

TRANSCRIPT

marketplace  of ideas



featuring

HARVEY ROSENFELD

On his success in lowering the cost of insurance.

OCTOBER 24, 2005
THE HARVARD CLUB
NEW YORK CITY

**DRUM
MAJOR**
INSTITUTE FOR PUBLIC
POLICY

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U.S. House of Representatives, Eighth Congressional District
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Executive Director, Drum Major Institute for Public Policy

ABOUT DMI'S "MARKETPLACE OF IDEAS" SERIES:

Never content just to argue theory, the Drum Major Institute provides a platform for policymakers who have successfully worked for social and economic fairness in our public institutions. For far too long the conservative right has defined the limits of what is "possible" in society and politics. The "Marketplace of Ideas" shows that we can transcend these artificial boundaries: it is possible to be progressive, practical, and effective. Since its inception we've heard from Andy Stern, President of the Service Employees International Union; Howard Dean, former Governor of Vermont; Eliot Spitzer, Attorney General of New York State; Michael Hennessey, Sheriff of the City of San Francisco; and Rep. Hilda Solis, member of Congress for California.

PANELISTS AND SPEAKERS

HARVEY ROSENFELD

Harvey Rosenfield, founder of The Foundation for Taxpayer and Consumer Rights, is one of the nation's foremost consumer advocates. Trained as a public interest lawyer, Rosenfield authored Proposition 103 and organized the campaign that led to its passage by California voters in 1988 despite over \$80 million spent in opposition (still a record).

He has co-authored groundbreaking initiatives on HMO reform and utility rate deregulation (Proposition 9, 1998). Rosenfield is the author of the book, *Silent Violence, Silent Death: The Hidden Epidemic of Medical Malpractice* (Essential Books, 1994).

Rosenfield, who established FTCCR in 1985, has worked for the Federal Trade Commission, the U.S. Congress, in private practice, as a staff attorney for Ralph Nader's Public Citizen Congress Watch and as the Program Director for the California Public Interest Research Group (CalPIRG).

Rosenfield graduated magna cum laude from Amherst College and obtained a joint Law and Masters Degree in Foreign Service from Georgetown University.

SHOSHANA BOOKSON

Shoshana Bookson serves as a senior partner at Shandell, Blitz, Blitz & Bookson, LLP. She is known as a tireless advocate for injured people. Shoshana started her career assisting Richard Shandell with his complex trials. From that in-depth tutelage she has developed into a well respected trial attorney throughout the city. Defendants have learned that she is a tough but fair advocate. That reputation has earned her several seven figure settlements and verdicts.

Shoshana has served as President of the New York State Trial Lawyers Association (NYSTLA), previously having served as its Parliamentarian and on its board of directors for several years. She also serves as Chair of The Women's Caucus and is a member of several committees. She actively lectures other lawyers through seminars and frequently advocates the rights of the injured to our elected representatives. Shoshana has actively and effectively lobbied in both Albany and Washington D.C. to help fight the lies perpetrated by the insurance companies and their lobbyists. Whatever the issue, Shoshana is always on the side of the consumers and the injured, passionately and eloquently arguing their cause.

ASSEMBLYMEMBER PETER GRANNIS

Assemblyman Pete Grannis was first elected to the Assembly in the fall of 1974 and represents the Upper East Side of Manhattan and Roosevelt Island. He serves as a full-time legislator.

Mr. Grannis, as chair of the Assembly Insurance Committee since 1992, has authored landmark legislation on behalf of consumers, including New York's precedent-setting Community Rating/Open Enrollment law which revolutionized the way small group and individual health insurance policies are sold in the state. As a result of his work, New York banned health care discrimination in the individual and small group markets on the basis of a person's age, sex, health

condition or occupation and, for the first time, provided complete portability of health insurance coverage by closing gaps in the law which had allowed consumers to lose their coverage when they changed jobs or insurers. Many states followed New York in adopting similar provisions, and the federal Health Insurance Portability and Accountability Act of 1996 incorporates much of the portability standard enacted four years earlier in New York.

Mr. Grannis also has authored a long list of consumer protection laws for people in managed care plans that are among the strongest in the nation, and he is a leader in the fight to expand access to high quality health care coverage for all New Yorkers. His 1996 Managed Care Consumer Protection Act set out a range of new provisions to improve disclosure to consumers, regulate utilization review activities, outlaw so-called gag provisions on providers, establish due process standards for credentialing and termination of health care providers and enhance access to specialty care.

Mr. Grannis has developed important consumer legislation in the life, property and casualty areas as well, including a pioneering law requiring life insurance companies to report annually on the socially responsive investments and charitable contributions they make in New York, and measures to ensure the availability of homeowners' insurance in coastal areas. As co-chair of the Assembly Speaker's Task Force on Auto Insurance, he has championed far-reaching reforms designed to bring down New York's high automobile insurance rates.

ANDREA BATISTA SCHLESINGER

Since 2002, Andrea Batista Schlesinger has led the effort to turn the Drum Major Institute, originally founded by an advisor to Rev. Dr. Martin Luther King, Jr. during the civil rights movement, into a progressive policy institute with national impact. Under Andrea's leadership as Executive Director, DMI has released several important policy papers to national audiences including: *Middle Class 2004: How Congress Voted, People and Politics in America's Big Cities* and *From Governance to Accountability: Building Relationships that Make Schools Work*. Andrea studied public policy at the University of Chicago. Andrea has worked in various capacities to promote educational equity and youth empowerment. She directed a national campaign to engage college students in the discussion on the future of Social Security for the Pew Charitable Trusts, and served as Director of Public Relations of Teach For America before working as the education advisor to Bronx Borough President and mayoral candidate Fernando Ferrer. Andrea has been profiled in the *New York Times*, *New Yorker* magazine, *Latina Magazine* and in "Hear us Now," an award-winning documentary about her tenure as the student member of the New York City Board of Education. She has been published in *Alternet.org*, *New York Newsday*, *New York Sun*, and *City Limits* magazine.

CONGRESSMAN JERROLD NADLER

Congressman Jerrold Nadler represents New York's Eighth Congressional district. Congressman Nadler was first elected to the House of Representatives in 1992 after serving for 16 years in the New York State Assembly. He was re-elected to his seventh full term in 2004 with a resounding 80 percent of the vote. Throughout his career he has championed civil rights, civil liberties, efficient transportation, and a host of progressive issues such as access to health care, support for the arts and protection of the Social Security system. He is considered an unapologetic defender of those who might otherwise be forgotten by American law or the economy, and is respected specifically for his creative and pragmatic legislative approaches.

In his roles as an Assistant Whip and a senior member of both the House Judiciary and the House Transportation Committee, Congressman Nadler has the opportunity on a daily basis to craft and shape the major laws that govern our country. From his leadership in response to the September 11th terrorist attacks on his district, to his insight and policymaking prominence on issues facing Israel and the Middle East, Nadler has constantly sought to be steadfast and responsive in his service to New York and the nation.

Congressman Nadler is perhaps best known as a prominent member of the House Judiciary Committee. It was there that, as a third-term representative in 1998, he rose to national prominence as a vigorous defender of the Constitution during the Presidential impeachment hearings. Congressman Nadler's unwavering demand for bipartisan adherence to the Constitution earned him national praise.

A well-regarded source of political opinion and policy expertise, Nadler has been a featured guest on nearly every significant public affairs and news program on air, from CNN's Crossfire and Larry King Live to PBS's NewsHour with Jim Lehrer to NBC's Meet the Press. Nadler is also a reliable commentator for major print news sources in the nation, as well as for a wide variety of international outlets.

WILLIAM B. WACHTEL

Mr. Wachtel is founder of the Drum Major Institute for Public Policy. He is also the founding partner of Wachtel & Masyr, a law firm comprised of approximately 30 attorneys specializing in domestic and international business transactions and litigations. He is a graduate of the University of Vermont (B.A. 1975, magna cum laude) and Columbia University (J.D., 1979); Phi Beta Kappa; Harlan Fiske Scholar. Mr. Wachtel was the legislative assistant to United States Senator P.J. Leahy from 1974-75. He is a member of the Association of the Bar of the City of New York and the American Bar Association. Mr. Wachtel is also founder of the Why Tuesday? Campaign. Why Tuesday? is a bipartisan effort to increase voter participation in our electoral process by moving our federal Election Day from the first Tuesday in November to the first Saturday and Sunday of the month.

TRANSCRIPT

The transcript from this event has been edited for length and readability.

WILLIAM WACHTEL: I have the honor of welcoming you this morning. I am the founder of the Drum Major Institute although, in reality, I am simply carrying on the legacy of a lot of other good people that precede me. The Institute dates back to 1961 when it was much easier for people trying to do good things to be heard. What do I mean by that? Ambassador Andrew Young, who's our chairman, was recently schooling some of us in the next generation, explaining that when you had German Shepherds barking and snarling at you, and the cameras caught it, America listened. When you had sheriffs like Bull Connor incarcerating you, America listened. Forty years later people like Harvey Rosenfield have a much more difficult time getting America to listen.

That is why we have, at the Drum Major Institute, initiated the marketplace of ideas. It's a marketplace out there, and our goal is to give thoughtful, committed people a platform, a megaphone, so that their voice can be heard. If we had told everybody this was a seminar or speaking series where people would learn how to save money on their insurance, the room would be filled. Somehow, the personal self interest, call it greed, has taken over the marketplace. But the good news is, we're beginning to change that. Harvey Rosenfield is here because he has demonstrated not only that he is a great thinker, but that he knows how to get things done. He has demonstrated that you can be progressive, practical, and effective; a triple crown of success. We call him a citizen legislator, because in 1988 he wrote a ballot proposition in California known as Prop 103, and he's going to tell you all about it. I'm not going to steal his lines. But I think when you hear what not only he has to say, but what the panel says today, you will come to realize that the insurance industry...has a powerful grip on our stature as a society, as individuals, then they'll come to understand the majesty of what Harvey's been able to accomplish in California. Hopefully others around the country will start to realize what can be done in their states.

We have a special opportunity here today, because part of the marketplace of ideas is to stimulate dialogue in this room, but a dialogue that each individual takes away and hopefully creates yet further conversation. Far too long the conservative Right has defined the limits of what is possible in society and politics. Our marketplace of ideas takes that premise on. It is not possible to create near universal health care. Well, our guest Howard Dean stood up about a year ago and explained why that just isn't so. It's not possible to pursue corporate malfeasance. Well, our guest Elliot Spitzer stood up and explained that you can. It is not possible to translate the lives of union workers into being honest members of society. Well, Andy Stern stood up and explained how his union is growing and is growing with a newfound sense of integrity. Well, Mr. Rosenfeld's experience shows you don't have to shield wrongdoers from responsibility to bring insurance rates down. That the so-called 'tort reform effort' really isn't designed to protect the working member of society.

When he's not writing new laws, Mr. Rosenfeld works at the Foundation for Tax Payer and Consumer Rights, which he founded in 1985. He fights for a broad range of consumer issues, from HMO reform to utility rate deregulation. He is the author of the 1994 book, "Silent Violence, Silent Death: The Hidden Epidemic of Medical Malpractice". He also spends time with his two children in California, and he also tries to do his best to stay in touch with his mother, Sonya, in Boston, who is still waiting for Harvey to figure out how to take his great work and turn it into a pot of gold.

PRESENTATION

HARVEY ROSENFELD: Thank you very much. Thanks to the Drum Major Institute for inviting me today, and thank you all for appearing. Sometimes it's a little hard to get people to show up to talk about insurance. I've experienced that in the past. We have a word for it at our office in Los Angeles, we call it the insurance syndrome. Let me explain to you what that is. The liability insurance industry is a 1.2 trillion dollar industry. Over one billion dollars in premiums were collected in the United States last year. The industry is the source of enormous consumer outrage every time somebody has to open up that bill and pay that premium. It's notorious for not paying claims, as we're watching right now in Louisiana and Mississippi, in post-Katrina times. The industry's discriminatory practices, such as redlining and credit scoring, are also notorious. And over the last three years, because of the so-called insurance crisis, the insurance industry has disrupted our budgets, our governments, our economy, our businesses. Despite all that, hardly any policy people ever talk about insurance. Scholars hardly ever study insurance. Apart from a few advocacy groups such as ours and the Center for Justice and Democracy, which is headed in New York by Joanne Doroshow, there are very few organizations that challenge the insurance industry's practices. Very few journalists report on the insurance industry other than the basic financials. No foundation that I've ever found has ever given a grant to a consumer group to challenge what the insurance industry is doing. And, with a few notable exceptions, almost no politicians are ever willing to take on the insurance industry. That is insurance syndrome. This industry, as I'm going to explain today, has perpetrated one of the greatest financial and public policy frauds on the country in the last three years, and over the last three decades. And almost nobody discusses it. It's really quite amazing.

I've got a theory about what causes it. I mean, part of it is pretty obvious. Part of it is that the insurance industry has used its financial resources to buy the silence of many people. But also, I think, part of it is that the industry has been able to hide behind a veil of complexity, which has always stymied efforts to reform it. So in the next twenty minutes I'm going to explain to you how we turned this invisible industry into the number one topic of conversation in California back in 1988, how we toilet trained the insurance industry in our state, and I'm going to suggest a few lessons that might be applicable in other states and in other contexts, based on what we learned in California.

So the story begins in 1975, the modern story of insurance reform, when malpractice premiums for doctors in California started to skyrocket. Now, you'd think that since it was the insurance companies that were sending out the premium notices with the higher prices in them, that people would have blamed the insurance industry. But, in fact, the insurance companies pioneered an amazingly successful strategy that they've used to this day. They were able to deflect blame for their own premium increase onto the legal system. They told doctors that malpractice premiums were rising because malpractice claims were out of control, there were too many lawsuits, and they were paying too many jury awards. So the solution that the insurance companies came up with for a crisis that they themselves caused was a cap on the amount of damages that could be awarded to victims of dangerous, negligent doctors. And not just caps on their damages, but also a cap on the amount that

victims of medical malpractice could pay an attorney to take a malpractice case. Between the combination of those caps, obviously none of the attorneys would want to take a malpractice case. Well, doctors went on strike to make sure that caps passed in the California legislature and the bill was sponsored by some very liberal Democrats now in Congress, and signed by Governor Jerry Brown. There was only one problem with that whole plan — medical malpractice premiums kept rising.

Fast forward ten years later, to 1985. I moved to California in 1982, but the insurance crisis had now restarted and spread all over the country. It wasn't just medical malpractice in California, as it was in '75, now it was across the board. Some of you will recall that businesses couldn't get insurance, nonprofits, daycare centers, municipalities couldn't find it. And premiums were skyrocketing, if you could get insurance at all. Once again, insurance companies blame lawsuits. They realized that their strategy had worked, so they said it wasn't just malpractice lawsuits, it was every kind of lawsuit that was causing all the premiums to go up. Apparently it had nothing to do with the fact that insurance companies in the early '80s, when interest rates were high, were rolling in dough. They made a lot of bad investment decisions and sold a lot of policies that were too risky. It had nothing to do with that. It was too many lawsuits that just happened to appear at the same time there was an economic downturn in the mid-'80s. And there was more of what they began to call tort reform, passed both in California and around the country. Corporations became big backers, since the so-called tort reform restricting people's rights to go to court altered the cost benefit analysis that these corporations had to engage in when they decided whether to produce that dangerous product or market that dangerous drug.

Well, in 1986, in the middle of this second insurance crisis in two decades, California passed more restrictions on tort law. This was true even though the malpractice cap that had been passed in 1975 had not worked. Between its passage in 1975 and 1988, malpractice premiums in California rose another 450%. That's when some of us decided it was time to start focusing on the real cause of the insurance crisis, which was the insurance industry.

Now, like most states, California at the time had very little regulation of insurance, nor were the antitrust laws applicable, because the insurance industry had won exemption from the antitrust laws all over the country. So the insurance industry had the best of both worlds. No regulation and no real incentive to compete. After it was clear that the legislature in California would not take any action to address the problems in the state, we got together and started drafting a ballot measure. Here is what Proposition 103 does: First, it mandated an immediate 20% across the board rate rollback of all premiums for auto, home and business. Second, it required insurance companies to open up their books to the public for the first time when they applied for rate increases. They'd have to comply with a very stringent formula that limits their profits, their expenses, their overhead and, very importantly, it limits their projection of future losses. Number three, Proposition 103 banned unfair and discriminatory practices for which the insurance industry is legendary. Also, we applied the state's Civil Rights laws, which had been exempted from application to the insurance industry thanks to some creative lobbying by the insurance companies. Finally, Prop. 103 sought to make sure all those other reforms would be properly implemented. So we created an elected insurance commissioner. We gave consumers the right to challenge illegal insurance company conduct, violations of Prop. 103,

either before the Administrative Department of Insurance or in the judicial branch, and we allowed consumers who brought those challenges to collect attorney's fees for doing so.

Well, given the amount of money that was at stake, which we calculated in the billions of dollars at the time, we expected the insurance industry to fight these reforms pretty hard at the ballot box. But everybody in the state was astonished at what happened. The insurance company spent a record eighty million dollars in 1988 against Proposition 103. Most of that money was spent in TV ads, which saturated people's televisions. There was literally one ad every two minutes on every station for three months in California, talking about why Prop 103 was bad news. Quite a few of those ads actually attacked me personally, which turned out to be a huge strategic mistake for the insurance industry, because I became a very popular hero to many Californians when everybody was educated by the insurance industry on what a bad guy I was. They immediately understood that anybody who's the target of this much paid advertising has to be on my side. Every household received probably a hundred mailings from the insurance industry during the campaign.

And there were three counter initiatives. One to enact no fault insurance, which was sponsored by the insurance industry. A second one by the industry to cap pain and suffering damage awards in auto accident cases. And a third went to cap contingency fees across the board, all three backed by the industry. Now, our campaigning was 100 % grassroots. I borrowed \$150,000 from three very wealthy people in California. I used that money to buy postage and printed up a bunch of the petitions because you've got to get 700,000 signatures to put an initiative on the ballot. So we printed up the petitions, we bought the postage, and we included a letter saying, could you please send us a donation back? All 700,000 signatures were signed that way, and we got donations back that actually covered the cost of the mailing. An average donation of \$8.00. The entire campaign for Prop 103 on our end cost us 2.9 million dollars and all but \$400,000 of that was postage. So we spent half a million dollars to actually run the campaign against an 80 million-dollar campaign by the insurance industry. Now, from day one, the campaign for Prop 103 was backed by civil rights groups, minority and low income organizations, consumers, senior groups, Mothers Against Drunk Driving, labor and feminist organizations. It was a very broad coalition. Everybody in California got it. They understood which side you needed to be on in this battle. The pocketbook aspect of this proved to transcend all the ideological and partisan labels. And Prop 103 passed by 1 % — but that's all you need, right? Both the core urban Democrat in Los Angeles passed it, and the Reagan Republicans in Orange County approved it. And the three insurance industry tort reform initiatives were defeated.

Now, let me tell you what the results of Prop 103 have been. 1.2 billion dollars in refund checks were sent out over the next three years. Another 23 billion dollars in rate increases were blocked between 1989 and 1999. We used to have the second highest auto insurance premium in the nation in 1989. By 2001 we were 22nd, and where our auto insurance premium dropped 22 % between 1989 and 2001, it went up 30 % around the rest of the country, on average. In the last few years, taking advantage of the right to go in as a consumer group and challenge unjustified applications for rate increases, we have blocked 230 million dollars in rate increases. That's of particular interest given the history of this insurance reform story in California. We had actually specialized in blocking rate increases requested for doctors. Not that we really care about doctors as a consumer group. But we wanted

to prove a point, which was that the caps on damage awards never actually lowered premiums. It wasn't until Prop 103 passed that premiums went down for medical malpractice in California. They went down by almost exactly the amount of the required rollback, 20%. In fact, with the rollback doctors got about \$70,000,000 in refund checks. We've been focusing in recent years on these applications and have blocked another \$75,000,000 in rate increases for the doctors in the last couple of years. What's interesting about that, of course, is that one of the ways we use Prop 103 is put the actuaries and executives of these medical insurers under oath. And guess what they said under oath when we asked them, well, if you're asking for a rate increase, what about that cap on damages that was passed in 1975? Oh, that would never have any effect on premiums. That's what they say under oath.

Lawyers have become the scapegoat for insurance premium increases around the country. When we collect our fees for challenging rate increases, sometimes the insurance companies try to go out there and say, look at those lawyers grabbing those excessive fees in those insurance cases. Of course, we point out that our total fees in the last three years, for saving \$230,000,000, were \$570,000 in lawyers' fees and expenses. Which, if you do the math, comes out to people had to pay 1/4 of one cent for every dollar we saved them in insurance premiums. That really shuts the insurers up. All of this occurred despite the fact that the industry filed over a hundred lawsuits against Prop 103, all of which were rejected. They successfully corrupted one of the elected insurance commissioners, who was forced to resign, and the constant legal challenges occur to this day.

Now, why does Prop 103 work? Well, it works because it targets the true cause of the insurance crisis, which is the increase in premiums. The cause of it is very simple. Insurance companies run into trouble when the stock market goes down, or their investments go down or when the economy starts misbehaving because insurance companies make most of their money by investing our premiums. So when the market goes south, when the interest rates are as low as they've been for the last few weeks, remarkably low, insurance companies' investments decline. So they must offset those losses by increasing premiums. One of the big problems for the insurance industry is that they got carried away in the go-go '90s, like many others, and they invested in Enron, Worldcom, Tyco and Global Crossing and they got killed in those stocks. So they came back in 2000, 2001, took advantage of 9/11, and decided that they had to raise premiums. By taking advantage of the disclosure required by Prop 103, we have uncovered what's really going on when insurance companies claim they have to raise premiums. Their standard accounting practices allow them to treat projected losses as real losses for tax and regulatory purposes. So they have a direct incentive, when they need to raise premiums, to inflate their projections of losses. They can announce that all of a sudden lawsuits are skyrocketing in order to turn around and divert attention from the fact that they're just trying to recoup their own losses. That's why in 2000 and 2001 the medical malpractice insurance industry announced that claims for malpractice lawsuits went up 106% in one year. It's like there was an epidemic of malpractice, and they were going to have to cover that epidemic by raising our premiums.

Well, we went back and looked at the insurance industry data from the 1985 crisis. We looked at the data between 1986 and 1993 on the amount of money the insurance industry collected in premiums and how much they projected they would pay out in claims. They said in 1986, we're going to pay out in x dollars for 1986 policies

to cover claims. Well, you can actually see by 1996 how much they had to pay out. And you can compare what they projected with what they ended up doing. Well, it turns out that between 1986 and 1993, on average, their estimated losses were inflated by 30%. At the height of the crisis years, they were up to 40% inflation. That's exactly the scam that's going on in the insurance business today. So what's happened in this latest crisis, which began in 2000? Well, the companies are claiming there are too many claims, lawsuits have soared, and that they have to boost premiums. If it's such a crisis, why are their profits at the highest level since 1987, the last crisis? They made thirty billion dollars in profits this year. Which is up 29% over 2004, which was up 62% over 2003. The insurance industry has four billion dollars in investment income gains, a total of twenty-seven billion investment income, and a 52% increase in dividends. As for claims, they pay out only 58 cents for every dollar in premium that they take in. This is the industry that says they are losing money on insurance policies. Now, they can't get away with it in California, because of Prop 103.

Let me tell you the lessons we're learned, and I think these lessons will transcend even the insurance battle. Pocketbook issues trump ideology any day. We used Prop 103 to unite the middle class and the poor, the Reagan voters, and the urban core voters. That's a very important lesson. Right now, the debate is all about tax cuts. Why aren't we talking about cutting people's insurance premiums? Because next to taxes and your mortgage, insurance premiums are probably the third largest expense most people have in this country. You never hear it discussed. Let me tell you what the issues are that people really care about. They care about the fact that their cell phone service sucks, they care about the fact that their credit card late fees are going up, they care about the interest rates on their mortgage. These are the kind of pocketbook issues that, if we wanted to, our side could use to transcend all the other debates. We could get back most of the voters in this country just by talking about meaningful pocketbook issues, and the need to regulate the big corporations who are responsible for this. I also feel that if people were made to understand that our mortgage interest rates are going up so that we can fund the war in Iraq, I think the war would be over within a month. People do not get that connection. Pocketbook issues trump ideology.

Lesson number two: complex issues can be made simple, it's just a matter of messaging. We need to send a message about the greed of the insurance companies. We should talk about the need to regulate companies that are not regulated, whether it's insurance companies or energy companies. It is much easier to appeal to people on the issue of the insurance companies ripping them off than it is to explain to people how lawsuits are causing their insurance premiums to go up. The insurance companies are able to get away with it because we are not articulating this message consistently around the country.

Third lesson: offense, not defense. I think it should be a totally brutal and aggressive offense. If you want to see how we, as an organization, talk about stuff in California, go to consumerwatchdog.org. Or, if you want to see what we have to say about Arnold Schwarzenegger, go to Arnoldwatch.org. We try to play as vicious as we can. We never lie, we don't deceive, we tell the truth, it's based on facts, but we are vicious and proud of it. What we've discovered is, when you start talking about insurance companies and what they're really doing, as I do when I testify before the legislature, insurance companies will back down. The insurance companies go

right to the trial lawyers group and say, if you will withdraw any insurance reform legislation we will withdraw our tort reform legislation. That's what happens when you go on the offense.

The fourth lesson: Ju-jitsu. We use the power of our opponents against them. We take advantage of their strength and their resources and use that against them, and prevail.

One more lesson I want to spend a little time on is the tort reform lesson. Our side has not taken advantage of Proposition 103 and other offensive strategies, and it's created a vacuum, which is why this ridiculous tort reform approach still works. Corporations have spent millions of dollars to back efforts to place their greedy thumbs on the scale of justice. It works because insurers hide behind the white coats of doctors even though, ironically, the fact the doctors have associated themselves with insurers has eroded their credibility. Between that and what's happened with managed care, I don't think doctors are going to be able to shield the insurers much longer. Another reason why tort reform has still got hold of the country is there's a catastrophic indifference of communities to what's going on. In other words, many organizations have been misled into thinking the battle to restrict tort lawsuits is about lawyers, when really it's about justice. That's been a huge loss and mistake on our part.

Anyone who thinks the attack on the tort system is just an isolated attack on trial lawyers does not get the big picture. The big picture is tort reform is part of a bigger and broader effort to basically undermine the system of justice in our country. The courts have been deeply politicized, not just by George Bush and by the Right and by big business, but specifically by this assault on the tort system. Public confidence in the integrity of the judicial branch is lower than it's ever been, according to polls. Many people are now starting to look at the judicial branch as just another corrupt branch like the executive branch and the legislative branch. To understand how partisan, profound and damaging the assault on the system of justice is, consider what Maurice Greenberg, the CEO of the AIG Insurance Company, had to say in 2004. He said, "I call the plaintiff's bar terrorists." Of course, that was before Greenberg was dumped, and AIG had to restate four billion dollars in earnings and eliminate them from its books. Or consider what Republican strategist Grover Norquist had to say about why Republicans should support federal efforts to impose malpractice caps: "Trial lawyers are a bigger funder of the Democratic Party than the labor unions. If this legislation, the caps legislation, is passed, the people we have to argue with and fight with next year and five years from now will be less powerful than they are today." Finally there's this statement: "It is a disgrace to be a lawyer." The same man said, "Every lawyer must be regarded as a man deficient by nature, or else deformed by usage." Now, that could come from a late night talk show, it could be a tort reformer who said that, maybe even the president of the United States at his State of the Union. It was Adolph Hitler. Ladies and gentleman, thank you for attention, and I look forward to an interesting panel discussion.

PANEL DISCUSSION

ANDREA BATISTA SCHLESINGER: Thank you all for coming. My name is Andrea Batista Schlesinger, and it's my honor to serve as Executive Director of the Drum Major Institute. I'm going to introduce the panelists in turn and ask them a question. First, to my left, is Representative Jerry Nadler, who represents New York's Eighth Congressional District. Congressman Nadler was first elected to the House of Representatives in 1992, after serving for sixteen years on the New York State Assembly. He was reelected to a seventh full term in 2004 with a resounding 80% of the vote. Throughout his career he has championed civil rights, civil liberties, efficient transportation and a host of progressive issues such as access to health care, support for the arts, and protection of the Social Security system. He is considered an unapologetic defender of those who might otherwise be forgotten by American law or the economy and is respected specifically for his creative and pragmatic legislative approaches. Let's talk about creative and pragmatic legislative approaches. Harvey is giving us something that worked in California, which worked for not only uniting the poor and the middle class, but that got right to the pocketbook issues of residents of California. The Democrats have been playing defense on this issue. For instance, we had Kerry and Edwards running and even though Edwards was a trial lawyer he was saying mend it, but don't end it. Why isn't the Left taking advantage of the issue of an insurance industry out of control? Why are we playing defense on tort reform?

REP. JERRY NADLER: That's a very good question. Why are we playing defense on most issues? Well, for one thing, in most states and in the federal government, we don't have a referendum system. There's a lot to be said for and against the referendum system, but we haven't been able to use it in most places. In Washington we're certainly playing defense on this, and we don't have the megaphones the Right wing has had. They've spent millions and millions of dollars to educate people on the wrong propositions. When Harvey was talking about the strategy of deflect the blame, I was thinking of a legislative battle that I just fought for eight years and lost against the bankruptcy bill. The Right taught everybody that the problem of increasing bankruptcies was because of the lack of social stigma and people going to bankruptcy right away. It was, in fact, because of the profligate extension of credit by the credit card industry, and the charging of these huge interest rates. All of this stemmed from a Supreme Court decision back in 1978 that said you couldn't regulate credit cards because the credit card regulation applied all over the country from the state from which the card was issued. So New York couldn't regulate it, and California couldn't regulate it. It's a race to the bottom.

When I speak about this to medical groups, I always say, you don't benefit from this. The proof is that the Republicans won't let us put an amendment onto the bill to guarantee that the benefit will get passed to the doctors. When you point that out the doctors say, wait a minute, there's something to this.

I would start by saying: the proof is that nobody will guarantee to the doctors, or to anybody else, that it will be reflected in lower malpractice rates. And the second thing is that nobody is dealing with what Harvey talked about at the end, that we are not disciplining the one or two percent of the doctors who are causing 80% of the damages. And 80% of the people are being injured by a very small percentage

of the doctors that nobody across the country is disciplining.

ANDREA BATISTA SCHLESINGER: I'd next like to introduce Assemblyman Peter Grannis, who was first elected to the Assembly in the fall of 1974, and represents the Upper East Side and Roosevelt Island. He serves as a full time legislator. As chair of the Assembly Insurance Committee since 1992, he's authored landmark legislation on behalf of consumers. This includes New York's precedent setting community rating open enrollment law, which revolutionized the way small group and individual health insurance policies are sold in the state. As a result of his work, New York banned health care discrimination in the individual and small group markets on the basis of a person's age, sex, health condition or occupation and, for the first time, provided complete portability of health insurance coverage by closing gaps in the law which had allowed consumers to lose their coverage when they change jobs or insurers. In doing research for this panel, there was one person who was described as a true independent on this topic, and that's you. This is a debate characterized by sides, and the insurance industry is armed with facing hundreds of insurance lobbyists on the consumer advocacy side. What is the insurance industry's agenda?

ASSEMBLYMEMBER PETER GRANNIS: I guess the problem is why this issue isn't more on people's agenda. It's a very complicated concept, insurance. People understand it only because they pay their premiums, but it's a very simple industry. All they do is take costs, add profits and send out the checks. I've often joked that I could run an insurance company for two or three years doing that. You open every envelope that comes in; if there's a check for you, you deposit it, anything else you say "claim denied" and mail it back. In three years you move to Bermuda, a country that doesn't have an extradition treaty, and you're on easy street.

I guess the problem is that it's very hard to energize people on this issue. We've had some significant victories in this legislature, but they've come usually because of crises. We had a crisis in medical malpractice a long time ago, and we took steps to resolve it by creating a pool of resources where we ended up buying insurance for the richest segment of our economy, doctors. We called it medical welfare. We pay millions of millions of dollars every year buying insurance coverage for excess medical practice premiums for coverage for doctors with public dollars, something doctors don't truly appreciate. We had a big reform in the health care field, which you just talked about, where we had a collapsing insurer that created a lot of problems because of its discriminatory business practices, and it led to some major reforms in the health area. But it's very tough to get people's attention on this issue. Particularly with a State Senate that starts off its morning, at least for most members, by calling their local insurance representatives and lobbyists to find out what their agenda is. That's the end of the discussion for most of the things we talk about in the Assembly. What Harvey was able to do, and what we've been able to do to a lesser degree, without initiative and referendum, is to galvanize public attention on certain aspects of the insurance industry. Auto rates, we've been able to have some success in dealing with some of the problems in auto insurance. We continue to battle with the insurance department and the health insurance industry on regulating rates that they're able to charge.

I guess the real problem is getting back to the core issue of getting people's attention. This is a pocketbook issue. It ought to be a core Democratic campaign issue. And it hasn't been. Not just Democrats, because Republicans care about this, too. It ought

to be a core political issue. If we had a populist type of candidate that could raise these issues in a big enough forum, in a way the public can not only hear about it, but understand it. Then if we could translate that frustration over high insurance premiums into political action, obviously you'd have more success. No industry touches as many different aspects of our economy and individual lives as the insurance industry. It's an extraordinary industry, that stretches across whether children's playground can open, whether not-for-profits can function, and whether you get a car or buy a house. There are so many aspects that touch people's lives, and yet it's basically a very boring subject. Unless somebody can galvanize the public's attention and capture the imagination of the public, I think we're going to have a problem chipping away at these issues. I mean, there are a host of things I could talk about that we are hoping to do with a new administration in Albany. But to make these happen, you have to get people's attention. I think that's where we've fallen down so far.

ANDREA BATISTA SCHLESINGER: I want to get back to the issue of presumed Democratic consensus on this, and first introduce Shoshana Bookson. She's known as a tireless advocate for injured people. She started her career assisting Richard Shandell with his complex trials. From that in depth tutelage she has developed into a well-respected trial attorney throughout the city. She previously served as president of the New York State Trial Lawyer's Association and Chair of the Women's Caucus. She has actively and effectively lobbied in both Albany and Washington to help fight the lies perpetrated by the insurance companies and their lobbyists. That comes directly from her bio, I should say. Trial lawyers, Harvey said, are the top donors to the Democratic Party. Although the insurance industry certainly overwhelms them, it's not necessarily a resourceless group. Why aren't the trial lawyers more effectively waging this battle? Is it just a question of being outgunned?

SHOSHANA BOOKSON: Well, we may be outgunned financially, but we certainly speak well for ourselves. I often feel like the Maytag repairman. It's a very lonely job being a trial lawyer. We're certainly not a popular group. We're demonized; we are taken to task at every turn. I think the one tremendous success that the insurance companies have had is to completely change the public's understanding and image of trial lawyers and what we do. We've gone from the positive image of Gregory Peck in "To Kill A Mockingbird" or Paul Newman in "The Verdict" to an image of us as bottom feeder sharks who are just looking for their own profit and their own interest. I think what has been completely lost to the general public is the amount of good that we do. We take on the most powerful interest groups, where we are completely overwhelmed by their legal team of twenty lawyers and we're the lone gunslinger walking into court. It is a lonely, lonely position. And I have to say I stand by everything in my bio. Because everything in my experience as a trial lawyer, and as president of the Trial Lawyer Association last year, has shown me that this is truly a noble field. I'm proud to be a trial lawyer. And I'll say that in any forum, here or anywhere else. Trial lawyers are the last bastions of individual rights in this country. We are virtually alone in protecting individual rights against large corporations and their interests. We have been very successful in the state levels in making our voices heard. In fact, we have been phenomenally successful there, and that's why this is a state that has not seen any tort reform, despite everything that has swept the rest of this country. But we have not been as effective on a national level due to a lot of factors. I think the beginning of this reshaping of the debate of what the insurance industry does has to start with an

education of the public about lawyers being on the good side, as opposed to being on the side of evil.

REP. JERRY NADLER: I just want to make one brief comment. One of the problems is, for the last ten years, the Republicans have controlled both houses of Congress. And that means that they control the hearings, and they control the oversight, and they control the publicity. If we get one or both houses next year, then you can have a real campaign in the Senate or the House Judiciary Committee or both to educate people on the questions of what's really going on with the insurance company. You could have an education campaign by having the proper public hearings on what's really going on with the credit card industry, or to answer questions on the distribution of power. Right now, the hearings are all on the other side, and the straight formula is three Republican witnesses for every Democratic witness, and they control the topics. So without a huge amount of money for publicity, you can use legislative bodies if you control them, and if you control the agenda, which is what party control does for an educational purpose.

ASSEMBLYMEMBER PETER GRANNIS: Unfortunately, I think the question begs the issue. This is not a debate and should not be a debate between trial lawyers and insurers. Trial lawyers, despite their protestations, aren't the only people wearing the white hats in these discussions. This is a major core consumer issue. The consumers' voices have been allowed to be almost subverted to this debate about whether trial lawyers are good or bad. And that's not really where the debate ought to be. We do count on the trial lawyers. They're a source of great information. Obviously, for some they're a source of campaign funds. But there are many, many other people that ought to be framing this debate, and getting us away from this focus on whether or not we like or don't like trial lawyers. They have become the convenient whipping boys and girls of the Right, and of the insurance industry. But we have sort of settled into this debate, all of us that care about these issues, and allowed insurers and sometimes editorial writers to get away with framing the debate in a way that I don't think is in the best interest of consumers.

ANDREA BATISTA SCHLESINGER: Harvey, let's pick up on that in terms of who the coalition is. I have to say, in doing research for this panel, and getting people excited about coming this morning, it was a challenge. We decided to change the title from, let's just talk about insurance regulation to let's talk about the powerful versus the people and so on. But getting traditional civil rights organizations engaged was difficult. Who is the coalition for this? Is it the fault of the Lefties that we haven't extended this issue beyond the trial lawyers versus the insurance company?

HARVEY ROSENFELD: Well, I actually don't know who you're referring to when you refer to the Left. When you get all the people on board you can walk out, as I could right now in this street, and if I had an hour I could raise a thousand dollars in donations. I'd collect no more than ten dollars a person from people walking down the street, from the guy selling bagels, and the cab driver because people are angry, but nobody is speaking to them about this issue. That's the problem. Congressman Nadler said it's tough because the Republicans control the committees. But they don't control the lawn outside the Congress. If 50 members of Congress, from the Democrats, went outside on the lawn and said, our number one focus is going to be to roll back people's insurance premiums, I think four or five or maybe eight months of that campaign would result in a complete revision and reaffirmation of the debate in the United States. That's what happened in California. I don't purport

to suggest that I could do this single handedly in Congress; maybe the Republicans do control the lawn. But what I'm saying is, in California we turned the debate around in two years just by appealing to people's pocketbooks and getting everybody on board on the same issue. I think it could be replicated today. The same thing could be done, as I tried to indicate, it could be done on the issue of cell phones. It could certainly be done on health care, which is driving people crazy. But what I'm not seeing, at least from my vantage point out there on the West Coast, is an organized coherent campaign by our side to promote those principles. You asked a question about Edwards and Kerry running away from this issue. It was pitiful. The guy's a phenomenal trial lawyer. He ducked the issue. He was terrified.

ANDREA BATISTA SCHLESINGER: Let's move from the election to 2005.

Representative Nadler, I'd love to know your thoughts about this. We identified our rising star and the keynote at the Democratic Convention [Senator Barack Obama], whose first vote, I believe, was a class action bill that limited access to courts. What is the party to do when its rising star goes on the wrong side of civil justice?

REP. JERRY NADLER: I think the first thing to do is consider that that vote tells me he's not the rising star. We have a major problem in the Democratic Party, from my point of view. When we had that bankruptcy bill which was, to me, the definitive bill saying, let's screw the middle class, and low-income people, I said that this bill is the exact measuring rod of the extent to which the campaign finance system is corrupted in two political parties. The Republican Party is 100% corrupt, the Democratic Party is 46% corrupt in the House and 72% corrupt in the Senate. That doesn't endear me to some of my colleagues. But the fact is that these pocketbook issues are defining issues, political issues, and a large part of the Democratic Party is afraid of them, or on the wrong side.

ANDREA BATISTA SCHLESINGER: Why are they afraid?

REP. JERRY NADLER: They are afraid because they see the political and financial power. Look at the senators from Delaware. You look at people from places where the insurance companies are particularly strong in the banks, and they bow down to them. I wasn't kidding when I said the Democratic Party is partially corrupt because of campaign financing. The entire political system is corrupt because of campaign financing. I've often said the campaign finance system is a metastasized cancer on democracy. And unfortunately, that means is that it is very difficult to get parts of even the Democratic Party on the right side of these issues. And we must. When I entered politics 35 years ago or so, the defining difference between the two political parties was economic. If you believed in government regulation of the economy, if you believed in the use of political power to help low income people, you're a Democrat. If you didn't, you're a Republican. Today, the defining issues are social issues: choice, gay rights, civil rights, to some extent civil liberties. A lot of people, who, forty years ago, would have been Eisenhower Republicans are today Democrats and not good at economic issues. So there's a fault line in the Democratic Party. I'm not sure how you deal with that, except to raise issues like these and get a grassroots out there that will hold the feet to the fire of Democratic members of Congress and legislative bodies.

SHOSHANA BOOKSON: I just wanted to say that one of the areas I think most people would be surprised to find that this becomes a consumer issue to the

doctors themselves. There is a groundswell of frustration and anger in the medical community about the fees they are being 'allowed' by the HMOs in their industry. And I know quite a bit about this personally, because my husband happens to be a practicing obstetrician in this city and in that group, which is a very high-risk group and a highly targeted group in terms of litigation. They are just up in arms. Now, they've been brainwashed to think that their solution is tort reform caps. But most of them are pretty realistic, even the ones that aren't married to trial lawyers are pretty realistic. Most of them are looking for relief against the HMOs. And I think that's the huge untapped and unconventional consumer group that could be easily converted over to these issues, and that should be sought after. I know we have sought after them as trial lawyers to make them understand that we can actually ally with them on those issues, and we are not their enemies on any of this.

ASSEMBLYMEMBER PETER GRANNIS: Just very briefly on the malpractice issue, we're a regulator state and we're proud of it. We actually set the standard for regulations across the country. We didn't need a referendum on malpractice rates we have prior approval standards for malpractice insurance rates. For five of the last seven years rates didn't increase at all across the board. They went up a little in the last two years, but this focus on this issue is a galvanizing tool. When you ask the question about going out on the lawn of Congress, I think that again begs the question. This is a grassroots issue. Pocketbook issues don't start from the top, they start from the bottom. All the Democrats and Congress can go out and stand on the steps, but if they don't put it in their news letters, and campaign on it, and raise these issues at the local level then it means nothing. They're not building a farm team of candidates moving up through the ranks and taking on legislators. This isn't a partisan issue, it's a policy issue. Take people to task for doing the wrong things and make examples of them. Some of these people that voted for this miserable bankruptcy law need to be taken to task next year in the mid-term elections. They should be called on the carpet and actually face losing an election. There's no more sobering reminder to a politician, whether you're a majority or minority, than if a colleague losses because he or she voted on the right issue the wrong way. It happened in Albany last year, where several Republican State senators lost races, and suddenly the leadership was looking at consumer issues a little more carefully.

HARVEY ROSENFELD: I think it has to be a grass roots campaign, ultimately, because that's who the voters are, they're the grass roots. But it does require leadership. I think that leader could be anybody or any group of people. It just requires a determination among some group of people to become the leaders and take this issue on, and make it a campaign.

I want to disagree a little bit with you, Shoshana. I think doctors hate lawyers. I think it's got only a little bit to do with premiums and being brainwashed and indoctrinated. All that is true, but I also think doctors just don't like lawyers because lawyers have dragged the medical profession off its pedestal. They've shown people that doctors are human too, and they make mistakes, and sometimes the mistakes are devastating. After Prop 103 passed, our organization sort of became two organizations, and we started getting involved in health care. We saw that with the collapse of the Clinton plan, in 1994, there would be a vacuum that the HMOs would rush to fill. Well, for most of the '90s, we were working very

closely with doctors and the medical profession. We brought suits with them against HMOs. We backed legislation with them in Sacramento for a Patients' Bill of Rights. Look what happened when Bush takes office, and the American Medical Association and Bush get together and they completely derail the HMO Bill of Patients' Rights. You never hear about that anymore. It all became tort reform and caps on damage awards. Bush, with the help of the AMA and insurance industry, diverted the medical profession completely away from something which would affect the doctors' lives. Because doctors are getting killed by managed care, talk about dragging them off the pedestal. They're like union workers on the shop floor. They were derailed from the Patients Rights movement, which would have protected them, and vectored into this caps on damages tort reform side show that has been so costly to consumers and to victims.

REP. JERRY NADLER: I agree with that, but it wasn't that Bush was a genius. We were working in Washington with the AMA in the last couple of years under Clinton to try to deal with a medical bill of rights. We had a bill that actually passed, it got to the House floor, to give an anti-trust exemption to let doctors bargain collectively with HMOs. Then it all disappeared. Then AMA turned on it and simply said, forget all this we're going for tort reform. Why? They should understand some of their own interest. They can campaign for tort reform if they're stupid about that, without eliminating the HMO issues which are bread and butter and immediate to them. Every time I speak to a doctors' group I bring that question up. I say, why aren't you concentrating on this?

ANDREA BATISTA SCHLESINGER: I just want to ask one question before turning it over to the audience. Here in New York, Assemblyman Grannis has done a great job of protecting New Yorkers from the insurance industry's agenda. With Prop 103 a lot of the success came in opening up the process, having a publicly elected commissioner, and enforcing hearings. To what extent do you think New York would benefit from opening this up? And a question for Shoshana, are the trial lawyers anticipating that New York will become a battleground state for these issues?

ASSEMBLYMEMBER PETER GRANNIS: I think certain aspects of what happened in California are very illuminating and would be very helpful. We have been pushing for an independent consumer advocate's office in New York to stand up to the insurance industry. It would be nice to be able to wade through the arcane filings they make, with their projections and everything else they use to justify their rates. Obviously, the insurance industry hates that proposal. It has not gone further than being passed in the Assembly four or five times, and we're hoping to have better luck next year, but I think that model, perhaps, is even more effective than the idea of being able to sue a public reelected insurance consumer commissioner. You wonder where these people get their campaign filings. It's a financing issue.

There are two movements afoot that are actually even more threatening to the insurance movement. The Smart Act is federal control or takeover of insurance product review and rate review. If you think you have problems fighting at the state level, where there's more access to government and more access to regulators, wait till you have this process taken over by the feds. It's a major federal discussion going on, on whether or not there's going to be federal regulation of insurance activities because of their multi-state and international ramifications or whether insurance will be left as it traditionally is, under the auspices of state regulators.

We're lucky in New York because we have a heavy regulating system, and we have some access to these people. I still think, though, that even in the states that don't have that, Smart Act will be a race to the bottom. You won't have any more stringent regulations than the weakest states. It is a real threat. The other threat is the increasing use of offshore insurers that we can't regulate. People are increasingly looking to offshore insurers that provide products that don't come under our regulatory umbrella. It's sort of a battle between federal regulation and no regulation at all. But I think, clearly the global battle on insurance is going to have to start with making sure that at least state regulators keep a handle on rates, forms and the kinds of products that are offered in the particular states. Then, if we can move from there into a more consumer advocacy, looking after the pocketbook issues, I think our chances are better there than in Washington.

SHOSHANA BOOKSON: I think the federal movement to take over all the individual states' powers has been quite terrifying, to be honest. We saw it happen to us over the summer, with a highway appropriations bill that got an insertion at the very last moment of the repeal of vicarious liability for leased and rented cars. Something that is really a complete states' issue. That had been a major, major political issue here in New York, where it had been defeated thus far, but was usurped by the federal government and that bill without any debate, and without even a vote in conference. And I think it's part of the general trend of the federal hand reaching out into the state governments where it does not belong. That is a very terrifying specter, and it does seem to be the movement of the Bush administration. As far as New York is concerned, we are somewhat of an anomaly, I suppose. We have just been getting more and more blue since the last election. We were certainly heavily Democratic in the presidential election, and in the last local election. Just this year, as Assemblyman Grannis said before, the Republicans lost seats. They just lost some more seats in the Assembly in a special election. There is definitely a Democratic trend here. All the traditional voting in the suburbs and Long Island is considerably damaged. So I think there's great hope here that we can tap into that voters' sentiment that is voting Democratic and utilize it to keep going on our agenda.

REP. JERRY NADLER: There's absolutely a danger, as Shoshana mentioned and Pete alluded to. The Republicans who are in control in Washington now talk about minimal federal government, a smaller federal government, talk about states' rights. In fact, wherever the states are standing up to corporate power they want to move it to Washington. We saw this with the so-called Class Action bill, where we suddenly moved most class action lawsuits into federal court because you can't trust the state courts, because they actually stand up sometimes. We see this with the Smart Act, which is to impose federal regulation on the insurance system. Which might not be a bad idea, if it didn't carry with it preemption of state regulation. So it makes the federal regulation not a floor, but a ceiling. We see it in a number of other places, where they're trying to impose federal law to preclude the states. It's a great danger as long as the federal Congress is as retrogressive as it is.

ANDREA BATISTA SCHLESINGER: When Assemblyman Grannis said that hopefully we'll have a new administration in Albany, and Shoshana talked about New York State turning blue, in regards to the 2006 gubernatorial election, are we just hoping for a change in government? Or, if Eliot Spitzer were here or anyone who may be considering running for the Democratic or the Republican side, what do you want them to be talking about when it comes to this issue?

ASSEMBLYMAN PETER GRANNIS: I think it goes back to what you said at the beginning. This is a pocketbook issue. We're focusing on Democrats. This is not a partisan issue. There are Republicans that care about this, number one, and certainly Republicans that may care about it even more if it can be made an issue. So what I would like, if Eliot is the nominee, is hopefully he'll be talking about better regulation of health insurance. It's one of the only lines of insurance we don't have prior approval for. The industry has run amok, fifteen percent of all HMO profits in the county are from New York. Why? Because we do not have prior approval of rates in this one field. Every other field in insurance, we have prior approval for. We don't have it for small group and individual policies, and the managed care companies have taken advantage of that. They have been able to raise rates without any fear of after rate imposition reviewed by the insurance department. I think both the people that run our campaigns and the grass roots organizations ought to see whether or not they can inject a handful of these issues into the debate on the next year's elections, about whether or not insurers are going to be able to get away with the practices they've been able to get away with. We have laws in New York that you cannot go after an individual insurance company for a crappy claims practice unless you can prove it's a pattern. So somebody gets horribly screwed by the very overbearing claims settlement process somewhere, and the insurance department's hands are tied because they can do nothing about it. Unless you can prove this company does this repeatedly. You can't go to the regulators to protect you from the insurance companies unless a whole lot of people get hurt. I think there's something wrong with that system. That's a sort of small area that I think resonates along with health care insurance rate regulation and can be made into core issues in next years' campaign if the people that fashion the messages for both the Assembly and the State Senate and governor's race put these out in the public realm. These things really work if people can get out there and talk about it.

ANDREA BATISTA SCHLESINGER: We have some great guests in the audience, and the first person I wanted to ask a question is Joanne Doroshow, President and Executive Director for the Center of Justice and Democracy and co-founder of Americans for Insurance Reform, a coalition of a hundred consumer groups around the country working to strengthen oversight of insurance industry practices. Joanne's another attorney who worked with Ralph Nader in liability and insurance industry issues. Joanne, do you have a question for the panel?

JOANNE DOROSHOW: Sure. I wonder if someone could comment on the trouble Bill Frist seems to be in and whether they think that might have some kind of impact on whether the medical malpractice bill may be slowed down significantly now, in Congress. I know Harvey has done a lot of work on the ethics problems of that particular senator.

HARVEY ROSENFELD: Thank you, Joanne. Also, I just want to acknowledge that Joanne is the head of the leading group in the country that is working on these issues. So those of you in New York who want a resource, Joanne is the person you want to talk to.

This Frist thing is a good example of what I tried to describe in my presentation of being brutal. It was clear to us that Frist had a conflict of interest in his financial dealings. Money that he claimed that he put in a blind trust wasn't actually blind, that he may have engaged in insider trading with respect to shares in the company

that his family started. So about a year ago we began to ask the Senate Ethics Committee, such as it is, to investigate Frist. We made quite a few public statements about Frist's conflicts. And then when he sold these shares before anybody else knew what was going on, and that got him into a lot of trouble, it seems as if we were prescient in our work. In fact now, because of Frist's problems, I don't think there's going to be a medical malpractice cap bill. He's just too tied up and hung on his own greedy petard to actually focus on that. So that's the kind of good example of how an advocacy group can focus on an issue that may not have to do with a public policy, but at the end it has the right result.

ANDREA BATISTA SCHLESINGER: So you're suggesting we start investigating the ethics practices of everyone?

HARVEY ROSENFELD: Absolutely. I'm suggesting we investigate everybody, on everything. We should use any conceivable angle to get these people. We gotta get them. Right?

REP. JERRY NADLER: I was struck by one thing Harvey said before, when he said you've got to fight viciously. Not dirty, but viciously. We, it seems to me, we play by Marquis of Queensbury rules too often. Tom Delay right now is in trouble for what I consider a misdemeanor compared to some of the felonies that he has committed. An example is what they called the K Street Project. This is something that the Republicans, Tom Delay and Norquist do and brag about. They go out and use political power to extort lobbying firms and trade associations. If you want to do business in Congress you hire the right people and you fire the right people. You hire Republicans and you fire Democrats. And you give campaign contributions to the right people or we won't talk to you if you don't. We have a book. There was an article by someone, I think it was Mitch Alter, in Newsweek a few weeks ago, in which he talked about how Delay showed him the book in 1995. He couldn't believe he would do that. In which they recorded the contributions and the hiring and firing practices. They went so far, in 1998, as to publicly chastise the electronic industry association for hiring the wrong person as president after a year's search, and they told them that if they insisted on hiring them, they would punish them, and they did punish the man. Two pieces of legislation on the floor of the House, supported by the Electronics Industry Association, with great fanfare, they pulled it off the floor without a vote. Why weren't they indicted? Why weren't they indicted by the U.S. Attorney for extortion, bribery, misuse of official power, and about six other felonies? And they do this all the time. Now, you're not going to get a U.S. attorney today to indict, because of who they are. Why they didn't back in 1998, I don't know. This kind of abuse of power, to rig the political system, to use extortion and institutionalize bribery goes to the core of any kind of Democratic procedure.

ANDREA BATISTA SCHLESINGER: I guess this issue around indictments and abuse of power just leaves me to wonder why people aren't more mistrustful of corporate power than they are of lawyers?

SHOSHANA BOOKSON: I think that's one of the humorous sidelines of this that lawyers are now lower on the list than corporate CEOs, despite all the recent corporate scandals and the rape of corporations. Despite the loss of pocketbook pensions and wages to everyday workers, these same workers are not rising up against the Republican representatives. That's the great irony, and that lawyers are still at the bottom of the heap.

AUDIENCE MEMBER: I'm here as a consumer. We all seem to be deflecting the blame. The lawyers are blaming insurance companies, insurance companies are blaming the lawyers, the lawyers are blaming the doctors. Let's stop blaming. What Harvey did in California is what I think we have to do here in New York. Every year my health insurance premiums go up, and their profits are enormous. I don't care about Frist. He did what's illegal, but that doesn't help my premiums get under control. Harvey, what should we do in New York State?

HARVEY ROSENFELD: Well, here's what I would do if I were you. You seem like the right person to lead this cause. You're angry. That's all it takes. So, what is the strategy? Well, I would advise whoever it is to call for a rate refund, a roll back of insurance premiums for auto, homeowner, business of 20%. Then do the same thing for health care premiums. Then back that call up, which is really what will mesmerize and inspire the interest of the voters, with a regulatory system. You have some of that here in New York, some of which I suspect is not quite the same as what we did in California in terms of the actual ability to reduce the profits of the industry. But whatever the case is, you lead with a rate reduction across the board.

You're also asking me how you begin a campaign for something like that. Well, you either research it yourself, or you go to your elected officials and have them assist you and do the research. Then you develop legislation, and you get a sponsor for that legislation. This is a little Civics 101.

ANDREA BATISTA SCHLESINGER: I think everyone would agree, though, that the left needs a little more Civics 101.

HARVEY ROSENFELD: Also, I know everyone feels that the issue referendum is the big deal. But this is such a powerful issue, that I believe if it's done right it could alter the composition of other state legislatures and ultimately the congress.

REP. JERRY NADLER: I agree with you, but let me just correct one thing. I am not in support of an issue referendum until you can control corporate money spending on the initiative referendum as a general rule. One of the few advantages is that it does open it up to a wider audience.

AUDIENCE MEMBER: I'm sorry to take this in another direction. My question has to do with the history of "no fault". If you go back to the 1960's, 1970's, "no fault" was something which liberals and progressives and consumer groups really promoted. Later that changed and what I don't understand is, why? It seems to me there was an opportunity for progressives to use "no fault" as a way of helping exactly the constituency that we care about. In countries dominated by Social Democratic parties, "no fault" has been seen as a very important bread and butter issue. I don't know what happened in the United States.

HARVEY ROSENFELD: I can tell you what happened. It failed because it didn't lower insurance premiums. It's perceived to, and it is unfair because it arbitrarily limits the amount of money a victim of a car accident can obtain from the person who caused the accident. In our society, where personal responsibility is considered important, No Fault flies in the face of personal responsibility. So, it was premiums and personal responsibilities that killed No Fault. Today, only insurance companies support No Fault.

AUDIENCE MEMBER: This is primarily directed to Congressman Nadler, but I'll take input from anybody. Congressman, you had a couple of nice soapbox moments

talking about the corruption of lobbyists and campaign finance and my question is very simple. What's the solution?

REP. JERRY NADLER: The solution is obvious. How you get there is not so obvious. The solution, I think, is a bill that John Tierney and I introduced in Congress which was instituted in Maine and Arizona and a couple of other states called the clean election system. Basically, it's a total public financing system in which you show you're a serious candidate by getting a certain number of five or ten dollar contributions. Then the government gives you a check, and that's the campaign, there's no other funding allowed. You'd have to overturn the Buckley vs. Valeo Decision of the Supreme Court. Otherwise people can opt out of the system, as Mayor Bloomberg has opted out here, and made a mockery of our rather good public financing system in New York City. But that ultimately is the solution. You have to get that kind of money out of the political system.

HARVEY ROSENFELD: Can I offer another solution? My view is that the problem reaches way beyond what could be done by Congress. The problem now is that the Supreme Court has said the corporations had the same First Amendment Rights as human beings, and therefore money is a freedom of expression. I think the real solution has to be an effort to have a Constitutional Amendment to amend the First Amendment saying corporations are not people. Congressman Nadler just gasped at that, and nobody understands better than me how scary that is. But if we don't start talking about things in terms of changing the First Amendment, then my prediction would be once that move got under way the Supreme Court would gradually roll back its decision.

REP. JERRY NADLER: Let me just comment on that briefly. I am extremely hesitant to amend the First Amendment. We have never done that, and we have any number of proposals in Congress to do it for stupid reasons, the Flag Desecration Amendment and so forth. If we're going to amend the Constitution I think the Supreme Court should get rid of the Buckley vs. Valeo Decision. I hate to do it by Constitutional Amendment. If we're going to start amending the Constitution maybe we should be more fundamental and take a look at the 1886 cases in which the Supreme Court declared corporations persons under the medium of the Fourteenth Amendment. The Fourteenth Amendment and the Buckley vs. Valeo is to a large extent based on corporate free speech, which is an oxymoron. The Fourteenth Amendment was passed and says no person shall be deprived of life, liberty or property without due process of law by any state. No state shall deprive any person of life, liberty or property — no person. Now, when they wrote that they were thinking of the ex-slaves in particular. They were not thinking of corporations as persons, but the Supreme Court declared corporations as persons. A lot of sins and a lot of our problems in society arise from that. So we've got to look at amendments of the Constitution. Stay away from the First Amendment. I'm not too happy about amending the Fourteenth either, but that's a better place to look.

AUDIENCE MEMBER: I think that's what we need to focus on in the future, but I want to just ask a question about how we can apply, and maybe slightly amend the lessons. The pocketbook issue is critical but I think it's really more what people can see as a direct benefit. And I feel like we need to take the ju jitsu approach and apply it in a way to help us understand why tort reform has been used. We use it as a distraction and an indirect attack. So I'm proposing a focus on what now has become, with Katrina and the bird flu, perhaps a pandemic. What can we do to

broadly protect the public and attack the insurance industry? Can we create a roll back or rebate to reinvest in public health in some manner, so there is a direct benefit of rolling back the unjust profits of this administration?

HARVEY ROSENFELD: Are you suggesting a roll back but the money doesn't go back to the people? Then I haven't been very effective as an advocate for what I'm trying to describe. You've got to give people a reason to care. If you just tell people we're going to roll back the insurance industry's premiums and give the money that belongs to you to some other program, you're not going to get excited. You've got to give it back to people. Let me skip to the point you might be making, or at least the goal you're trying to reach. We need to reestablish for people that the government, through regulation, can make people's lives financially better, and their health and safety better. Then you reintroduce government as a positive force and you can ask the public for their support for other things like that, including a better health care system.

AUDIENCE MEMBER: I'm a constituent of yours and I'm proud of it. I'm here from the Upper West Side, and I want to know, what do we do now about health insurance? You as my Congressman, me as an active member of the Democratic party, what are we going to do to get this roll back? It's a wonderful idea. How are we going to fight?

REP. JERRY NADLER: In the absence of a major grass roots campaign, the only thing we can really do is stop the takeover on the federal level, and try to get proper regulation on the state level. This means a Democratic State Senate in practical terms, which we've been talking about for forty years, and it hasn't happened. It will happen in the next few years. The biggest change in the state legislature will be if the control changes in the State Senate. The demographics and the politics are headed inexorably in that direction. The only question is whether it'll take two years or six years. When I was in the Legislature you passed a million bills in the Assembly, you feel good that you passed the Assembly but know it has no effect because the Senate won't look at it. The Senate started looking at a few of these things recently, because their margins are being whittled down and they're getting scared. So you may be able to pass some of it now. They have passed some progressive stuff on economics, civil rights, civil liberties. When that change comes in the next couple of years, and we should hasten that change any way we can, then the floodgates open up. Then the state can become a model.

ASSEMBLYMAN PETER GRANNIS: Health insurers cannot do anything they want to do in New York. We do have a regulatory system, and we're supposed to have an insurance department whose mandated responsibility is to protect consumers from insurers. It's not to protect insurers. That's been the focus of my attention for the last decade, to try to reinstill a consumer-oriented focus with the insurance department. The next year is an election year. You don't need to wait for things that aren't going to happen. We're not going to change the Constitution. We're not going to pass a roll back of rates. They did it in California and it worked, but they did it in New Jersey and it was a disaster. It's a very artificial way to go about dealing with the problem. We need to start this discussion in January to make the consumer side of this insurance equation an issue in two or three races in the State Senate next year. They're going to be worried about protecting their majority. They're on the very thin edge of losing the Republican majority in the Senate. They will do virtually anything to protect that majority.

Last year they passed up the raise in the minimum wage, something they hated. They passed emergency contraception for women. Over their extraordinary objections it was passed because of political concerns. So what can be done in the very short term is to pick out and work with the various campaign committees, to pick out those target legislators whose seats are in jeopardy and inject these issues early. We can't wait for the campaign to start, where you're beating up on candidates, because it's too late then. Make this an issue starting in January for the Republican majority in the Senate to take on some of these issues. They're not going to be the global issues, but they're going to deal with health rates, how health rates are overseen, how the insurers relate to consumers about consumer complaints, and what kinds of products are on the market. People are trying to save their jobs, and they'll be a lot more attentive next year than they have been in the past.

DAN FELDMAN*: This panel has done a magnificent job. I would only add a little bit in response to Pete's last comment. With respect to your independent insurance advocate and maybe the bad faith legislation, those could be closer to global issues that might be precisely, as you suggest, issues that Senate Democrats can begin to push now, and hard, as an issue in the legislature. Some may win on that, others can at least run on it. Thank you.

AUDIENCE MEMBER: I'm the Green Party candidate for mayor. And on a historical point, the state that gave corporations their personhood was New York State, in the Constitution of 1847. Now, one of the problems I think the Democrats have is that they don't seem to be united on basic issues, like the bankruptcy reform issue. You don't seem to have any party unity or discipline or principals, that people can identify with. I'm wondering, what can you do to have the kind of party discipline the Republicans have, and certainly the Greens have on these issues? It's one reason why the Greens are gaining.

REP. JERRY NADLER: I suppose I should try to answer that question. I wish we had that kind of discipline. We have better discipline in the last couple years than we did before, on a lot of issues, but not on every issue. There are a number of economic issues in the last few months that we've actually obtained 100% in the Congress on. On the other hand, more hugely we lose anywhere from 15 to 40 votes. Which are, from my point of view, unforgivable. I led the opposition personally for eight years against the bankruptcy bill. And I feel very strongly about it and very emotional about it. We lost a lot of votes. We lost 96 votes in 1998 and we brought it all the way down to 73 votes this year. We shouldn't lose those votes. With all due respect, the Green Party is an ideological party. The Democratic Party is a broad party. American parties, the two major ones, are generally broad. The Republicans at this stage of history are unusually homogeneous for a political party. The Democrats are not. I think it would be nice if we were, but that can only be accomplished by people running primary campaigns and disciplining some people. You talk about the Democratic Party as if there were some group of people who say, this is the Party doctrine, and you had better vote that way or else. It doesn't operate that way. Tammany Hall doesn't exist anymore. That's a good thing, and in some ways it's a bad thing. The only way you discipline a political party today is by getting involved in that party and electing and defeating candidates in primaries.

*DAN FELDMAN SERVES AS THE EXECUTIVE DIRECTOR AND GENERAL COUNSEL OF THE NEW YORK STATE TRIAL LAWYERS ASSOCIATION

ANDREA BATISTA SCHLESINGER: It seems to me, in the process of preparing this event, the elephant in the room is a conversation about race. What Katrina did in many ways was to make visible the relationship between race and poverty. To what extent, should we be talking more directly about the relationship between race and access to the courts, race and disparate access to health care and access to legal protection? Again, it's difficult for us to get traditional civil rights organizations engaged in this particular conversation. Which I don't necessarily think is reflective of lack of interest. But in terms of challenges to the coalition, how should we be framing or incorporating the conversation about race into this broader conversation?

ASSEMBLYMEMBER PETER GRANNIS: I think the focus ought to be on poverty and not race. One of the issues we get involved with in our continuing discussion on Medicaid in New York is that it's viewed as a downstate city issue. When, in fact, in upstate counties there are far more people than most people realize, not of color, that are on Medicaid. It is a poverty issue. Most of the bankruptcies we're seeing are people that don't have a lot of money. It's not a race issue, it's a poverty issue. One of the reminders is New Orleans, that in the midst of this tourist destination and all the glitz, were an awful lot of very poor people. They happen to be black and Hispanic and Cajun. I think the focus for a national agenda ought to be on people that are falling further and further behind. We have more poor people in New York. They happen to be often people of color, but the real focus is that people don't have an opportunity to move up. I think there ought to be a big discussion on access to health care, access to courts, and access to the property insurance that you need to buy a home.

REP. JERRY NADLER: Let me agree with Pete. I think it's a mistake to focus too much on race because it can be a divisive issue. You have to get people to focus on what unites them. These are class issues. There are really two core issues in American politics. One has always been race, obviously. The other has always been class, and that core issue in American politics divides progressives from reactionaries in a very stark way. The reactionary wants to sway the middle class, because everybody's middle class from \$10,000 to \$600,000. The reactionary wants to convince people who regard themselves as middle class that their proper political alliance is with the rich against the poor, who are trying to steal money from their pockets. The progressives should want to convince the people who regard themselves as middle class that their proper political alliance is with low income people. You both need help against the corporate power and against the upper income people who are hogging all the money in this society. That's the real political divide. Anything that helps to get to the Progressive side of that political divide is a good argument. You are a victim as much as that poor black person in the 9th Ward down there in New Orleans of the class based distortion of our economic system. Therefore, you should support insurance reform and all these other things we want you to support. So I think you have to focus, if you want to make progress, much more on class. You've got to educate the people in the middle about their interests, with the poor people, and why they have to support real changes in the economic distribution of power in the society.

SHOSHANA BOOKSON: On the race issue I just want to say I think it's been proven over and over, both statistically and anecdotally, that access to justice is class based and economic based. Closing courthouse doors is a very potent way to keep class issues alive. That's something that should never be lost in a debate.

ANDREA BATISTA SCHLESINGER: Now we'll have the closing statements

ASSEMBLYMEMBER PETER GRANNIS: I think we've covered a lot of ground here. I guess I worry about leaving here with the idea of a big picture of changing things globally. In fact, I think things are going to have to be changed incrementally, from the bottom up, rather than the top down. I just am frustrated by the fact that we can't get a cohesive message out of Washington from the Democratic side. We have a Democratic majority in the Assembly that has people that are as liberal as Jerry, and as conservative as some of the most conservative reactionary Republicans in Washington. We get their vote most of the time on core Democratic issues but it's a very diverse party. I think being able to fashion a message is very difficult that resonates across a lot of areas. I think there are people here that have done this before and understand that to send a message you tackle a sitting legislator, for instance. Or if you make an issue that everybody has to buy into, it will work. If you worry about amending the Constitution or doing rate roll backs at this point, I think you're going to be spending a lot of time on a very frustrating area. You'll be able to be marginalized, when in fact you can make a difference by thinking a little smaller, and sending a message that these issues are important and they will be taken into account on election day.

SHOSHANA BOOKSON: The new political reality is not just at the state level, which is very vital and where most grass roots and incremental changes can happen, but the federal level which has become increasingly the real elephant in the room. This level has direct effects on our states' rights. So I would keep both the federal and the state work in tandem, as equally important as the new reality we live with.

HARVEY ROSENFELD: Just two things. Mr. Grannis, I've got to say I've never seen anything worthwhile happen from thinking small. And maybe that's incrementally, maybe that's how it would work here in New York.

ASSEMBLYMEMBER PETER GRANNIS: We have a smoking ban that is sweeping the nation that started off in local governments. Didn't start off at the national level, it didn't start off at the state level. It started off with local government.

HARVEY ROSENFELD: Yeah but it was a ban, it wasn't a rule on no smoking for 15 minutes each hour.

ASSEMBLYMEMBER PETER GRANNIS: It was a ban, a global social change that started off at the grass roots level.

HARVEY ROSENFELD: Okay I don't want to argue with you. The other thing I want to do is thank you, Andrea, for holding this forum. I have a suggestion. I think you ought to hold it in Washington., DC. I think it could be an institutionalized thing where people down there would be influenced by it.

REP. JERRY NADLER: Let me thank you for holding this, it's been very educational and worthwhile. And I think we hear in some of the questions a level of frustration that is not surprising. The frustration is shared by me and I'm sure by Pete. Harvey may be a little optimistic. There's no magic bullet, unfortunately. Elections have consequences. We have to fight for these issues at every level. We have to fight for them in the broad way you're talking about and also accept incremental change because it's all you're likely to get, up to a point. We have to look at educating the people. Let me say one other thing, I found something which really surprised me in Congress. That is that there is so much lack of information among members of Congress.

I remember talking to one rather influential senior member, we were talking about some point we had made and embarrassed the Republicans. He said when we have the votes we're going to have to be responsible. I said, no we don't, and I gave him the facts. He was totally taken aback and relieved to hear that we didn't have to do something he regarded as distasteful but assumed was necessary. So there's a lot of education to be done on economic matters even for members of Congress.

ANDREA BATISTA SCHLESINGER: I just wanted to thank this excellent panel for coming out here on a Monday morning and doing this with us. Thank you, the studio audience, this event will air on CUNY TV, as all of our events do. We'll be distributing transcripts to policy makers and everyone who represents New York. As of later this week, you'll be able to actually view it on our newly relaunched web site, drummajorinstitute.org. You can also view all of our past Marketplace of Ideas series events. Thank you.

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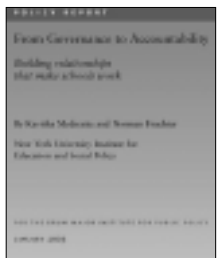
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