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Ballot Measure 81: Limitations on Civil Damages

City Club of Portland (Portland, Or.)

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ballot measure

81:

limitations on civil damages

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Your committee found:

After a few weeks of intense investigation of Measure 81, we found the issues complicated, reliable facts in short supply, and the likely impacts of both passing and not passing Measure 81 hotly contested, but primarily unknown. The legislature rushed through this far-reaching proposal to amend the Oregon Constitution in less than a week. Legislators did so without a clear understanding of what the problems are, with no public input or deliberation on the implications of their proposed remedy. Whatever Measure 81 might do to encourage stable and affordable liability insurance in Oregon and to protect public employees and volunteers from lawsuits, is far outweighed by the potential threat it poses to important constitutional rights, especially the right of an injured citizen to seek appropriate compensation for injuries and damages before a jury in a court of law.

Our committee unanimously recommends a "NO" vote on Measure 81.

The City Club membership will vote on this report on Friday, April 28, 2000. Until the membership vote, the City Club of Portland does not have an official position on this report. The outcome of this vote will be reported in the City Club *Bulletin* dated May 12, 2000.

I. INTRODUCTION

Ballot Measure 81 will appear on the ballot as follows:

Caption:	Amends Constitution: Allows legislature to limit recovery of damages in civil actions.
Result of "Yes" Vote:	"Yes" vote adds constitutional provision allowing legislature to limit recovery of damages in civil actions.
Result of "No" Vote:	"No" vote retains restrictions on legislature's authority to limit recovery of damages in civil actions.
Summary:	Amends Constitution. Under the Oregon Constitution, the right to jury trial restricts the legislature's authority to limit recovery of some kinds of damages in some civil actions. This measure overrides that restriction by adding a new constitutional provision expressly allowing legislature to impose limits on damages that may be recovered in any civil action.

(The language of the caption, question, and summary was prepared by the Oregon Attorney General.)

The 1999 Oregon Legislature drafted and referred this constitutional amendment to voters in the final days of the 1999 legislative session. Measure 81 is the legislature's response to a 1999 Oregon Supreme Court decision (*Lakin v. Senco Products, Inc.*) that held unconstitutional a \$500,000 cap on non-economic damages originally passed by the Oregon Legislature in 1987.

The City Club appointed a committee of Club members to study Measure 81. Committee members were screened to ensure that no member had an economic interest in the outcome of the study or had taken a public position on the subject of the measure. Our committee interviewed proponents and opponents of Measure 81, current and former legislators, a law professor, and other individuals. Committee members also reviewed relevant articles, reports, and materials provided by Measure 81 proponents and opponents.

Measure 81 is supported primarily by insurance companies, the Oregon Medical Association, and large business interests. The measure is opposed primarily by trial lawyers, and civil rights, consumer rights and victim advocate groups, and union and environmental groups.

How would Measure 81 amend the Oregon Constitution?

Measure 81 would amend the Oregon Constitution, by adding the following language to Article VII, Section 3:

"Notwithstanding any other provision of this Constitution, the Legislative Assembly by law may impose limitations on the damages that may be recovered in civil actions."

The amendment would give the Oregon Legislature the authority to limit damages awarded in any type of civil damage case.

II. BACKGROUND

Measure 81 is the Oregon Legislature's response to a July 1999 Oregon Supreme Court decision. The decision—*Lakin v. Senco Products, Inc.*—invalidated an Oregon law that limited non-economic civil damages to no more than \$500,000. The legislature imposed the cap in 1987 as part of a broader package of "tort reforms." An understanding of this measure requires some background on the general tort reform movement in the U.S., tort reform in Oregon, and the Supreme Court's *Lakin* decision.

Tort Reform—The National Context

During the mid-1980s, manufacturers, local governments, doctors, non-profit groups and other commercial purchasers of insurance experienced significant increases in their insurance premiums, reduced coverage, and policy cancellations. The insurance industry and large business interests blamed the problems on a dramatic increase in damage claims and lawsuits, frivolous lawsuits, and large damage awards by juries. They advocated a wide range of "tort reforms" to restrict the ability of consumers and others to pursue civil claims and recover large damage awards. The proponents suggested these reforms would "stabilize and reduce insurance rates." As a result, in 1986, 41 states passed some form of tort reform legislation. Since then other states, including Oregon, have adopted similar limitations.

In the 1980s, trial lawyers, consumer groups, and others acknowledged the problems of escalating insurance premiums and shrinking access to insurance. They said, however, that the legal system was not the problem. Instead they blamed the "insurance crisis" on the cyclical ups and downs of the insurance industry and a "self-inflicted phenomenon caused by the mismanaged underwriting practices of the [insurance] industry itself." (1999, *Premium Deceit*.)

Insurance companies collect premiums from their customers, invest the proceeds, and estimate a rate of return on their investments. They factor this rate of return into their calculation of the premiums they need to charge to provide the company's desired level of return. Tort reform opponents say that, when interest rates or insurer profits are high, insurance companies aggressively compete to sell policies and use the increased premiums to take advantage of the higher interest rates. Opponents say that insurance companies often generate additional premium payments to invest by lowering prices and insuring poor risks. When interest rates drop, insurance companies increase their premiums and reduce the availability of coverage, thereby creating a "liability insurance crisis."

Tort reform supporters continue to advocate for additional restrictions on civil suits and awards. Their opponents claim that tort reforms have failed to reduce insurance premiums—a key claim of tort reform supporters—and that tort reform restrictions violate basic rights, hinder adequate compensation for plaintiffs, and allow large companies to avoid accountability for defective products or harmful practices. Over the past 14 years, 19 state supreme courts (including Oregon's) have struck down individual tort reform statutes or entire packages of tort reform laws. Courts have held caps on non-economic damages unconstitutional in many of these states because the caps violate the separation of powers or the right to a jury trial under their state constitutions.

Tort reform continues to be a major and controversial political issue. In the early 1990s, tort reform was an element of the Republican "Contract with America." In 1999, the Florida Legislature passed an extensive tort reform package. Tort reform is also playing a role in the 2000 U.S. presidential campaign. Presidential Candidate George W. Bush has made tort reform one of his key campaign goals, while trial lawyers are contributing millions of dollars to defeat him.

What is "tort reform?"

A "tort" is a wrongful act that causes harm and for which a civil action can be brought in court to recover damages. Three types of damages are common in civil cases:

- **Economic:** damages with clear monetary costs, such as medical costs or lost wages.
- **Non-economic:** damages that are intangible and are not easily assigned monetary values, such as pain, mental suffering, emotional distress, humiliation, infertility, permanent disability, disfigurement, loss of a limb, or other physical impairment.
- **Punitive:** damages assessed against a defendant to punish particularly outrageous, deliberate or harmful misconduct, and to deter the defendant and others from similar misconduct.

Determining the amount of damages in a civil case has for centuries been a traditional role of a jury. While judges determine issues of the law, juries determine issues of fact. A common tort reform is to limit or cap damage awards, such as non-economic and punitive damages. Tort reform critics charge that such caps interfere with the jury's role by setting damages based on arbitrary limits rather than the evidence in a particular case.

Other common tort reforms include: reducing the damages an injured party receives by the amount the injured party receives from other sources (e.g. insurance payments); limits on contingency fees to reduce the incentive for lawyers to take cases; limits on the ability of an injured party to collect full damages from a single party when multiple parties are each 100 percent at fault; restrictions on the ability of plaintiffs to receive interest on a damage award until it is paid; immunity from liability if a defective product meets current government standards; limits on the length of time a party is liable for injuries caused by a defective product; and requirements that plaintiffs receive settlements in payments over time instead of a lump sum.

Tort Reform in Oregon

In the 1980s, Oregon experienced the same problems with high insurance premiums and lack of access to insurance as the rest of the nation. In 1986, Governor Vic Atiyeh appointed a task force to examine ways to control the cost and ensure the availability of liability coverage to businesses, professional persons and other citizens. The task force, composed primarily of insurance and business representatives, made a number of recommendations later considered by the 1987 Oregon Legislature.

In addition to general insurance reform provisions, the Task Force recommended a series of tort reforms designed to reduce the price of insurance premiums. Among them:

- **limitations for non-economic damage awards,**
- **periodic rather than installment payment of damages,**

- **the abolition of joint and several liability** (when multiple parties are each found to be fully responsible for causing an injury, the ability of a plaintiff to recover the full amount of damages from any one of these parties, if the others cannot pay their share),
- **the abolition of punitive damages from all civil actions except where required by statute,**
- **a limitation on attorney's contingency fees** (the portion of a settlement that goes to the attorney),
- **a repeal of the collateral source rule** (a rule that prevents a party responsible for causing an injury from reducing its financial responsibility by the amount the injured party receives from outside sources (e.g. health insurance, social security, free medical care, etc.)),
- **increased sanctions to deter the filing of frivolous lawsuits,**
- **expert qualification of the merits of a case,**
- **waiver of the physician-patient privilege during litigation, and**
- **limitation of liability for directors of non-profit and charitable organizations.**

At the time, the Governor's Task Force and other tort reform proponents presented little evidence of excessive runaway jury awards in civil actions, or a direct link between the amount of jury awards and the rise in insurance premiums. Nevertheless, legislators in Oregon, as in other states across the nation, believed a limit on damage awards would result in a reduction in the cost of insurance premiums.

1987 Tort Reform Act: The 1987 Oregon Legislature passed some, but not all, of the Governor's Task Force recommendations into law. The series of tort reform statutes included a cap on non-economic damages of \$500,000 (ORS 18.650)¹. The Oregon Supreme Court's invalidation of this cap led the legislature to refer Measure 81 to voters.

1994 *Tenold v. Weyerhaeuser*: In 1994, the Oregon Appeals Court, in a case called *Tenold v. Weyerhaeuser* (127 Or App 511, 873 P2d 413 (1994)), held that

¹ORS 18.650 provided in relevant part: "(1) Except for claims subject to ORS 30.260 to 30.300 [the Oregon Tort Claims Act] and ORS chapter 656 [the Oregon Workers' Compensation Act], in any civil action seeking damages arising out of bodily injury, including emotional injury or distress, death or property damage of any one person including claims for loss of care, comfort, companionship and society and loss of consortium the amount awarded for non-economic damages shall not exceed \$500,000."

the \$500,000 cap on non-economic damages violated the Oregon Constitution. The relevant section of the constitution states:

"In actions at law,...the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say that there is no evidence to support the verdict." (Article VII (Amended), section 3.)

After this decision, the constitutionality of the cap on non-economic damages was clearly in question. Plaintiffs and defendants used this uncertainty in their settlement negotiations. Plaintiffs argued for higher settlement amounts warning that the cap would be eliminated, and defendants arguing for smaller settlement amounts saying the cap would be found constitutional.

1999 Lakin Decision: In 1992, John and Anne Marie Lakin were awarded non-economic damages in the amount of \$2,000,000 and \$876,000 respectively, for permanent brain injuries that Mr. Lakin sustained as a result of the malfunction of a pneumatic nail gun manufactured by Senco Products, Inc. The trial court applied the tort reform provisions of ORS 18.650 which placed a cap on the amount of non-economic damages a plaintiff could be awarded, and subsequently reduced the non-economic damage award to \$500,000. Mr. and Mrs. Lakin and Senco Products, Inc. appealed.

On July 15, 1999 the Oregon Supreme Court held that the statutory cap on non-economic damages as found in ORS 18.650 violated Article I, Section 17 of the Oregon Constitution². (*Lakin v. Senco Products, Inc.*, 329 Or. 62 (Or. 1999)).

In a unanimous decision, the court found that Article I, Section 17 of the Oregon Constitution guarantees the right to a trial by jury in civil actions—but only civil actions for which the common law provided a jury trial in 1857. The year 1857 is significant because that was the year the Oregon Constitution was drafted and approved by voters of Oregon Territory. The Supreme Court focused on what was common practice in 1857 in an attempt to define the scope of the right to a jury trial as closely as possible to that intended by the drafters of the constitution.

The court went on to find that in 1857 as well as today, the amount of damages awarded is a question of fact to be determined by the jury. As a

²Article I, Section 17 states: "In all civil cases the right of Trial by Jury shall remain inviolate."

result of this finding, the court held that the ORS 18.650(1) requirement that "the amount awarded...shall not exceed \$500,000" impermissibly violates the jury's factual determination of the amount of damages and the plaintiff's right to a trial by jury. The Supreme Court found ORS 18.650 to be unconstitutional, and reinstated the jury's full non-economic damage award to Mr. and Mrs. Lakin.

Ballot Measure 81: Within only one week of the *Lakin* decision, the Oregon Legislature had drafted and passed House Joint Resolution 2 (HJR2), which referred Measure 81 to the voters for the May 2000 ballot. While Measure 81 does not itself reinstate the damage cap in ORS 18.650(1), it gives the legislature the constitutional authority to impose caps on damage awards in any type of civil actions. No public hearing was held on this proposed amendment to the state constitution. Instead, Senate Judiciary Committee Chair Neil Bryant gave the lobbyists of the proponents and opponents each 15 minutes speak to the committee. Oregon Attorney General Hardy Myers took the unusual step of sending a formal letter to the Senate Judiciary Committee urging the committee not to refer the measure to voters with so little review.

The timeline for HJR 2 . The steps in the process were as follows:

- July 15: Oregon Supreme Court *Lakin* decision released
- July 19: Senate Judiciary Committee work session
- July 20: moved out of committee
- July 22: approved by Oregon Senate by (18 to 11)
- July 23: approved by Oregon House of Representatives (34 to 26)
- July 24: 1999 legislative session adjourned.

At issue for the voters of Oregon are two general propositions: First, is a constitutional amendment granting the legislature the ability to cap damages in civil actions necessary (i.e. does the reasoning behind the above-mentioned 1987 tort reform still apply)? Secondly, does the Supreme Court's decision in *Lakin v. Senco Products, Inc.* have implications for other statutes in Oregon beyond the repudiation of ORS 18.650(1)?

The Breadth of the Lakin Decision

The court's opinion in *Lakin v. Senco Products, Inc.* leaves a question regarding which other Oregon statutes currently in effect will be subject to challenge as an unconstitutional violation of the right to a trial by jury. Oregon Supreme Court Justice George Van Hoomissen's statement that Article 1, section 17 of the Oregon Constitution is violated when the legislature "interfere[s] with the full effect of a jury's assessment of non-economic damages, at least as to civil cases in which the right to a jury trial was

customary in 1857, or cases of like nature" has caused Measure 81 proponents to decry the end of many of the tort reform statutes passed in 1987 as well as laws limiting liability or granting immunity to certain people (i.e. Good Samaritan laws, guest-passenger statutes, governmental immunity, etc.). (*Emphasis added.*)

2000 "Kantor" Decision: In February 2000, Multnomah County Circuit Court Judge Henry Kantor issued the first court opinion based on the *Lakin* decision. The State of Oregon Office for Services to Children and Families (SCF), and individual SCF caseworkers and court-appointed attorney had been accused of negligence that led to the abuse and death of two children at the hands of their caregivers. Under prior state law, individual public employees could not be sued. Based on the *Lakin* decision, Judge Kantor held that the "removal of the right to sue the government employee...would violate the injured person's right to a jury trial against the government employee...." (Opinion of Judge Henry Kantor in *Fellows v. Coomes, et al.*, Multnomah County Circuit Court, February 15, 2000.)

Whether or not the *Lakin* decision has the far reaching effect suggested by Measure 81 proponents is debatable and gets to the heart of what is properly the province of the Supreme Court, and what should be left to the legislature. Nevertheless, the wording of Ballot Measure 81 would render the *Lakin* decision, and that debate moot by its terms "[n]otwithstanding any other provision in this Constitution ...".

It is against this backdrop that the voters will decide whether a constitutional amendment should be adopted allowing the legislature the ability to limit damages in civil actions.

III. ARGUMENTS PRO AND CON

A. Arguments Advanced in Favor of the Measure

- Important state laws are clearly jeopardized by the *Lakin* decision. These include liability and damage protections that apply to a wide range of occupations and activities, including limits for police officers, firefighters, teachers and other public employees.
- Without Measure 81, individuals and non-profit organizations that perform a wide range of important and essential activities and services may lose existing immunities and liability limits. As a result, they may decide not to take essential actions or provide necessary services.
- Measure 81 would allow the legislature to protect the immunity of individuals currently protected by the "Good Samaritan" law from civil lawsuits.

- Measure 81 would allow state lawmakers to eliminate the risk that large "pain and suffering" jury verdicts would drive up the cost of malpractice insurance for physicians and force doctors to leave Oregon.
- Trial lawyers have created a new loophole that threatens to eliminate existing laws that protect Oregonians from unfair lawsuits because trial lawyers don't want any limits on their fees.
- Without the constitutional change in Measure 81, uncertainty over damage and liability limits have to be resolved by court challenges—statute by statute, case by case, year by year.
- Without Measure 81, exhaustive historical analysis will be required to determine if any given damage claim was a function of a jury trial in 1857.
- The Oregon Legislature thoroughly studied and debated tort reform in 1987 and 1995. Legislators did not need to hold extensive hearings to hear this same testimony again before passing HJR 2.
- Measure 81 will help keep in place over 80 existing state laws that protect Oregonians from unfair and frivolous lawsuits, and maintain the checks and balances in Oregon's 140-year old legal system by preserving the state's authority to set reasonable limits on damage awards in civil cases.

B. Arguments Advanced Against the Measure

- Measure 81 would effectively take away every Oregonian's most basic right—their right to complete and impartial justice before a civil jury.
- Instead of damage awards being determined by a jury on evidence brought forward at the time of a trial, damages would be predetermined by politicians who set arbitrary limits based on special interest lobbying.
- "Tort reforms" do not lower insurance costs or rates. Insurance rates in Oregon, a state with some of the most severe tort restrictions in the nation, have not proven better than many other states with no limits on the decision-making of juries.
- Measure 81 is so broadly written it would seriously weaken other provisions and jeopardize the fundamental rights of all Oregonians. The legislature would be able to set limits that violate the Oregon Bill of Rights or other sections of our state constitution.
- The *Lakin* decision does not put public employees at risk. They are indemnified by their employer for their conduct on the job. The court's decision does not change the immunity from suits enjoyed by government bodies or agencies in Oregon.
- The five-day process the Oregon Legislature used to draft and pass HJR 2 showed a shocking disregard for both public process and deliberative decision-making and a complete lack of understanding of the importance of our state constitution as our fundamental law.

- Measure 81 will upset the balance of power between the legislative and judicial branches of our state government. It will throw out the mix of constitutional provisions, statutes, and judge-crafted common law that currently govern damage awards.
- We need "insurance industry reform" not "tort reform." The "insurance crisis" of the 1980s was caused not by the legal system, but by the underwriting cycle and economic and strategic decisions made by the insurance industry.
- "Tort Reform" is a hoax perpetrated by insurance companies and other large companies. If Measure 81 passes, defiant, reckless companies will not be held accountable for dangerous products and practices that hurt the public.
- Oregon has seen very few large jury verdicts and does not have a malpractice insurance crisis. No evidence exists that arbitrary damage caps lower overall premiums to doctors, or that median damage awards are significantly higher in states without damage caps.
- Oregon taxpayers will ultimately have to pay to care for victims who do not receive adequate damage settlements to cover their medical and other care needs.

IV. DISCUSSION

Measure 81 requires Oregon voters to decide a number of important issues. Does the Oregon Supreme Court's invalidation of the \$500,000 damage cap pose a serious problem? If so, is the constitutional amendment proposed by Measure 81 an appropriate solution to the problem? Do any potential benefits of Measure 81 outweigh concerns about impacts on the balance of power in Oregon's government and restriction of access by plaintiffs to civil remedies? We discuss the pros and cons of these issues below.

Is there a problem that needs to be solved by Measure 81?

Measure 81 proponents and opponents strongly disagree about the nature and cause of any existing or potential problems with insurance rates and accessibility. Proponents say that many individual professionals, doctors, small businesses, local governments, and non-profits continue to have difficulty affording insurance coverage. They say these problems are caused by high numbers of lawsuits and large damage awards by juries. Proponents say that the *Lakin* decision threatens many of the tort reforms that were enacted to stabilize insurance rates and increase availability. They cite two studies (Office of Technology Assessment, 1993; and Congressional Budget Office, 1998) that show that caps on damages are effective in "lowering payment per paid claim and, hence, malpractice insurance premiums."

Measure 81 opponents counter that there is no evidence that tort reforms reduce insurance premiums or increases accessibility. A 1999 national study by Citizens for Corporate Accountability & Individual Rights analyzed insurance rate activity since the first wave of tort reform in the 1980s. The study found that "tort law limits enacted since the liability insurance crisis of the mid-1980s have not lowered insurance rates in the ensuing years. States with little or no tort law restrictions have experienced the same level of insurance rates as those states that enacted severe restrictions on victims' rights." Proponents also presented figures showing that insurance company profits are substantially higher in Oregon than the national average. They claimed that Measure 81 would enable Oregon's insurance companies to continue to enjoy those higher profits by limiting their responsibility to pay legitimate damages to injured parties.

Large Jury Damage Awards: Our committee was surprised by how much trouble we had finding information on the actual overall number and size of jury damage awards in civil cases and final settlement amounts. Little information is readily available to help citizens or lawmakers determine whether Oregon has a problem with large jury awards. Most of the information provided by Measure 81 proponents and opponents was anecdotal or incomplete.

Representatives of the Oregon Attorney General, the Oregon Judicial Department, the Oregon Insurance Division, and the Oregon State Bar Association told us they did not know of anyone who tracks jury verdicts and settlement amounts. It was only in the final days of our research that we discovered that commercial services—like Jury Verdicts Northwest—do track this information—a source well-known to trial attorneys. Reporting to these services is voluntary and information is not available on every case—some settlements are confidential and are not reported.

Neither Measure 81 proponents or opponents were able to provide us with an overall picture of the number and size of large non-economic damage awards in Oregon since 1987 or the number of times judges have imposed the \$500,000 cap on non-economic damages.

In 1994, the *Tenold* decision cast into doubt the constitutionality of the non-economic damages cap. Proponents provided a list of 12 large jury damage verdicts in Oregon civil cases since 1994. The verdicts include non-economic damages from \$613,000 to \$12 million. Proponents told us that if judges had imposed the \$500,000 cap in these cases, the defendants and their insurance companies would have saved \$41,295,000. A proponent told us that the cases were settled—some for much less than the jury

verdict and others for close to the jury verdict amount—while others are still being appealed.

A Measure 81 opponent recently wrote in the Oregon State Bar Bulletin that large verdicts are rare in Oregon. He goes on to say "Awards in Oregon are 'less than half the national average.' The size of personal injury verdicts in Oregon has been on the decline since at least the early 1990s." He adds that "fewer than 5 percent of all civil cases are tort cases (which includes business and bodily injury claims)."

Both plaintiff and defendant representatives complained that the other side uses threats of lengthy appeals and the uncertainty of their outcome to negotiate settlements that are too low for plaintiffs or too high for defendants.

The *Oregonian*, in an April 8, 2000 editorial, accused the legislature of allowing inflation to "erode awards for non-economic damages toward insignificance," by allowing the \$500,000 cap on non-economic damages to remain unchanged since 1987. The editorial said that the \$500,000 limit had only \$320,000 of buying power at the time of the *Lakin* decision. "The award ceiling would have had to rise up to \$778,200 to have kept injured parties even with the purchasing power of 1987 in Oregon."

Medical malpractice insurance: Proponents warn of a health care crisis caused by soaring medical liability insurance rates unless the 1987 law that set a cap on non-economic damages is reinstated. Proponents claim there will be a shortage of doctors in some parts of Oregon where lower fees will render liability insurance unaffordable. Opponents countered this claim with figures showing that insurance rates in Washington State, where caps were repealed, are no higher than Oregon's rates. They also provided statistics that showed that the percentage of Washington's population that lacks access to primary health care is in fact lower than the percentage of Oregonians without access to care.

Proponents countered that Oregon malpractice premiums are roughly half what they were 12 years ago, and that physicians in Washington State on average pay twice as much as Oregon physicians for malpractice insurance. They said that in 1998 the total of premium payments for all medical professional liability insurance in Oregon was \$38.8 million. The chief executive officer of one regional medical insurance company reported that last year the company took in \$12 million in premiums and paid out about the same amount in settlements. When defense costs and business costs were added in, the company ended the year with a loss. He warned that multi-million dollar awards—one recent award totaled \$17 million—could easily break the system.

Proponents warn that many doctors carry only \$1 million in liability coverage. A multi-million settlement can easily exceed both this limit and the value of the doctor's personal assets. Proponents warn that, as a result, some doctors in Oregon are beginning to avoid high-risk procedures and high-risk patients to protect themselves from lawsuits.

Implications of the *Lakin* Decision

Most witnesses agree that *Lakin* opens the door to challenges of other Oregon tort reform statutes. They differ on the vulnerability of different existing liability limitations and the desirability of preserving these tort restrictions. A law professor suggested that some some limits will be challenged.

Actions subject to jury trial in 1857: Most witnesses agreed that the *Lakin* decision raises questions about what types of actions were subject to a jury trial in 1857. Measure 81 proponents warned that exhaustive historical analysis will be required to determine if any given damage claim was a function of a jury trial in 1857, leading to uncertainty over damage and liability limits that will have to be resolved by court challenges—statute by statute, case by case, year by year. The law professor believes that public employee immunity would not be in question. He said that Oregon's \$500,000 cap on punitive damages is probably not vulnerable to a challenge. The opportunity to impose punitive damages did not exist in 1857 and was not traditionally within the power of a jury to determine. He suggested that a number of other immunities granted by the legislature in past years may be open to challenge.

Potential vulnerability for public employees: A key argument of the proponents is that the *Lakin* decision and the subsequent "Kantor" decision threaten the immunity of public employees from being sued as individuals for damages caused in the course of their duties. A law professor who spoke to our committee disagreed. He said that public employees are protected under the "sovereign immunity" that applies to most government entities. "Sovereign immunity" stems from a determination by Britain's King John (the signer of the Magna Carta in 1215) that subjects do not have the right to sue their king or sovereign for damages. Governments later took on this same protection. In 1857, citizens did not have the right to sue their state or local governments. The state only granted limited opportunity to sue state government in the 1960s through passage of the Oregon Tort Claim Act. Measure 81 proponents agree that state agencies are not affected but state that the "Kantor" decision clearly found that any limitation of the liability of public employees violates the right to a jury trial under the *Lakin* decision.

Liability limitations for Good Samaritans and volunteers: Proponents warn that immunities granted to a wide variety of individuals who provide aid and services could be invalidated under the *Lakin* decision, discouraging people from providing these needed services. Some Measure 81 opponents say that the legislature has the authority to define the conditions for immunity, which would not be affected by the *Lakin* decision's invalidation of cap on non-economic damages. Proponents said this distinction will not hold up under *Lakin*.

A law professor told us that immunity for volunteers could be challenged, but no one knows how the courts would rule. Good Samaritans are generally immune unless they act with "gross negligence." Some claim that *Lakin* may prevent the legislature from limiting damages through its definition of "gross negligence." The law professor also questioned whether the legislature needs to take any action to protect Good Samaritans. He reported no cases that he was aware of in the U.S. in which a doctor, acting as a Good Samaritan, had been successfully sued. He questioned how many juries would find damages against individuals who acted in good faith to try to help someone.

Measure 81 opponents told us that even if volunteers lose their immunity under Oregon law, the Federal Volunteer Protection Act of 1997 protects volunteers from most damage claims. Proponents concede that this federal law provides some protection but only for volunteers who are assisting government entities or non-profits. They say it does not cover Good Samaritan actions or damages caused by a volunteer driving a car. They also caution that non-profits and their board members are not covered.

The Legislative Drafting and Review Process

The legislature's fast-track approach to Measure 81 raises important questions about the way constitutional amendments should be drafted and reviewed. Senate Judiciary Committee Chair Neil Bryant defends the process he used to move the measure forward. He said the Supreme Court announced its decision just seven days before the end of the legislative session. He said he approached lobbyists on both sides of the issue and told them of his intention to propose a constitutional amendment. Bryant told them they would each have 15 minutes to present their respective positions before the Judiciary Committee.

A representative of the Oregon Medical Association supported Bryant's decision and said that further testimony was not necessary because the legislature had heard extensive public testimony from tort victims in 1987 and in 1995. His comment does not appear to recognize that Measure 81

would amend the state constitution and that the measure's impacts are very different than statutory measures the legislature considered in 1987 and 1995.

Senator Kate Brown, ranking minority member of the committee, said she was "horrified" by the process. She told our committee that "this is a constitutional amendment, after all, a big deal. The hearing was very brief, with very little opportunity for public input, none at all for tort survivors.... There was practically no discussion about the ramifications" of the proposed measure. She said that lack of input and deliberation was very unusual, especially for a measure with such a large impact.

Oregon Attorney General Hardy Myers took the unusual step of sending Senator Bryant a letter (dated July 19, 1999) urging the committee not to refer the measure to voters. Myers wrote that

"...sound public policy is not served by responding to a particular Supreme Court opinion with a hastily drafted amendment affecting parts of the Bill of Rights that have existed unchanged since 1859. Even more than ordinary lawmaking, constitutional lawmaking should occur only after careful, thorough deliberation. The constitution, after all, is our *fundamental* law, expressing our basic values. Further, the precedent established by this hurried measure can pave the way for future hurried constitutional amendments affecting protection of...other important rights."

Myers continued that:

"Neither the implications of the Lakin decision, " or the response suggested by HJR 2, [are] fully understood. For all of these reasons, I urge you to refrain from referring this constitutional amendment to the people. Instead, I suggest that the subject it addresses be committed to an interim task force, or to the Oregon Law Commission, for thorough and thoughtful study, possibly resulting in a proposed measure for the 2001 session."

The *Oregonian*, in an April 8, 2000 editorial opposing Measure 81, wrote: "Seldom if ever during the last 30 years have the editors of The Oregonian seen the Legislature stampeded more recklessly than in the case of Measure 81."

Is Measure 81 an appropriate response to the Lakin decision?

Measure 81 would go far beyond allowing the legislature to reinstate the \$500,000 cap on non-economic civil damages invalidated by the *Lakin* decision. The measure would give the legislature broad authority to limit damage awards in all types of civil damage suits. Measure 81 supporters say that the measure would give the legislature the authority to set reasonable limits to protect citizens from excessive civil damage awards. Without Measure 81, a wide range of existing statutes providing immunity or limiting damages would be subject to challenge under the *Lakin* decision, a position supported in a November 1999 analysis prepared by Legislative Counsel. Opponents claim that no evidence substantiate proponents' claims that a measure as broad as Measure 81 is needed to correct the concerns the proponents delineated.

Breadth of Measure 81: A key feature of Measure 81 is its broad reach. If approved by voters, Measure 81 would authorize the legislature to impose limits, not just on non-economic damages or even other tort damages, but on any damage awards in any type of civil case. We were told that tort claims represent only a small portion of the civil case load in Oregon. A law professor suggested that businesses should be concerned about Measure 81 because it may allow the legislature to limit their ability to pursue damages resulting from business agreements and transactions.

Senator Bryant said legislators likely would not use the authority provided by Measure 81 to impose excessive or inappropriate restrictions. He added that any restrictions would have to run the gauntlet of the legislative process. He said that trial lawyers and consumer advocates have effective lobbies that defend their interests. Parties on both sides of the issue would have ample opportunity to battle out any damage limitations before they are ever enacted into law. Some witnesses found this assurance ironic, given the lack of input with which Measure 81 was passed by the legislature. Opponents also noted that the legislature would have little motivation to compromise given that the language of Measure 81 may prevent the Governor from vetoing any damage restrictions and voters from referring or amending the restrictions through the initiative process.

Senator Brown questioned why Measure 81 was not drafted more narrowly to "deal exclusively with non-economic damages, because that's what the *Lakin* ruling dealt with. Why did they feel they had to include all damages?" She said she would have supported a more narrowly written measure to reinstate that cap on non-economic damages.

Constitutional Rights: Proponents are concerned about dire consequences for insurance affordability and accessibility if the *Lakin* decision stands. They believe that the need for limits on jury damage awards outweighs any belief that juries should have the right to assess damages on a case by case basis. They believe action is needed now. Opponents believe that such important rights are at stake that they should not be limited without clear evidence of a serious problem.

The American Civil Liberties Union (ACLU) and others raise concerns that language "notwithstanding any other provision of this Constitution..." would allow civil damage limitations to override other provisions of the Oregon Bill of Rights. The ACLU's raised concerns that the civil damage limitations enacted by the legislature could supersede the following constitutional rights:

- Article I, section 20 which prohibits granting any "privileges or immunities to any class of citizens which are not equally available to all";
- Article I, section 10 which requires that every person "shall have remedy by due course of law for injury done him in his person, property, or reputation;" and
- Article I, section 17 which says that "in all civil cases the right to trial by jury shall remain inviolate."

Opponents suggested that if Measure 81 passes, any further attempts to cap damage awards could be appealed to the U.S. Supreme Court as a violation of U.S. Constitution's 7th amendment protection of right to jury trial. Proponents responded that "regardless of whether Measure 81 passes, important individual rights are protected by the provisions of the U.S. Constitution."

Balance of Power: Measure 81 opponents cautioned that the language in Measure 81 that states "Notwithstanding any other provision of this constitution...", could undermine the balance of power between the executive, legislative, and judicial branches of Oregon's state government. A representative of the Oregon Attorney General questioned whether the Governor would have any authority to veto legislation passed by the legislature if it is related to limits on civil damages. He questioned whether citizens would be precluded from referring or changing this legislation through the initiative process. Other witnesses warned that the measure would limit the court system's authority to sort out conflicts between statutes or between a given statute and the Oregon Constitution itself.

The ACLU warns that that Measure 81 would upset the balance of power between the legislative and judicial branches of government, and would give the legislature "complete power to reduce, or even eliminate, remedies for wrongs done."

Measure 81 proponents counter that Article XVIII, section 7 of the Oregon Constitution gives the legislature the power to alter or repeal all laws that existed in 1857. They say the *Lakin* decision itself creates questions about the proper roles of each branch of government.

City Club Criteria for Constitutional Amendments and Lawmaking

Measure 81 meets the City Club criterion that constitutional amendments only should relate to "the structure, organization and powers of government, and the rights of the people with respect to their government." But the legislature's hasty drafting and very limited review of HJR 2 fall far short of another City Club criterion: that lawmaking should be a thoughtful, informed, inclusive, and deliberative process. (See City Club reports: *The Initiative and Referendum in Oregon* (1996), and *The Process and Structure of the Oregon Legislature* (1997))

V. CONCLUSIONS

Our examination of Measure 81 quickly introduced us to a complex and intensely politicized battle between well-funded and powerful political forces. Oregon's Measure 81 is clearly a local skirmish in a broader national conflict over tort reform. After a few weeks of intense investigation, we found the issues complicated, reliable facts in short supply, and the likely impacts of both passing and not passing Measure 81 hotly contested, but primarily unknown.

We are very disturbed to find how little reliable information is available, either to lawmakers or the public, about the actual number and size of civil damage awards and final terms of settlement. Equally disturbing is the lack of reliable information about the impact these awards and Oregon's existing tort reforms have had on liability insurance in Oregon and on the just compensation of injured parties. Oregon lawmakers and voters need a much better understanding of these impacts and their implications before embarking on the broad constitutional change proposed by Measure 81.

The legislature rushed through this far-reaching proposal to amend the Oregon Constitution in less than a week. Legislators did so without a clear understanding of what the problems are, with no public input or deliberation on the implications of their proposed remedy. This process does no credit to legislative leaders and is an affront to the public trust. We agree with Attorney General Hardy Myers that "Even more than ordinary lawmaking, constitutional lawmaking should occur only after careful, thorough deliberation." As it stands, Measure 81 appears to be an overly

broad response to uncertain problems—a response that could have far-reaching, negative impacts on important public rights and constitutional protections.

A more responsible response to the *Lakin* decision is the one suggested by Hardy Myers: thorough and thoughtful study by an interim task force, the Oregon Law Commission, or some neutral and unbiased body, resulting in recommendations for further statutory action or constitutional amendment in the 2001 legislative session.

The *Lakin* decision will clearly influence how civil suits are pursued in Oregon. While proponents appear to exaggerate the dire consequences of not passing Measure 81, opponents similarly appear to overly minimize the likely impacts of *Lakin*. Some existing liability limits and immunities will probably be invalidated—although it is unclear how many will be challenged or how quickly. Many uncertainties will only be settled through legal tests and court decisions. Legislative remedies, if needed, should be carefully crafted and targeted to clear and documented problems. In responding, the legislature should first seek statutory remedies. Legislators should ask the voters to amend the state constitution only where clearly necessary.

In contrast, Measure 81 would institute an open-ended and broad transfer of constitutional power from juries to the legislature. Neither legislators or the Yes on Measure 81 Campaign has made the case that such a dramatic change is needed in our constitutional balance of powers—a balance that has existed for almost 150 years in Oregon.

Whatever Measure 81 might do to encourage stable and affordable liability insurance in Oregon and to protect public employees and volunteers from lawsuits, is far outweighed by the potential threat it poses to important constitutional rights, especially the right of an injured citizen to seek appropriate compensation for injuries and damages before a jury in a court of law.

VI. RECOMMENDATION

Your Committee unanimously recommends a "NO" vote on Measure 81.

Respectfully submitted,

Dianne Bocci
Brett Kenney
Martha Maroney
Ken McGair
Tom Tinkler
B. J. Seymour, vice chair
Hillary Barbour, chair

Les Swanson, research advisor
Paul Leistner, research director

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VII. APPENDICES

A. WITNESS LIST

Arwen Bird, executive director, Survivors Advocating for an Effective System
Kate Brown, ranking minority member, Oregon Senate Judiciary Committee
Neil Bryant, chair, Oregon Senate Judiciary Committee
James Dorigan, chief executive officer, Northwest Physicians Mutual Insurance Company
Scott Gallant, director of government affairs, Oregon Medical Association
Michael Lamb, Oregon Insurance Division
Ron Lansing, professor of law, Northwestern School of Law
Steve Larson, attorney
Thomas J. Sadoris, M.D.
Art Sasse, communications director, Trust Juries not Politicians Coalition
David Schuman, deputy Oregon attorney general
Dick Springer, former chair, Oregon Senate Judiciary Committee
Jill Thorne, Yes on 81 Campaign
Sarah Wetherson, communications coordinator, Trust Juries not Politicians Coalition
Max Williams, Oregon state representative

B. RESOURCE MATERIALS

42 USC Sec. 14501, 1997 *Federal Volunteer Protection Act*.

ACLU of Oregon, "Position on Measure 81 (May 16, 2000 Election), January 31, 2000.

Citizens for Corporate Accountability & Individual Rights. "Tort Reforms" that have been found unconstitutional," (Internet:<http://www.ccair.org/factsheets/unconstitutional.html>)

Dorigan, James T (CEO, Northwest Physicians Mutual Insurance Company).

Letter to Thomas Saddoris, M.D. responding to March 30, 2000 Health Forum presentation, April 4, 2000.

Editorials. "Protect trial by jury" and "A shadow of an award," *Oregonian*, April 8, 2000.

Governor's Task Force on Liability, "Final Report on Recommendations to Ease the Liability Insurance Strain in Oregon, July 1, 1986.

Heynderickx, David (senior deputy legislative counsel). Letter to Representative Max Williams analyzing likely impacts of *Lakin* decision, November 19, 1999.

Hunter, J. Robert and Doroshov, Joanne. *Premium Deceit: The Failure of "Tort Reform" to Cut Insurance Rates*, Citizens for Corporate Accountability & Individual Rights, 1999.

Letter from Oregon Attorney General Hardy Myers to Oregon State Senator

Neil Bryant, July 19, 1999

Opinion of Judge Henry Kantor in *Fellows v. Coomes, et al.*, Multnomah
County Circuit Court, February 15, 2000

Oregon Supreme Court decision, "Lakin v. Senco Products," July 15, 1999

Oregon Supreme Court, December 9, 1999, Delashmutt, et al v. Hardy Myers,
Oregon AG and Love v. Myers...

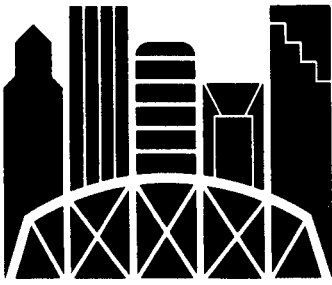
Trust Juries Not Politicians Coalition. "The Truth in Tort Reform: Trust the
Record!" March 1999.

Wayne, Leslie. "Trial lawyers dedicate big bucks to effort to defeat Bush,"
Oregonian, March 24, 2000.

Williams, Max (pro statement); Neuberger, Robert J. (con statement),
"Deciding Damages: Two Views on Ballot Measure 81," February/March
2000, pp. 19-26.

Williams, Steven (attorney, Cooney & Crew, P.C.). Letter to Scott Gallant
responding to Robert Neuberger article in Oregon State Bar Bulletin,
March 13, 2000.

Williams, Steven. Letter to Scott Gallant analyzing scope of 1997 Volunteer
Protection Act, April 6, 2000.



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