FACT SHEET ON INEFFICIENCIES IN THE LEGAL SYSTEM

1. The size of jury awards and the number of lawsuits filed have remained essentially flat during the past 25 years, after inflation and the increase in population is accounted for.

According to the Institute for Civil Justice, since 1959 the median jury verdict has remained at about $8,000 in 1979 dollars, the number of lawsuits filed per capita has remained constant, and jurors have consistently found for the defendant about as often as they find for the plaintiff. Whatever the problems with our legal system, therefore, overly generous judges and jurers are clearly not responsible for skyrocketing insurance rates.

2. The biggest single source of inefficiency in the legal system is delay, caused mostly by defense lawyers, who charge by the hour. (Plaintiff's lawyers have no incentive to delay since they work on a contingency fee basis, getting paid only if and when they win.)

Because they charge by the hour, defense lawyers have an incentive to "keep their meter running" by raising objections, filing motions, interposing objections and briefing and rebriefing the same issue -- no matter how untenable their position -- even if settling the case quickly would actually be cheaper for their clients.

Thus, according to the National Association of Independent Insurers, since 1956 fees to defense lawyers have risen about three times as fast as the amount insurers pay to injured people. According to the insurance industry funded Institute for Civil Justice, defense lawyers receive more money than either the plaintiff or the plaintiff's lawyer in product liability cases.

3. The state "tort reform" legislation sought by the insurance industry does not address the inefficiencies of the legal system.

The insurance industry is seeking legislation that would limit the amount of money injured people could recover for their injuries, but would not cure the inefficiencies in the tort system. Such legislation includes:

A. Caps, typically of between $250,000 and $500,000, on the amount an injured person could recover for pain and suffering. Thus, a passenger in a defectively designed jeep that turned over who has become a quadriplegic, or a person permanently burned and disfigured by an exploding Pinto gas tank, could recover for only a small fraction of his actual pain and suffering.

B. The elimination or severe limitation of punitive damages. Punitive damages are meant to deter corporations and individuals from consciously disregarding safety. Thus, when Ford deliberately did not make an $11 improvement in the Pinto gas tank because it calculated that the cost of the improvement was greater than the benefit of avoiding the 180 deaths and 180 burns it estimated would occur without the improvement, Ford was held liable for punitive damages. A. H. Robins, the maker of the Dalkon Shiled IUD, was also held liable for punitive damages when it failed to warn women or doctors of the damages it knew about: that the string attached to the Shield wicked bacteria that could cause serious infection resulting in infertility or even death. Because no effective criminal penalties exist to deter corporate disregard for safety, eliminating or restricting punitive damages would increase the likelihood that safety will be disregarded.

C. Limiting contingency fees. Under the contingency fee system, a lawyer who files a lawsuit on behalf of an injured individual receives one-third of any recovery; if he loses the case, he not only receives nothing but often pays the expenses of suit out of his own pocket. This system enables average people, who could never afford to pay a lawyer by the hour (hourly rates typically range from $100 to $250 and up) to have their day in court. The insurance industry seeks to limit contingency fees to a much smaller percentage -- sometimes as little as 10% -- of any recovery above a specified amount. As the Institute for Civil Justice has found, to so limit contingency fees would "tend to reduce attorney effort and hence the plaintiff's probability of injury, the gross recovery and the net realized by the plaintiff." See P. Danzon, An Economic Analysis of the Medical Malpractice System, 1 Behavioral Sciences and the Law 39, 52-53 (1983).

D. Eliminating joint and several liability. Under the doctrine of joint and several liability, all defendants who are responsible for an injury are liable for the injured person's damages. The injured person can recover from whichever defendant or defendants he chooses, and it is then up to the defendants to work out among themselves who ultimately must pay how much. The insurance industry wants to eliminate this doctrine and make each defendant responsible for only part of the damages he has caused. Thus, when a defendant is bankrupt or immune from suit -- as is often the case, for example, in asbestos litigation -- the injured person may well recover only a small percentage of his damages. The policy behind joint and several liability is that as between the innocent plaintiff and a defendant who has been negligent or has manufactured a defective product, the equities are on the side of the plaintiff: he should get his full recovery. Under the insurance industry's proposed

legislation, each wrongdoer benefits from the wrongdoing of all other wrongdoers: a single defendant is never liable for the injured person's full damages when more than one defendant is negligent.

4. Changing the substantive tort law to make it more difficult for injured people to win cases -- as proposed, for example, in the Kasten Product Liability bill -- would make the legal system less rather than more efficient.

The Kasten bill, like some state legislative proposals, would make it more difficult for injured people to win lawsuits by eliminating strict liability in design defect cases, eliminating strict liability for retailers and distributors in all types of cases, suppressing evidence of subsequent remedial measures, and establishing a statute of repose (an absolute bar to suit for injuries caused by products more than a certain number of years old, typically eight to 25). Because such changes would override well-established law, and because statutes of repose have been held unconstitutional in five states, such changes in the law would breed more litigation, not less. And because thy increase the burden of proof for the injured person, they would require the introduction of more evidence and thus create more delay (assuming they did not entirely deter injured people from suing).