDDERT, D. M.
IP-184
A Flood of Litigation? Predicting the Consequences of Changing Legal Remedies Available to ERISA Beneficiaries ........................................ p. 56
RP-812
Direct Contracts, Data Sharing and Employee Risk Selection: New Stakes for Patient Privacy in Tomorrow’s Health Insurance Market .... p. 87
RP-860
RP-862
Legal Issues in the Delivery of Alternative Medicine ............................................. p. 89
RP-885
Negligent Care and Malpractice Claiming Behavior in Utah and Colorado ............ p. 89
RP-886
The Jury Is Still In: Florida’s Birth-Related Neurological Injury Compensation Plan After a Decade ........................................ p. 90
<table>
<thead>
<tr>
<th>Author</th>
<th>Reference</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>SUVANKULOV, F.</td>
<td>TR-556-USSEC</td>
<td>Investor and Industry Perspectives on Investment Advisers and Broker-Dealers</td>
<td>39</td>
</tr>
<tr>
<td>TALLEY, E.</td>
<td>TR-556-USSEC</td>
<td>Investor and Industry Perspectives on Investment Advisers and Broker-Dealers</td>
<td>39</td>
</tr>
<tr>
<td>WR-292-ICJ</td>
<td></td>
<td>Criteria Used to Define a Small Business in Determining Thresholds for the Application of Federal Statutes and Litigation</td>
<td>61</td>
</tr>
<tr>
<td>WR-302-ICJ</td>
<td></td>
<td>Uncoroporated Professionals</td>
<td>62</td>
</tr>
<tr>
<td>WR-317-ICJ</td>
<td></td>
<td>The Impact of Regulation and Litigation on Small Business and Entrepreneurship: An Overview</td>
<td>62</td>
</tr>
<tr>
<td>WR-403-ICJ</td>
<td></td>
<td>Do the Owners of Small Law Firms Benefit from Limited Liability?</td>
<td>63</td>
</tr>
<tr>
<td>RP-1267</td>
<td></td>
<td>Cataclysmic Liability Risk Among Big Four Auditors</td>
<td>94</td>
</tr>
<tr>
<td>TELEKI, S. S.</td>
<td>CF-214-ICJ</td>
<td>Research Colloquium on Workers’ Compensation Medical Benefit Delivery and Return to Work</td>
<td>69</td>
</tr>
<tr>
<td>THOMAS, E. J.</td>
<td>RP-885</td>
<td>Negligent Care and Malpractice Claiming Behavior in Utah and Colorado</td>
<td>89</td>
</tr>
<tr>
<td></td>
<td>RP-896</td>
<td>Costs of Medical Injuries in Utah and Colorado</td>
<td>90</td>
</tr>
<tr>
<td>TRAYNOR, M.</td>
<td>R-3421-ICJ</td>
<td>Costs and Compensation Paid in Aviation Accident Litigation</td>
<td>29</td>
</tr>
<tr>
<td></td>
<td>R-3684-ICJ</td>
<td>Executive Summaries of the Aviation Accident Study</td>
<td>32</td>
</tr>
<tr>
<td></td>
<td>N-2773-ICJ</td>
<td>Aviation Accident Litigation Survey: Data Collection Forms</td>
<td>43</td>
</tr>
<tr>
<td>TRUBEK, D. M.</td>
<td>P-7180-ICJ</td>
<td>The Impact of Fee Arrangement on Lawyer Effort</td>
<td>48</td>
</tr>
<tr>
<td>TYLER, T. R.</td>
<td>R-3708-ICJ</td>
<td>The Perception of Justice: Tort Litigants’ Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences</td>
<td>32</td>
</tr>
<tr>
<td></td>
<td>RP-117</td>
<td>Alternative Dispute Resolution in Trial and Appellate Courts</td>
<td>78</td>
</tr>
</tbody>
</table>
MR-800-ICJ
Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act p. 3

MR-801-ICJ
Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts p. 4

MR-802-ICJ
An Evaluation of Judicial Case Management Under the Civil Justice Reform Act p. 4

MR-803-ICJ
An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act p. 4

MR-919-ICJ
Findings and Recommendations on California’s Permanent Partial Disability System: Executive Summary p. 5

MR-941-ICJ
Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data p. 5

R-3583-ICJ
Trends in Tort Litigation: The Story Behind the Statistics p. 31

R-3999-HHS/ICJ
Compensation for Accidental Injuries in the United States p. 34

R-3999/1-HHS/ICJ
Compensation for Accidental Injuries: Research Design and Methods p. 44

DB-139-ICJ
The Costs of Excess Medical Claims for Automobile Personal Injuries p. 67

DRU-1264-ICJ
Liability System Incentives to Consume Excess Medical Care p. 73

DRU-1266-1-ICJ
Making ZEV Policy Despite Uncertainty: An Annotated Briefing for the California Air Resources Board p. 74

RP-861

VICTOR, R. B.

R-2918-ICJ
Workers’ Compensation and Workplace Safety: Some Lessons from Economic Theory p. 23

R-2979-ICJ
Workers’ Compensation and Workplace Safety: The Nature of Employer Financial Incentives p. 23

VOGELSANG, I.

MG-587-1-ICJ
Insurance Class Actions in the United States p. 16

WR-405-ICJ
Survey Instruments: Insurance Class Actions in the United States p. 63

Journal Article
An Economic Analysis of Consumer Class Actions in Regulated Industries p. 100

WALLACE, P.

MG-400-ICJ
Evaluating Medical Treatment Guideline Sets for Injured Workers in California p. 14

WR-203-ICJ
Evaluating Medical Treatment Guideline Sets for Injured Workers in California p. 59

WATERMAN, D. A.

R-2717-ICJ
Models of Legal Decisionmaking p. 20
P-7073-ICJ
Evaluating Civil Claims: An Expert Systems Approach .................................. p. 47

WHITE, M.
TR-483-EOUST

DB-362.0-ICJ
Asbestos Litigation in the U.S.: A New Look at an Old Issue ......................... p. 67

DB-397-ICJ
Asbestos Litigation Costs and Compensation: An Interim Report ................ p. 67

WILLIAMS, A. P., JR.
P-7445
Malpractice, Outcomes, and Appropriateness of Care ................................ p. 51

WILLIAMS, E. J.
RP-896
Costs of Medical Injuries in Utah and Colorado ........................................... p. 90

WILLIS, H. H.
MG-520-CTRMP
Maritime Terrorism: Risk and Liability .................................................. p. 15

WR-487-IEC
Using Probabilistic Terrorism Risk Modeling for Regulatory Benefit-Cost Analysis: Application to the Western Hemisphere Travel Initiative Implemented in the Land Environment ......................................... p. 64

WILSON-ADLER, J.
R-2732-ICJ
Court Efforts to Reduce Pretrial Delay: A National Inventory ...................... p. 20

R-2732/1-ICJ
Court Efforts to Reduce Pretrial Delay: A National Inventory: Executive Summary ................ p. 20

WICKIZER, T.
WR-203-ICJ
Evaluating Medical Treatment Guideline Sets for Injured Workers in California .......... p. 59

CF-214-ICJ
Research Colloquium on Workers’ Compensation Medical Benefit Delivery and Return to Work ................................................................. p. 69

WYNN, B.O.
MR-1776-ICJ
Adopting Medicare Fee Schedules: Consideration for the California Workers’ Compensation Program ......................................................... p. 11

WR-203-ICJ
Evaluating Medical Treatment Guideline Sets for Injured Workers in California .......... p. 59

WR-260-1-ICJ
Paying for Repackaged Drugs Under the California Workers’ Compensation Official Medical Fee Schedule ......................................................... p. 60

MG-400-ICJ
Evaluating Medical Treatment Guideline Sets for Injured Workers in California .......... p. 14

WR-263-1-ICJ
Payments for Burn Patients Under California’s Official Medical Fee Schedule for Injured Workers ................................................................. p. 60
WR-301-ICJ
Payment for Hardware Used in Complex Spinal Procedures under California’s Official Medical Fee Schedule for Injured Workers ........ p. 61

WR-394-ICJ
Medical Care Provided California’s Injured Workers: An Overview of the Issues ........ p. 63

WR-512-ICJ
Pay-for-Performance in California’s Workers’ Compensation Medical Treatment System: An Assessment of Options, Challenges and Potential Benefits .................. p. 64

CF-214-ICJ
Research Colloquium on Workers’ Compensation Medical Benefit Delivery and Return to Work ........................................ p. 69

CT-202-ICJ
Inflation in Hospital Charges: Implications for the California Workers’ Compensation Program ........................................... p. 72

WICKIZER, T.
MG-400-ICJ
Evaluating Medical Treatment Guideline Sets for Injured Workers in California .......... p. 14

WR-203-ICJ
Evaluating Medical Treatment Guideline Sets for Injured Workers in California .......... p. 59

YEE-WEI LIM
WR-203-ICJ
Evaluating Medical Treatment Guideline Sets for Injured Workers in California .......... p. 59

YEOM, J.
MR-1425/1-ICJ
Improving Dispute Resolution for California’s Injured Workers: Executive Summary .... p. 10

YESLEY, M. S.
R-2732-1CJ
Court Efforts to Reduce Pretrial Delay: A National Inventory ........................... p. 20

R-2732/1-ICJ
Court Efforts to Reduce Pretrial Delay: A National Inventory. Executive Summary .......... p. 20

ZAKARAS, L.
MR-1425/1-ICJ
Improving Dispute Resolution for California’s Injured Workers: Executive Summary .... p. 10

MG-234-ICJ
Capping Non-Economic Awards in Medical Malpractice Trials: California Jury Verdicts Under MICRA .......................... p. 13

MG-587-1-ICJ
Insurance Class Actions in the United States ........................................... p. 16

OP-189-ICJ
Regulating Older Drivers: Are New Policies Needed? ........................ p. 57

WR-405-ICJ
Survey Instruments: Insurance Class Actions in the United States ................ p. 63

ZANJANI, G.
WR-171-ICJ
Insurance, Self-Protection and the Economics of Terrorism ........................... p. 59

ZBAR, B. I.
RP-885
Negligent Care and Malpractice Claiming Behavior in Utah and Colorado .......... p. 89
RP-896
Costs of Medical Injuries in Utah and Colorado ......................... p. 90

ZEMANS, F. K.

RP-282
How to Improve Civil Justice Policy ....... p. 80

ZISSIMOPOULIS, J.

OP-190-ICJ
Commercial Wind Insurance in the Gulf States: Developments Since Hurricane Katrina and Challenges Moving Forward ......... p. 58