

101 Ways to Improve State Legal Systems

FIFTH
EDITION

*A User's Guide to Promoting
Fair and Effective Civil Justice*

.....
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How to Use This Guide

The American civil justice system is the most costly in the world. Litigation costs affect the ability of businesses to compete and prosper. By adding rationality and predictability to the American civil justice system and rooting out unnecessary expenses and abuse, civil justice reform can increase confidence in the economy, help businesses expand, and create jobs. Such reforms can also increase respect for the judicial system, which is too often characterized by liability that is disproportionate to responsibility, inconsistent outcomes, and jackpot verdicts.

101 Ways to Improve State Legal Systems offers some of the many options available to foster a sound legal system that promotes states' economies.¹ It considers key issues confronting policymakers. For example, when government officials hire contingency fee lawyers, what safeguards will ensure that law enforcement is driven by the public interest, not the financial interest of attorneys with a stake in the litigation? What role should a business's compliance with government safety standards play in product liability litigation? How can the law address damages that exceed actual losses, pain and suffering

awards that have become the largest part of tort damages, and punitive damage "run wild"? This report answers these questions and more.

101 Ways considers fair and effective measures that would improve the litigation process, promote rational liability rules, and rein in excessive awards. In addition, the report addresses over-regulation and enforcement. This problem occurs when elected officials, regulators, and the trial bar team up at the federal, state, and local levels to bring lawsuits regulating or punishing the same conduct.²

The report presents legal reform options in a conceptual manner by topic. It then directs readers to summaries of legal reform bills enacted in the states over the past five years. These recent laws show how legislators can move the proposals described in this guide from theory into practice.

Inclusion of a legal reform in this report does not necessarily mean that U.S. Chamber Institute for Legal Reform (ILR) endorses a certain approach or favors one

specific option over another. The options included in each section must be evaluated in light of a specific state's political and legal landscape. The order in which reforms are presented does not reflect their level of importance, priority, or effectiveness. ILR presents these options and recently enacted legislation to provide a useful resource to the reader.

Additional information on these and other legal reform issues can be found at www.InstituteForLegalReform.com.

Address Over-Regulation and Enforcement

Everyone—consumers, investors, and legitimate businesses—benefits when companies that engage in fraud or other unlawful conduct are identified and receive a punishment that fits the crime. There is a troubling trend, however, in which self-interested plaintiffs’ lawyers, allied with government officials, are making law enforcement decisions and setting the public policy of the state.

For example, multiple state attorneys general, other state regulators, and one or more federal agencies, acting in concert with private lawyers, may target a company or an entire industry. They institute multiple, overlapping investigations and lawsuits, alleging violations of law based on ambiguous claims such as “unfair practices,” “false claims,” “public nuisance,” or some other similarly vague theory. The company is then forced to defend duplicative investigations and legal actions that are pursued either simultaneously or in succession (forcing targets to litigate the same issues over and over again), imposing huge litigation costs long before any finder

of fact might have an opportunity to evaluate the merits of the claims. The public drumbeat regarding these accusations subjects the target to significant, ongoing reputational damage. The company ultimately has little choice but to agree to whatever settlement is demanded by the government officials and private lawyers.

States can enact reforms to protect the fundamental principles of fairness and impartiality that are the hallmark of our legal system. This section presents options for addressing these concerns in five core areas.

“...[M]ultiple state attorneys general, other state regulators, and one or more federal agencies, acting in concert with private lawyers, may target a company or an entire industry.”

State legislators can:

1. Adopt a transparent process with close government oversight when states hire private lawyers on a contingency fee basis to bring enforcement actions.
2. Ensure that unfair and deceptive trade practices laws help consumers, rather than provide a means for private lawyers to obtain lucrative fees where no consumer was injured or circumvent the evidence needed to recover in a tort lawsuit.
3. Learn from the experience of the federal False Claims Act, which plaintiffs' lawyers have transformed into a means to privately enforce a broad swath of laws and regulations governing companies that do business with the government.
4. Adopt best practices to ensure the fair enforcement of state unclaimed property laws, where government officials bent on balancing the budget have engaged financially-motivated private audit firms to assess compliance.
5. Curb abuses in bad faith actions against insurers that lead to higher costs for drivers and homeowners.

These changes would go a long way toward preventing enforcement abuses and ensuring that state actions are focused on actual wrongdoing that inflicts real harm on the consumers, taxpayers, policyholders, and businesses that the law is intended to protect.

Provide Transparency When State Officials Hire Private Lawyers

Purpose

Government officials are increasingly turning to private lawyers to pursue litigation on behalf of the state. Such arrangements are too often the result of agreements made behind closed doors between public officials and private contingency fee lawyers. In many cases, the lawsuits stem not from a government need to protect the rights of its citizens, but originate in theories developed by private attorneys and pitched to state attorneys general across the country until they find one or more “buyers.”³

These “pay-to-play” arrangements are contrary to good-government practices. The lawyers retained by the state often contribute substantial sums to the campaign of the official that hired them. Due to the current lack of disclosure and legislative oversight in many states, the public can be left with the perception that states hire outside counsel based primarily on their personal and political connections, not their experience.

In addition, these arrangements raise the troubling potential for enforcement of state law that is motivated by profit rather than

the public interest. When the government pays private lawyers based on the amount of damages or fines imposed, lawyers are driven to seek the largest financial award, no matter what the evidence supports and regardless of whether other remedies would provide a greater benefit to the public.

While hiring of outside counsel on a contingency fee basis may be pitched as “free,” it has significant costs for taxpayers. Private lawyers representing the state can obtain a windfall—millions of dollars in attorneys’ fees that would otherwise go to the general treasury—when the state could have pursued the litigation through government lawyers already on the public payroll.

In addition, lawsuits filed by plaintiffs’ lawyers on behalf of the government can financially benefit those lawyers in private litigation. Government lawsuits often mimic private class actions or other lawsuits brought by the same law firms. When this occurs, the lawyers retained by the state can gain improper leverage in their private litigation.

“...[T]hese arrangements raise the troubling potential for enforcement of state law that is motivated by profit, rather than the public interest.”

Options

1. Adopt aspects of the Transparency in Private Attorney Contracting (TIPAC) law, as first enacted in Florida, S.B. 712 (2010) (codified at Fla. Stat. Ann. § 16.0155):
 - *Finding of need*: Before hiring outside counsel on a contingency fee basis, the government must find that the arrangement is both cost-effective and in the public interest when considering: (1) whether the government has sufficient resources to handle the matter in house; (2) the time and labor required, complexity of the matter, and skill necessary; (3) the geographic area where the attorney services are to be provided; and (4) the amount of experience desired for the particular kind of attorney services to be provided and the nature of the private attorney’s experience with similar issues or cases.
 - *Request for proposals*: The government must issue a request for proposals from private attorneys who seek to represent the state on a contingency fee basis unless such a process is not feasible under the circumstances.
 - *Transparency*: Contingency fee agreements between the state and private lawyers, and fee payments made, must be promptly posted on a public website.
 - *Recordkeeping*: Law firms must keep detailed time and expense records.
 - *Fee schedule*: Contingency fee percentages are set through a reasonable sliding scale based on amount of recovery and subject to an aggregate cap, exclusive of reasonable costs and expenses.
 - *Oversight*: The attorney general must submit an annual report to the legislature describing use of contingency fee contracts in the preceding year and status of pending contingency fee litigation.
2. Legislators should also consider including the following additional elements:
 - *Government control*: Retention agreements must include safeguards requiring government attorneys to retain complete control over the litigation and that government attorneys have exclusive settlement authority (enacted in several states).
 - *Eliminate financial motive to punish*: A contingency fee may not be based on civil penalties or fines awarded, as enacted in Mississippi, Nevada, North Carolina, West Virginia, and Wisconsin.
 - *No improper leverage*: Preclude the state from retaining a law firm when that firm is presently engaged in

private litigation against the same defendant involving the same or substantially related subject matter.

3. Address attempts by attorneys general to circumvent existing safeguards that require them to obtain express statutory authority before hiring outside counsel.
 - Louisiana enacted such a law in 2014.

RECENT ENACTMENTS

Fifteen states have enacted attorney general transparency legislation since 2010. Each law varies but includes a combination of the elements above. Laws enacted over the past five years include:

- *West Virginia H.B. 4007 (2016) (codified at W. Va. Code Ann. § 5-3-3a)*
- *Arkansas S.B. 204 (2015) (codified at Ark. Code Ann. § 25-16-714)*
- *Nevada S.B. 244 (2015) (codified as amended at Nev. Rev. Stat. §§ 228.111 et seq.)*
- *Ohio S.B. 38 (2015) (codified at Ohio Rev. Code Ann. §§ 9.49 et seq.)*
- *Utah S.B. 233 (2015) (amending Utah Code § 63G-6a-106)*
- *North Carolina S.B. 648 (2014) (codified at N.C. Gen. Stat. §§ 114-9.2 et seq.)*
- *Louisiana Act No. 796 (2014) (amending La. Rev. Stat. §§ 42:262, 49:259)*
- *Wisconsin A.B. 27 (2013) (codified at Wis. Stat. §§ 14.11, 20.9305)*
- *Alabama H.B. 227 (2013) (codified at Ala. Code § 41-16-72)*
- *Iowa H.F. 563 (2012) (codified at Iowa Code §§ 23B.1 et seq.)*
- *Mississippi H.B. 211 (2012) (codified at Miss. Code Ann. §§ 7-5-5, 7-5-8, 7-5-21, 7-5-39)*

Restore Rationality to Unfair and Deceptive Trade Practices Litigation

Purpose

In 1914, Congress established the Federal Trade Commission (FTC) and, over time, empowered it to regulate unfair and deceptive trade practices. States developed so-called little FTC Acts to stop fraudulent acts within their jurisdictions. Unlike the federal FTC Act, however, most state unfair and deceptive trade practices acts (UDTPA or UDAP) (also known as consumer protection acts) allow consumers to bring private lawsuits for any conduct that could be considered “unfair” or “deceptive,” in addition to government enforcement.

These laws often permit private litigants to recover statutory damages—a minimum amount per violation regardless of whether a person experienced an actual injury. Many permit or require an award of three times the amount of actual damages (known as treble damages) as well as attorneys’ fees and legal costs.

Plaintiffs’ lawyers often assert UDTPA claims where traditional tort claims fail. More specifically, UDTPA claims are increasingly tacked on or brought as an alternative to product liability and other claims. Plaintiffs’ lawyers do so where they are unable to otherwise satisfy the well-reasoned elements of these claims, such as a showing of an actual injury, causation,

or damages. In addition, plaintiffs’ lawyers use UDTPA laws to bring lawsuits claiming violations of regulations that the legislature intended government agencies to monitor and enforce. UDTPA laws are often the basis for massive class actions brought on behalf of people whose purchase of consumer goods and services had nothing to do with the challenged advertising and labeling. For example, in recent years, certain plaintiffs’ law firms have filed cut-and-paste lawsuits targeting food and beverage marketing.⁴

State attorneys general also enforce these laws and some have done so in ways that stray from the laws’ intended purpose of protecting consumers. They have brought cases that are not sparked by consumer complaints but that are developed by profit-motivated lawyers retained by attorneys general to pursue the litigation on the state’s behalf. These cases often target practices that are already regulated by government agencies charged with protecting the public. State attorneys general are typically empowered to seek civil penalties under these laws. These lawsuits may indiscriminately seek the maximum fine then aggregate that fine “per violation,” which can lead to penalties

that are disproportionate to the alleged misconduct or consumer loss. Some attorneys general have distributed funds from the settlements and judgments

resulting from these actions to handpicked outside organizations and politically popular projects, or retained the money as an office slush fund.⁵

Options to Address Private Lawsuits

1. Require a plaintiff to show: (1) objectively reasonable reliance on an unfair or deceptive act or practice; (2) an ascertainable loss of money or property; and (3) proof that the conduct at issue caused the plaintiff's injury.
 - Currently law in Arkansas, among other states.
2. Require proof that the defendant willfully deceived the public for an award of treble damages where they are available or required.
3. Provide that punitive or exemplary damages are not available in an unfair or deceptive trade practices action to avoid double punishment of a defendant that has already been required to pay treble damages.
 - Currently law in Tennessee.
4. Provide that a court may not find conduct unfair or deceptive if the conduct is permitted or required by, or is consistent with, federal or state laws or regulations.
 - Most states have adopted regulatory compliance provisions, though the scope or application varies considerably: Alaska, Arizona (FTC-regulated conduct only), Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New York (federally-regulated conduct only), Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.
5. Provide that the UDTPA does not create a private right of action under other state laws that are enforced by government agencies and not through private lawsuits.
6. Encourage courts to apply traditional class action safeguards, such as requiring that common questions of law and fact predominate, where class actions are available.

“ They have brought cases that are not sparked by consumer complaints, but that are developed by profit-motivated lawyers retained by attorneys general to pursue the litigation on the state’s behalf. ”

- Alabama, Arkansas, Georgia, Louisiana, Mississippi, Montana, Tennessee, and South Carolina do not allow consumer protection claims to be brought as class actions, reserving these types of lawsuits for the attorney general. Iowa allows the filing of a class action after approval by the attorney general.
7. Do not permit statutory damages in class actions.
 - Currently law in Colorado, New York, Ohio, and Utah.
 8. Require a person, prior to bringing a lawsuit, to provide the prospective defendant with a certain number of days' notice of the intended action to promote prompt resolution of the dispute without the need for litigation.
 - Currently law in Georgia.
 9. Authorize awards of attorneys' fees and costs to prevailing plaintiffs only when the defendant's conduct was willful.
 - Currently law in Minnesota, North Carolina, and North Dakota.

RECENT ENACTMENTS

- *Arkansas H.B. 1742 (2017) (amending Ark. Code Ann. §§ 4-88-102, 4-88-113)*: Amends Arkansas Deceptive Trade Practices Act (DTPA) to require proof of an actual financial loss caused by a person's reliance on an unlawful practice. Defines "actual financial loss" as "an ascertainable amount of money that is equal to the difference between the amount paid by a person for goods or services and the actual market value of the goods or services provided to a person." Generally precludes class actions under the DTPA. Clarifies that an award of attorneys' fees to a prevailing plaintiff is discretionary, not mandatory.
- *West Virginia S.B. 315 (2015) (amending W. Va. Code Ann. §§ 46A-6-101, 105, 106)*: Provides that courts should be guided by the policies and interpretations of the FTC in construing the state's consumer protection law. Requires proof of an actual out-of-pocket loss proximately caused by a violation of the statute.

Options to Address Problematic Government Enforcement

1. Provide transparency in the state's hiring and payment of outside counsel and require government control over the litigation.
2. Foster consistency between state attorney general enforcement actions and government regulation through exempting conduct that is permitted or required by, or consist with, federal or state laws or regulations (discussed above).
3. Establish predictability and proportionality in civil penalties by:
 - (1) limiting civil penalties to cases in which there is evidence that a business willfully violated the law;
 - (2) requiring evidence of actual consumer harm;
 - (3) codifying factors to guide courts in determining an appropriate civil penalty level; and
 - (4) placing an aggregate limit on "per violation" civil penalties.

4. Ensure that settlement money furthers consumer and taxpayer interests by: (1) placing all recovered funds in the state's general fund to be allocated through the ordinary legislative appropriation process; (2) capping how much money the attorney general's office may retain in the consumer protection fund; (3) prohibiting allocation of recovered funds to outside organizations; and/or (4) requiring the attorney general to provide the legislature with a quarterly or annual report of settlements and judgments that details amounts recovered and the planned use of the funds.

RECENT ENACTMENTS

- *New Hampshire H.B. 2 (2015) (codified at N.H. Rev. Stat. Ann. § 7:6-f)*: Requires all funds recovered as a result of an attorney general enforcement action to be deposited in the state's consumer protection escrow account and provides that any amount over \$5 million must be deposited in the state's general fund.
- *Arizona H.B. 2396 (2013) (amending Ariz. Rev. Stat. Ann. § 35-142)*: Provides that money received by the state as a result of settlements, excluding restitution and reimbursement to state agencies for costs or attorney fees, must be credited to the state general fund unless specifically credited to another fund by law. Prohibits creation of funds, aside from those providing restitution, without prior legislative authorization.
- *Arkansas H.B. 2083 (2013) (amending Ark. Code Ann. § 4-88-105)*: Provides that whenever the state receives a portion of a settlement or judgment from an action in which the state is a party, the attorney general must distribute the money in the following manner: (1) payment to Arkansas consumers or state agencies designated by a court order or settlement agreement; (2) payment to a state agency having a nexus to the underlying litigation; (3) payment of attorneys' fees to the State Treasury; or (4) payment into the attorney general's Consumer Education and Enforcement Account, which is exclusively used for specified consumer litigation and education-related expenses. Caps the enforcement account to \$1 million and requires the attorney general to provide quarterly financial reports to the Legislative Council.
- *Kentucky H.B. 499 (2012) (amending Ky. Rev. Stat. § 48.005(4))*: Provides that funds recovered by the attorney general may be used to pay for the reasonable costs of litigation, as determined by the court and approved by the secretary of the Finance and Administration Cabinet. Any additional funds recovered must be deposited in the state's general fund.

Avoid Excesses in False Claims Act Litigation

Purpose

False claims litigation brought by private individuals (known as qui tam claims) under federal law has exploded.⁶ The federal False Claims Act (FCA) was originally enacted to address defense contracting fraud during the Civil War, but the law has transformed into a means for plaintiffs' lawyers to privately enforce a broad swath of laws and regulations governing companies that do business with the government. Such lawsuits now target conduct that does not actually involve a false claim or a true "whistleblower."

While the government can itself enforce the law, individuals who claim to have inside knowledge, known as a relator or whistleblower, can bring an action in the name of the government and receive a bounty between 15-25% of any government recovery. Companies that take such cases to trial face triple damages and the aggregation of "per claim" statutory penalties.

Congress provides an incentive for states to adopt false claims laws through offering increased federal Medicaid funding in the Deficit Reduction Act of 2005. In order to qualify, a state must enact a law with qui tam provisions authorizing private lawsuits on behalf of the government that are "at least as effective" as the federal law, have consistent liability provisions, and have penalties that are at least as high as the federal law.⁷ As an in-depth exploration of state false claims acts observed, states may receive a 10% bump in their recovery in multi-state federal FCA settlements, but that increase may be more than offset by the state's obligation to pay a 20% bounty of any funds received to the relators who filed suit under the state law and the administrative cost of reviewing FCA litigation brought by private plaintiffs' lawyers.⁸

With approximately two-thirds of states having enacted their own False Claims Acts, plaintiffs' lawyers are gravitating toward increased use of these laws.

Options

States that have enacted False Claims Acts, or are contemplating doing so, should consider the following reforms:

1. Provide liability protections to companies with certified compliance programs:
 - A defendant would be liable for treble damages only if it acted with specific intent to defraud; double damages if it acted with knowledge, reckless disregard, or deliberate ignorance; and 1.5 times damages if it made a qualifying self-disclosure to the government of the conduct.
 - With limited exceptions, a bar on qui tam actions against a company that previously disclosed substantially the same allegations to an appropriate government Inspector General or other federal investigative office.
 - In order to create incentives for employees to report alleged misconduct internally, an employee who failed to report internally at least 180 days before filing a qui tam action would face dismissal of the action.
 - A company and, absent personal involvement in fraud, its executives would not be subject to mandatory or permissive exclusion or debarment.
2. Adopt reforms applicable to all companies, such as:
 - Reduce the relator's share of the government recovery to provide substantial, but not excessive, incentives for bringing fraud to light.
 - o In cases in which the government intervenes, relators would receive 15% to 25% of the first \$50 million recovered; plus 5% to 15% of the next \$50 million recovered; plus 1% to 3% of amounts recovered above \$100 million.
 - o In non-intervened cases, relators would receive 25% to 30% of the first \$50 million recovered; plus 20% to 25% of the next \$50 million recovered; plus 10% to 20% of amounts recovered above \$100 million.
 - Bar qui tam actions brought by former or present government employees arising out of such person's employment by the government to prevent such employees from cashing in on their government service.
 - Prohibit actions based on the judicially-created concept of "implied false certification" liability, which typically allege liability based on a company's minor or insubstantial noncompliance with a statute, regulation, or contract.
 - o Alternatively, define the phrase "false or fraudulent claim" to require the plaintiff to show compliance with the specific provision at issue was material to the government's decision to pay the claims.
 - Require all essential elements of liability under the state FCA to be proven by "clear and convincing evidence" to bring the law in line with other federal and state anti-fraud statutes.

- Amend the FCA damages provision to better measure the government's actual loss. The government would recover its "net actual damage" before application of any damage multiplier, which is defined to mean "out-of-pocket monetary losses, less the value of benefits received by the government, and does not include indirect or consequential damages."
 - Change the current irrational penalty structure of the FCA, so that statutory penalties are assessed only where no damages are awarded and are capped at an "amount equal to the sum sought in the claim in addition to all costs to the government attributable to reviewing the claim."
 - Require a state attorney general who receives a qui tam complaint or initiates a false claims investigation to notify all relevant government employees of their obligation to preserve relevant documents. If the attorney general's office fails to provide this notification, the court would be instructed to "draw or instruct the jury to draw a negative inference from any failure of the government to produce documents requested in the course of litigation based on their loss or destruction."
 - Codify the unconditional authority of a state attorney general to dismiss meritless qui tam actions brought in the name of the state.
3. Repeal unnecessary and duplicative false claims laws.

RECENT ENACTMENTS

- *Washington S.B. 6156 (2016) (codified at Wash. Rev. Code § 43.131.419)*: Reauthorizes Medicaid False Claims Act, but repeals qui tam provisions in 2023 unless revisited.
- *Wisconsin S.B. 21, § 945n (2015)*: Repeals Wisconsin's False Claim for Medical Assistance Act, Wis. Stat. § 20.931, which was enacted in 2007. In a memorandum submitted to a Wisconsin legislator, the Wisconsin Department of Justice concluded that repeal of the law "will not reduce dollars recovered but rather, could serve to increase dollars recovered for the [Medical Assistance] program" because when the state pursues recovery through other laws, the state does not have to share its recovery with qui tam plaintiffs and pay their attorneys' fees.
- *Nevada A.B. 48 (2015) (amending Nev. Rev. Stat. § 357.210)*: Reduces from 33% to 25% the maximum share of any recovery that a private plaintiff is entitled to in a qui tam action brought under the state's Medicaid false claims law when the attorney general intervenes in the action at the outset, and from 50% to 33% the maximum share of any recovery that a private plaintiff is entitled when the attorney general does not intervene.

Adopt Best Practices for Fair Enforcement of Unclaimed Property Laws

Purpose

Unclaimed property laws require companies to transfer to the state treasury any money or property deemed abandoned after a certain period of inactivity by the property's last-known owner. These laws reach a wide range of assets—a long-forgotten insurance policy, inactive bank account with leftover funds, unclaimed dividend, or gift card that was never used. Such funds have become increasingly attractive to state officials looking to fill holes in government budgets.

Once transferred by a business, unclaimed funds are held by the state, nominally for the benefit of the absent owner, but as a practical matter as an indefinite, interest-free loan for the state. These laws, when fairly and appropriately enforced, may help reunite rightful owners with their property and may help ensure that companies are incentivized to protect abandoned consumer property. In times of budget tightening, however, there is a heightened focus on unclaimed property as a cash source for state treasuries.

This amplified state reliance on unclaimed property has dangerously coincided, with unclaimed property administrators increased use of private audit firms to assess whether businesses are properly reporting unclaimed property. When these firms stand to gain financially for every dollar collected, private auditors have an incentive to stretch the boundaries of the law in order to maximize their return. There is growing concern that private auditors operating under contingency fee arrangements have a conflict of interest that infects the process. They may be overly aggressive in pursuit of private gain and enforce the law without adequate oversight and accountability. States should take proactive steps and adopt best practices that ensure the fair and transparent enforcement of unclaimed property laws.

“When these firms stand to gain financially for every dollar collected, private auditors have an incentive to stretch the boundaries of the law in order to maximize their return.”

Options

1. Prohibit state officials from compensating private audit firms based on the amount recovered. All private audit firms should be paid on an hourly or fixed-fee basis.
2. Require unclaimed property administrators to make a written finding of need before engaging private auditors and use an open and competitive bidding process for all state contracts with private audit firms.
3. Require posting of all government contracts with private audit firms on the unclaimed property administrator's website.
4. Require unclaimed property administrators to maintain complete control over the course and manner of any audit conducted by a private auditor.
5. Provide companies subject to audit with the right to contact the unclaimed property administrator's staff directly on any matter pertaining to the scope of, legal justification for, or resolution of, the audit.
6. Adopt programs providing companies with incentives to voluntarily comply with unclaimed property laws without the risks associated with an intrusive audit. For example, some states have adopted voluntary disclosure programs that offer a materially shorter look-back period for voluntary reporting than would be subject to examination in an audit.

RECENT ENACTMENTS

- *Delaware S.B. 13 (2017) (amending Del. Code tit. 12, §§ 1145, 1156, 1172, 1173)*: Bars state officials from seeking unclaimed property when more than ten years has passed since it was presumed abandoned and requires the holder to retain records for that length of time. Provides certain companies that are subject to an unclaimed property audit with the ability to convert the audit into a voluntary disclosure agreement.
- *Arizona H.B. 2343 (2016) (amending Ariz. Rev. Stat. § 44-340)*: Requires the state to provide holders of unclaimed property with a notice of rights when contingency fee auditors are to conduct a third-party audit. Directs the Department of Revenue to explore options for unclaimed property audits that include compensating third-party auditors on a basis other than a percentage of recovery of the unclaimed property.
- *Pennsylvania H.B. 1605 (2016) (amending Pa. Stat. § 1301.8 and adding § 1301.10a)*: Requires the holder of the property presumed abandoned to send notice to the owner of the property before the property can be transferred to the state. Applies when the holder has an address for the owner that the holder's records do not disclose to be inaccurate and the value of the property is more than \$50.

- *Delaware S.B. 11 (2015) (amending various sections Del. Code tit. 12):* Limits the term of contracts with outside auditors to no more than five years and precludes hiring certain former government employees as outside auditors for two years after leaving state employment, among other changes.
- *Delaware S.B. 141 (2015) (amending Del. Code tit. 12, §§ 1156, 1158):* Permanently extends the state's voluntary disclosure program and reduces the look-back period for audits to 22 years from initiation of the audit (current law allows looking back to 1981), among other reforms.
- *Michigan S.B. 538 (2015) (amending Mich. Comp. Laws §§ 567.222, 567.250, and 567.251):* Allows eligible holders of unclaimed property to elect a streamlined audit process, which is subject to a shortened lookback period and not conducted by contingency fee auditors. Excludes property worth \$25 or less from being escheatable.

Reject Expansions of Liability in the Insurance Claims Settlement Process

Purpose

Every state has laws to protect against an insurer's improper and unfair handling of an insurance claim. These laws generally provide for regulatory enforcement by a state's insurance department but may also permit an insured, and sometimes a third party, to directly sue an insurer for any denial of a claim done in "bad faith."

Traditionally, courts have interpreted "bad faith" as an intentional or reckless denial of a claim; however, some state courts have diluted this standard by holding that minor or unintended technical violations of an insurance statute may constitute bad faith for the purposes of a civil action. This may enable a claimant to recover a broad array of damages against an insurer, such as the full value of the underlying insurance policy, extra-contractual damages, attorneys' fees, court costs, and punitive damages.

Plaintiffs' lawyers have pushed legislation to expand such lucrative lawsuits against insurers in four key ways by: (1) creating new statutory private rights of action for bad faith; (2) diluting any intentional conduct standard for claiming bad faith;

(3) enumerating strict criteria purporting to show bad faith; and (4) increasing and expanding penalties for bad faith actions. By establishing new private rights of action for insureds and third parties while lowering the standards for maintaining such claims, plaintiffs' lawyers are able to fashion a broad and highly malleable civil action that can transform even the most minor insurer error into a multi-million dollar lawsuit.

Ultimately, costs associated with such lawsuits are not borne by a "wealthy insurer," but rather by individuals, small businesses, and other policyholders onto whom higher premiums are passed. Higher premiums may price some consumers out of the insurance market altogether, increasing the number of uninsured and underinsured, and further increase costs for those able to maintain insurance. Some insurers may also discontinue or substantially curtail their services given the risks associated with an overly-expansive bad faith law, which would additionally penalize consumers through less insurer competition and fewer coverage choices.

NOTES

- States vary on whether a private right of action by a direct insured against his or her insurer (i.e., first-party claimant) is provided by statute or common law, although such an action is generally available. In comparison, only a handful of states permit claims by someone other than the insured individual (i.e., third-party claimant).⁹
- In 2016, U.S. Court of Appeals for the Third Circuit ruled that Pennsylvania's bad faith statute requires proof by "clear and convincing evidence" that the insurance company "did not have a reasonable basis for denying benefits under the policy and that [the] defendant knew or recklessly disregarded its lack of reasonable basis in denying the claim." In addition, the "evidence must be so clear, direct, weighty and convincing as to enable a clear conviction, without hesitation, about whether or not the defendant acted in bad faith."¹⁰
- The Pennsylvania Supreme Court is currently considering whether punitive damages are available in a statutory bad faith claim absent a showing of the insurer's "motive of self-interest or ill will."¹¹

Options

1. Provide a safe harbor from bad faith claims during which the insurer can properly investigate the claim and decide whether to offer policy limits.
2. Provide or clarify bad faith standards for any private statutory right of action, requiring proof that the insurer acted intentionally to unjustly deny payment under a claim or acted in reckless disregard of the claimant's interests.
3. Eliminate dual enforcement of bad faith actions under statute and common law so that a claimant failing to make a claim under statute cannot revive his or her claim through a common law tort action, or vice-versa.
4. Provide or clarify that any statutory private right of action is limited to the direct insured and not other third-party claimants.
5. Repeal statutes permitting third-party bad faith claims where applicable.

“By establishing new private rights of action for insureds and third parties while lowering the standards for maintaining such claims, plaintiffs’ lawyers are able to fashion a broad and highly malleable civil action that can transform even the most minor insurer error into a multi-million dollar lawsuit.”

6. Clarify that enforcement of the state's unfair claims settlement statute is limited to a state insurance commission or department, and that any private statutory right of action must be established separately.
7. Establish limits on extra-contractual and/or punitive damages available in bad faith actions.
8. Oppose legislation that creates a private right of action for third-party claimants, reduces or eliminates the standard for finding bad faith, or increases penalties.
9. Adopt safeguards against fraud and abuse when a policy holder assigns his or her insurance benefits to third parties, such as contractors, who make repairs and then pursue payment from the insurer.

RECENT ENACTMENTS

- *Missouri H.B. Nos. 339 & 714 (2017) (codified at Mo. Rev. Stat. §§ 537.058, 537.065)*: Requires that a settlement demand for personal injury, bodily injury, or wrongful death claim be in writing and sent by certified mail to the tortfeasor's liability insurer. Settlement demands must include a minimal level of information about a claim and needed authorizations so that an insurer can evaluate it.

- *Texas H.B. 1774 (2017) (codified at Tex. Ins. Code §§ 542A.001 et seq.)*: Requires a policyholder to provide 60-days notice to an insurer before filing a lawsuit alleging the insurer did not properly cover storm or other weather damage and including information needed for the insurer to address any outstanding claim issues. Attorneys' fees may not be awarded if the insurer was entitled to but not provided with pre-suit notice.

RECENT LEGISLATION

- *Florida H.B. 1421 (2017)*: Allows a policyholder to rescind an assignment of benefits agreement for any reason within seven days of signing. Requires an assignee to provide a copy of the assignment agreement to the insurer within three business days after the agreement is executed or the date of repair work begins. Requires an assignee to notify the policyholder and the insurer that the assignee will file litigation against the insurer. Awards attorneys' fees under a formula based on the judgment obtained by the assignee and the pre-suit settlement offer.

Safeguard the Integrity of the Litigation Process

Individuals and businesses that find themselves named as defendants in civil litigation are often confident that they will prevail against meritless lawsuits if the case is decided through a fair and impartial system. Unfortunately, in some areas of the country, the litigation system is slanted against defendants. The rules governing lawsuit procedure can matter just as much as the substantive law.

In order to gain an advantage, some plaintiffs' lawyers recruit clients across the United States and then file their claims in a state with procedures that favor plaintiffs. They know that defendants are placed at a distinct disadvantage in some jurisdictions. The U.S. Supreme Court recently curbed this practice when it found that a plaintiff cannot sue a business outside its home state unless the lawsuit involves conduct or harm that occurred in that state.¹² The Supreme Court's constitutional limitations on what is known as personal jurisdiction, however, do not address the particular court in which plaintiffs' lawyers can file a claim within a state. That is a matter of state venue laws. Loose state venue laws may allow plaintiffs' lawyers to pick and choose the court where they believe they will receive the most favorable judge or jury, even if that area has no connection to the lawsuit.

Other laws fail to provide parties with a representative jury—one whose diversity reduces the chance of an outlier decision or runaway award. Statutes and rules against frivolous lawsuits are also notoriously lax, leaving those hit with such suits to pay the cost even when the lawsuit is dismissed.

“ Loose state venue laws may allow plaintiffs' lawyers to pick and choose the court where they believe they will receive the most favorable judge or jury, even if that area has no connection to the lawsuit. ”

Defendants are also often forced into settling lawsuits by pre-trial rulings that stack the deck against them. In some states, judges do not act as gatekeepers over the reliability of purported “expert” testimony, placing defendants at a risk of junk science pervading the trial and an outcome that is unsupported by reliable evidence. In addition, the bet-the-company nature of class action lawsuits, once certified, often leads businesses to quickly settle claims even when many of the class members have no concern with the product or its marketing.

Plaintiffs’ lawyers exploit procedural loopholes. In asbestos litigation, for instance, they file claims against solvent companies that have only a remote connection to the litigation. During the litigation, however, the plaintiffs’ lawyers do not disclose that they believe their clients’ exposure to asbestos stemmed from the products of companies that have already filed for bankruptcy as a result of the liability. After a settlement or judgment, the lawyers file claims with trusts established by the bankrupt companies and recover more. Since the trust claims are kept hidden during the litigation, juries are misled and solvent companies settle for inflated amounts.

After an extraordinary verdict, a defendant may be unable to appeal due to rules that require the defendant to post a bond in an amount as much as, or more than, the amount of the judgment in order to prevent collection attempts during its appeal. And, during what may be a long litigation process, interest on the judgment continues to accumulate at a rate that, in some states, is ten times inflation. Laws such as these place undue pressure on defendants to settle rather than exercise their right to appeal.

Individuals who experience injuries also face unfairness in the legal system. They are enticed to take loans while their lawsuit is pending at sky-high interest rates. They also may be misled by attorney advertising and solicitation practices that do not fully educate them on their rights and options in obtaining legal representation. In addition, hedge funds and other investors are quietly funneling cash into big-ticket lawsuits brought by others, promoting speculative litigation.

The reforms addressed in this section are intended to safeguard the integrity of the litigation process, providing a balanced system to fairly resolve disputes.

Reduce Forum Shopping

Purpose

Forum shopping, or “litigation tourism,” describes the practice whereby attorneys file lawsuits in a jurisdiction that has little or no relation to the litigants or conduct involved in the lawsuit. This can occur within a state (intrastate forum shopping) or among states (interstate forum shopping). The motivation is often a perception of pro-plaintiff judges or juries, a reputation for high verdicts, or favorable court procedures or law.

Forum shopping has led to an influx of litigation in certain jurisdictions. This practice can provide plaintiffs with an unfair and inappropriate advantage in litigation and place an undue burden on the judicial system and taxpayers of these jurisdictions.

Choice of forum is typically governed by state venue laws or the doctrine of forum non conveniens, which provides a court with discretion to dismiss a case more appropriately heard in another forum.

NOTE

Recent U.S. Supreme Court decisions have clamped down on the ability of plaintiffs’ lawyers to drag businesses into courts in states that have no connection to the litigation.¹⁶ There remains a need for state venue reform, however, to establish rules consistent with the constitutional safeguards recognized by the Supreme Court and to address forum shopping within a state.

Options

1. Prohibit nonresidents of the state from bringing an action in state court unless all or a substantial part of the acts or omissions giving rise to the lawsuit occurred in the state.
2. Require that, in any civil action where more than one plaintiff is joined, each plaintiff shall independently establish proper venue.
3. Limit the ability of a plaintiff to file a lawsuit in a jurisdiction other than where the action arose, where the plaintiff resides, or where the defendant has its principal place of business.

“There remains a need for state venue reform, however, to establish rules consistent with the constitutional safeguards recognized by the Supreme Court and to address forum shopping within a state.”

4. Tighten venue rules by providing that owning property and transacting business in a county is insufficient in and of itself to establish the principal place of business for a corporation.
 5. Specify factors pursuant to which a court may dismiss or transfer a case when the lawsuit is more closely related, and is more appropriately decided, in another jurisdiction. Such factors may include where the injury occurred, where the parties are located, the location and availability of witnesses, the ease of access to evidence, the possibility of harassment to the defendant in an inconvenient forum, the enforceability of a judgment, whether the litigant is attempting to circumvent the time limit for bringing a claim in another state, which state's law would govern the case, and the burden on the court and jury of deciding a matter that is not of local concern.
 6. Reject constitutionally problematic legislation that attempts to establish personal jurisdiction over a corporation solely on the basis of the company registering to do business in the state.
- plaintiffs who are legal residents of Texas or derivative claimants of legal residents of Texas. Requires courts to apply a forum non conveniens analysis individually with respect to each plaintiff.
- *Virginia H.B. 1618 (2013) (amending Va. Code Ann. § 8.01-262)*: Provides that a plaintiff may only file a lawsuit where a corporate defendant's principal office or principal place of business is located, or where there is a practical nexus between a forum in which the defendant regularly conducts substantial business activity and the action, as shown by the location of fact witnesses, plaintiffs, or other evidence to the action.
 - *Oklahoma H.B. 1003X (Spec. Sess. 2013) (codified at Okla. Stat. tit. 12, § 140.3)*: Codifies the doctrine of forum non conveniens, allowing a court to transfer a claim or action to another venue in the interest of justice and for the convenience of the parties. The court must consider: whether an alternate forum exists in which the action may be tried; whether the alternate forum provides an adequate remedy; whether keeping the action in the court in which the case is filed would be a substantial injustice to the moving party; whether the alternate forum can exercise jurisdiction over all the defendants properly joined in the action of the plaintiff; whether the balance of the private interests of the parties and the public interest of the state predominates in favor of the action being pursued in an alternate forum; and whether the stay, transfer or dismissal would prevent unreasonable duplication or proliferation of litigation.

RECENT ENACTMENTS

- *Texas H.B. 1692 (2015) (amending Tex. Civ. Prac. & Rem. Code Ann. § 71.051)*: Curbs the practice of foreign plaintiffs filing personal injury and wrongful death cases in Texas courts. Amends a provision in the state's forum non conveniens law that prohibited courts from dismissing claims filed by nonresident plaintiffs when one plaintiff in the action is a legal resident of Texas. Provides that the legal residency exception to forum non conveniens applies only to

Ensure That Juries Represent the Entire Community

Purpose

Representative juries that include people from all walks of life enhance the quality of deliberations and reduce the potential for outlier verdicts. The jury service laws of some states, however, exempt certain professionals, make it easy for citizens to simply avoid jury service, or provide inadequate compensation for working jurors to serve on long, high-stakes trials. States can facilitate more representative juries by reducing the burdens of jury service and expecting all people to serve.

Two states use a particularly innovative “lengthy trial fund” to ensure that jurors who would not receive their ordinary income during jury service are able to serve on complex trials that extend more than one or two weeks. Without the availability of such wage replacement, individuals who depend on hourly wages, work as independent contractors, or own small businesses are likely to be excused from jury service on high-stakes trials due to financial hardship. By including a diverse range of experiences, this program may reduce the potential for a “runaway” jury.

Options

1. Consider updating state jury service laws to include the following best practices:
 - provide a procedure to automatically reschedule jury service;
 - limit the term of service to no more than one day or one trial;
 - strengthen the hardship excuse standard;
 - eliminate all exemptions based on profession or occupation;
 - prohibit requiring use of leave or vacation time for jury service;
 - protect small businesses that may suffer from a temporary loss of more than one employee on jury service; and
 - increase civil fines for failure to respond to a juror summons (e.g., \$500).
2. In coordination with the state’s judiciary, consider adopting legislation to authorize, study, or fund jury service innovations recommended by the National Center for State Courts and American Bar Association.¹⁷ The guides published by these organizations support several of the reforms above

and also recommend additional practices, such as allowing juror note taking.

3. Adopt a lengthy trial fund providing supplemental compensation to jurors selected to serve on trials of more than five or ten days who do not receive their full, regular compensation during jury service from their employers or who are self-employed. This fee may be financed by a nominal fee on filing of civil complaints without the use of taxpayer dollars. Such a system is currently operating in Arizona and Oklahoma.
 - *Ariz. Rev. Stat. § 21-222 et seq.*: Jurors who serve more than five days who document that they are not receiving their usual income can receive their daily loss up to \$300 for each day of jury service. Those who are retired or not employed are eligible to receive \$40 per day. Supplemental compensation is fully funded by a \$15 court fee assessed on the filing of civil complaints, answers to civil complaints, and motions to intervene in civil cases filed in superior court. The fee is not imposed in cases that involve minimal use of court resources or that are not afforded the opportunity for a trial by jury.
 - *Okla. Stat. tit. 28, § 86*: Jurors who serve more than ten days who document that they are not receiving their usual income can receive their daily loss up to \$200 for each day of jury service beginning the fourth day of service. The court may also award replacement wages of up to \$50 per day for the fourth to the tenth day of jury service when a juror serves more than ten days if it finds that jury service for a particular individual is a significant financial hardship. This wage replacement is fully funded by a \$10 court fee assessed on the filing of civil complaints.
4. Promote predictability and consistency in jury determinations by preserving a 12-member jury in civil cases (other than for deciding small claims). Smaller juries have less diversity, less deliberation, and are less representative of the community. They have a greater chance of reaching outlier decisions. Resist efforts—pushed by plaintiffs’ lawyers and enticing as a means to cut costs or increase juror pay—to reduce civil juries to six members.

RECENT ENACTMENT

- *Arizona H.B. 2246 (2017) (codified at Ariz. Rev. Stat. § 21-222)*: Extends the sunset provision of the Arizona Lengthy Trial Fund from June 30, 2019 to June 30, 2027.

Stop Frivolous Lawsuits

Purpose

Many states do not provide a meaningful remedy for victims of lawsuit abuse. Due to “safe harbors” allowing plaintiffs’ lawyers to walk away from a frivolous lawsuit without penalty and restrictions on the ability of a judge to reimburse defendants for their litigation expenses, individuals and businesses often have no choice but to settle even the most baseless claims. Defendants will often agree to plaintiffs’ lawyer’s demands to make the case “go away,” paying the nuisance value, which is an amount just under how much it would cost to have the case dismissed.

Legislators can enact laws that require plaintiffs and their lawyers to compensate those who are harmed by lawsuit abuse, prevent vexatious litigants from repeatedly filing lawsuits, and provide businesses with an opportunity to address technical regulatory compliance issues before being hit with a lawsuit.

NOTE: “LOSER PAYS”

State legislators periodically express interest in adopting “loser pays,” a system under which the losing party in a lawsuit must pay the opposing party’s attorneys’ fees and costs. Loser pays can have strong appeal, since under the current system it often takes little more than a small filing fee and generation of a form complaint to begin a lawsuit. It costs much more for a small business to defend itself. Even when an individual or business “wins” a lawsuit, the

cost of defending against a meritless claim can easily rise into the tens or hundreds of thousands of dollars. These expenses, which are typically not recoverable, become a cost of doing business in America—it is part of the “tort tax.”

Theoretically, a loser-pays law should deter lawyers from filing weak claims. Some respected scholars and advocacy groups strongly support a loser-pays system. There are questions, however, as to whether the pure form of a loser-pays law, known as the “English Rule,” achieves this result in practice. Some have expressed concern that a loser-pays system will be unevenly applied against defendants—adding attorneys’ fees on top of what may already be excessive liability.

Concern that the English Rule might not result in a loser-pays system, but instead “defendant pays,” stems from the considerable discretion that judges typically have to avoid imposing fees on individuals whose good-faith claims could not be proved by a preponderance of the evidence. Imposition of fees is especially unlikely when the prevailing party is a corporate defendant that is viewed as being able to “afford” to defend against the suit. Thus, the English Rule could paradoxically increase the liability exposure of America’s employers. Even if a judge imposed fees on a losing plaintiff, in many cases, such individuals are “judgment proof” and a

defendant that pursues fees would spend more money chasing after unattainable reimbursement.

The most recent action on loser pays occurred in Idaho. In December 2016, the Idaho Supreme Court, in a split decision, found that under Idaho Code § 12-1212 “prevailing parties in civil litigation have the right to be made whole for attorney fees they have incurred ‘when justice so requires.’”¹⁸ The ruling applied prospectively, taking effect on March 1, 2017. One day earlier, the Idaho Legislature passed H.B. 97, which allows a judge to award a prevailing party reasonable attorney’s fees only “when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation.” Governor Butch Otter signed the legislation on March 1. This legislation restored the status quo.

NOTE: CONSTITUTIONALITY OF LEGISLATIVE ACTION

Plaintiffs’ lawyers may challenge laws that compensate victims of lawsuit abuse, arguing that only the judiciary may regulate the practice of law or court procedure. One such attempt failed in 2017, when the Pennsylvania Supreme Court upheld a longstanding state law that provided individuals to bring a statutory cause of action for “wrongful use of civil proceedings.” The law, known as the Dragonetti Act,¹⁹ provides that an attorney who brings a lawsuit can be held liable to a prevailing opposing party if he or she, in prosecuting the underlying action, acts in a grossly negligent manner or without probable cause and primarily for an improper purpose. The state high court ruled that the Dragonetti Act was not designed to regulate the conduct of attorneys; rather, its “[p]urpose [is] to compensate victims of frivolous and abusive litigation and, therefore, [it] has a strong substantive, remedial thrust.”²⁰

Options

1. Strengthen the state’s existing statute or rule against frivolous claims. A frivolous lawsuit is one that: (1) is presented for an improper purpose; (2) is not supported by existing law or a legitimate argument for extending, modifying, or reversing existing law or for establishing new law; or (3) is not supported by the facts and is unlikely to have evidentiary support after a reasonable opportunity for further investigation or discovery. By way of contrast, a meritless lawsuit is one where there is a legitimate claim, but the plaintiff cannot, or does not, meet his or her burden of proof.
 - Eliminate the 21-day “safe harbor” (available in federal courts and about one-third of state courts), which allows plaintiffs’ lawyers to withdraw frivolous claims without penalty even after imposing significant costs upon a defendant.
 - Require courts to impose sanctions when a judge finds that a claim or defense is frivolous.

- Authorize courts to reimburse a victim of lawsuit abuse for reasonable attorneys' fees and costs incurred as a direct result of the frivolous claim.
 - Place the cost of frivolous legal claims or defenses on the attorney responsible.
2. Require a plaintiff whose case is dismissed at an early stage for failure to state a claim to pay the defendant's attorneys' fees and costs. This option would require a court, upon dismissing a claim, to evaluate whether the claim not only lacked merit but was frivolous. If the court finds a claim lacked any basis in law or fact, then the court would require the plaintiff to pay the defendant's attorneys' fees and costs incurred as a direct result of the frivolous claim.

RECENT ENACTMENTS AND LEGISLATION

- *West Virginia S.B. 342 (introduced 2017)*: Provides that when a court dismisses a lawsuit, a defendant is entitled to recover attorneys' fees and costs that directly result if the court finds the claim was frivolous. Provides a court with discretion to award less than the full amount of defendant's fees and costs if the amount would place an unreasonable burden on the plaintiff; the plaintiff promptly withdrew the frivolous claim or amended the complaint in good faith to state a claim; or the violation was de minimis.
- *Tennessee H.B. 3124 (2012) (amending Tenn. Code Ann. § 20-12-119)*: Provides that when a court dismisses a lawsuit for failure to

state a claim, a defendant is entitled to recover up to \$10,000 in attorneys' fees and costs that resulted from the filing of those claims. The court will not require a plaintiff to pay if: (1) the defendant did not file the motion to dismiss within 60 days of service of the complaint; (2) the plaintiff withdraws or amends the complaint to state a claim; (3) the plaintiff is a pro se litigant, unless the court finds the plaintiff acted unreasonably in bringing, or refusing to withdraw the dismissed claim; (4) the plaintiff is a government entity or public official; (5) the complaint specifically pleads that its purpose is to extend, modify, or reverse existing precedent, law or regulation, or establish the meaning, lawfulness or constitutionality of a law where the meaning, lawfulness or constitutionality is a matter of first impression of an appellate court; or (6) the court granted the motion to dismiss the claim due to the subsequent repeal, amendment, overruling or distinguishing of the applicable law, regulation or published court precedent. The court awards fees only after all appeals are exhausted.

3. Adopt a vexatious litigant law. This law would require pro se plaintiffs (individuals who file lawsuits without an attorney) who repeatedly file and lose lawsuits to obtain permission from the court and post security before filing additional litigation. Such laws have been enacted in states such as Arizona, California, Connecticut, Florida, Hawaii, New Hampshire, Nevada (court rule), Ohio, and Texas.

RECENT ENACTMENTS

- *California A.B. 1521 (2015)* (amending and adding several provisions of the Civil Code and Government Code): Requires a “high-frequency litigant” (a plaintiff who has filed ten or more complaints in the preceding year) to disclose the number of previous lawsuits filed, the reason the plaintiff was in the geographic location of the alleged violation, and why he or she visited the site before filing a lawsuit alleging a construction-related accessibility violation. Requires a high-frequency litigant to pay a \$1,000 filing fee in addition to the initial filing fee, among other provisions.
 - *Arizona S.B. 1048 (2015)* (amending *Ariz. Rev. Stat. §§ 12-302, 12-3201*): Prohibits courts from waiving court fees and costs in civil actions filed by a pro se vexatious litigant.
 - *New Hampshire S.B. 96 (2013)* (codified at *N.H. Rev. Stat. Ann. § 507:15-a*): Authorizes judges to order individuals who have filed three or more frivolous lawsuits to retain an attorney of good character to represent them in all actions or to post a cash or surety bond sufficient to cover all attorneys’ fees and anticipated damages.
4. Provide an opportunity to cure technical compliance issues. Some plaintiffs’ law firms and professional plaintiffs troll for minor technical violations of federal or state regulations, then immediately bring “gotcha” lawsuits against a business to collect monetary damages

or penalties. Small businesses, which may be unaware of the numerous regulatory requirements, are often targets. States have enacted laws in a variety of contexts that allow a business to address noncompliance with a regulation before a plaintiffs’ lawyer resorts to filing a lawsuit seeking damages or penalties.

RECENT ENACTMENTS

- *Texas H.B. 1774 (2017)* (amending *Tex. Ins. Code § 541.156* and adding *§ 542A.001 et seq.*): Addresses a surge of abusive lawsuits alleging damage from hailstorms and other severe nature-related events by requiring claimants to provide notice to an insurer of a claim and a 60-day period for an insurer to address any outstanding issues before the claimant files a lawsuit.
- *Arizona S.B. 1406 (2017)* (to be codified at *Ariz. Rev. Stat. Ann. § 41-1492.08(E)*): Provides that before filing a lawsuit alleging that a public accommodation operated by a private entity has a building, facility, or parking lot that fails to comply with certain technical aspects of disability access requirements, the aggrieved person must provide written notice with sufficient detail to allow the business to cure the violation or comply with the law. A business has 30 days to cure the alleged violation before the plaintiff may file a lawsuit. If the business is required to obtain a building permit or other government approval before making the change, it must provide a corrective action plan to the aggrieved party within 30 days of

receiving the notice, and then has another 60 days to comply, which does not include the time during which the business awaits government approval. A court may stay an action if it determines that a plaintiff is a vexatious litigant.

- *Minnesota H.B. 1542 (2017) (amending Minn. Stat. § 363A.331)*: Requires attorneys to provide a business with notice of an alleged architectural barrier that violates accessibility requirements and generally provides the business with 60 days to address the issue before the attorney may file a lawsuit.
- *Texas H.B. 1463 (2017) (to be codified at Tex. Hum. Res. Code § 121.0041)*: Requires a person intending to file an action alleging that an entity failed to comply with a disability access standard to provide that entity with 60-days' written notice of the alleged violation and an opportunity to correct the issue before filing a lawsuit.
- *West Virginia S.B. 563 (2017) (to be codified at W. Va. Code Ann. § 46A-5-108)*: Amends the West Virginia Consumer Credit and Protection Act, requiring that a consumer give 45-days' notice to a

creditor or debt collector before filing a lawsuit, providing the creditor or debt collector an opportunity to make an offer to cure the alleged violation. If the consumer accepts any offer that is made, the business must address the issue within 20 days and litigation is avoided. If no offer is made, the consumer may file the claim. If an offer is made during that 45-day period but is rejected by the consumer, that consumer must be awarded more than that offer at trial in order to recover attorneys' fees.

- *California S.B. 269 (2016) (amending Cal. Civ. Code § 55.56)*: Upon service of a complaint, provides a small business with 15 days to address certain technical violations of accessibility requirements. Upon obtaining compliance within this period, provides a presumption that the business is not liable for statutory damages (California law authorizes a \$4,000 penalty per violation). Exempts a defendant from full statutory damages if the structure is inspected by a certified access specialist and the business corrects, within 120 days, the violations that are the basis of the lawsuit.

Provide Proportionality in Discovery

Purpose

The standard of “broad and liberal discovery,” which has governed discovery for decades, has become an invitation to abuse.”²¹ The costs associated with civil discovery have grown exponentially, frustrating the goal of obtaining a just, speedy, and inexpensive determination of every action and imposing significant burdens on both litigants and the judiciary. It is estimated that discovery costs comprise between 50 and 90 percent of the total litigation costs in a given case.²² These increased costs are due in large part to the failure to contain the rapid growth of electronic discovery, which has forced parties to pay hundreds of thousands (if not millions) of dollars to respond to vexatious requests for documents that are often nothing more than open-ended fishing expeditions in search of a quick settlement.

In response to concerns regarding the growing cost of discovery, the federal judiciary amended its rules effective

December 1, 2015. It replaced a provision allowing a party to demand production of documents, responses to interrogatories, and deposition testimony that is “reasonably calculated to lead to the discovery of admissible evidence” with the concept of proportionality.

Given the challenge of identifying and preserving the ever-growing amount of electronically stored information (ESI) that may be relevant to litigation, the federal judiciary also updated its rules governing discovery sanctions. The new approach instructs courts to balance the severity of sanctions for failing to preserve ESI against the intent of the party that lost the evidence and any prejudice experienced by other parties.

NOTE

Changes to rein in abusive discovery in state courts may require amending court rules, which may involve seeking judicial, rather than legislative, action.

Options

1. *Proportionality requirement:* Amend the state's rules of civil procedure consistent with the new standard applied in federal courts to provide that parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.
2. *Sanctions for loss of ESI (spoliation of evidence):* Provide that if a party loses ESI that it should have preserved in the anticipation or conduct of litigation

because that party failed to take reasonable steps to preserve it, and the ESI cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (i) presume that the lost information was unfavorable to the party; (ii) instruct the jury that it may or must presume the information was unfavorable to the party; or (iii) dismiss the action or enter a default judgment.

RECENT STATE ACTION

- *Wyoming R. Civ. Pro. 26(b), 37(e)* (effective Jan. 1, 2017): Adopting a proportionality requirement and spoliation sanctions for ESI similar to the federal rule.

Ensure Class Actions Benefit the Public, Not Just Lawyers

Purpose

Class action abuse is a long-standing issue at both the federal and state levels. Courts that improperly certify class actions place tremendous pressure on defendants to settle, the alternative for whom is to spend a significant sum defending the lawsuit and “bet the company” should the case go to trial. A 2017 survey conducted by Carlton Fields, a legal consulting service, found that a business’s liability exposure in a “routine” class action is between \$2.1 million and \$19.6 million.²³

Many class action settlements reward the lawyers responsible for the creative theories behind such suits with highly lucrative fees. Their purported “clients,” the consumers of the products, either receive nothing of value or must fill out paperwork to obtain a nearly worthless recovery.

It is not uncommon for consumers to receive less money from a class action settlement than goes to paying attorneys’ fees, litigation expenses, and the costs of

administering the claims process. Few class members actually seek compensation, often less than 1 % of the class.²⁴ The low claims rate indicates that people generally do not view many of these class actions as providing value or feel they did not experience the injury that the lawsuit alleged. Class action lawyers bolster their own recovery by seeking fees based on a percentage of the total settlement fund (including amounts consumers will never collect) and placing an inflated value on injunctive relief, such as the addition of fine-print disclosures to product labels.

Legislation can require greater scrutiny of proposals for class certification and settlement agreements to help ensure that class members—not entrepreneurial lawyers—are the primary beneficiaries of these lawsuits. It can also protect the ability to appeal erroneous class certification decisions that undermine due process by allowing for immediate judicial review.

Options

1. Require class members to have “suffered the same type and scope of injury” as the named class representative in order to obtain class certification.
2. Prohibit class certification when there is no reliable and feasible way of identifying and distributing money to class members.
3. Require plaintiffs to establish that the class action states a plausible claim before permitting highly expensive and burdensome discovery to move forward.
4. Require class counsel to disclose the circumstances under which each class representative agreed to be included in the complaint. Prohibit class certification when a proposed class representative is a relative, or a present or former employee, of class counsel.
5. Establish a rule in all class actions that discovery may not proceed until threshold motions challenging the validity of the claims are resolved.
6. Provide a right to interlocutory (immediate) appeal of a trial court’s grant or denial of class certification. Several states provide a right to appeal class certification orders through statute or court rule.
 - These states include Alabama, Arizona, Arkansas, Connecticut, Florida, Georgia, Iowa, Kentucky, Louisiana, Montana, North Dakota, Ohio, Oklahoma, Tennessee, and Texas.
7. Preclude attorneys’ fees that dwarf the benefits provided to class members. Options include:
 - Basing attorney fee awards on a reasonable percentage of the money actually received by class members.
 - Determining attorneys’ fees through a “declining percentage principle,” whereby the percentage of recovery allocated to attorneys’ fees decreases as the size of the recovery increases.
 - Prohibiting attorney fee awards that exceed the amount of money distributed to the class members.
8. Instruct courts to provide greater scrutiny to proposed noncash relief, such as settlements involving distribution of coupons, vouchers, or products, or requiring minor labeling changes.
9. Require plaintiffs’ lawyers to submit to the court or judicial system an accounting of how class action settlement money is actually distributed in each case.

RECENT ENACTMENTS

- *Oklahoma H.B. 1013X (Spec. Sess. 2013) (amending Okla. Stat., tit. 12, § 2023) (reenacted 2009 law):*
 - o Limits membership in class actions to individuals who are Oklahoma residents or nonresidents of Oklahoma who own property located in Oklahoma that is relevant to the class action.
 - o Subjects class certification orders to closer appellate review (de novo).
 - o Provides that “[i]f any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorney fees awarded in the class action shall be in cash and noncash amounts in the same proportion as the recovery for the class.”
- o Establishes factors for awarding attorneys’ fees.
- o Authorizes the court to appoint an independent attorney to represent the class in any dispute over fees.
- *Arizona S.B. 1346 (2013) (codified at Ariz. Rev. Stat. Ann. §§ 12-1871 to 12-1873):* Establishes procedures for maintaining a class action and provides for interlocutory appeal of class certification rulings.

Prevent Suppression of Evidence of Plaintiff Exposures in Asbestos Cases

Purpose

Asbestos litigation is the longest-running mass tort in U.S. history. Asbestos-related liabilities have pushed approximately 120 employers into Chapter 11 bankruptcy.²⁵ Scores of trusts have been created to pay claims related to those companies' asbestos products. Asbestos trusts hold an estimated combined total of between \$30 billion and \$37 billion in assets.²⁶

In litigation, plaintiffs' lawyers claim that their clients' injuries stem from exposure to asbestos from products of solvent companies, but trust claim filings may reflect additional sources of exposure to asbestos by the plaintiff. Plaintiffs' lawyers often delay these filings, however, until after the resolution of the tort case, suppressing key evidence of the responsibility of bankrupt companies. As a result, solvent companies pay inflated settlements because of the difficulty of proving alternative causation.

U.S. Bankruptcy Judge George Hodges documented these problems in an opinion estimating the liability of Charlotte-based gasket and packing manufacturer Garlock Sealing Technologies, LLC for mesothelioma claims. Judge Hodges concluded that Garlock's settlements in the tort system were "infected by the manipulation of exposure evidence by plaintiffs and their lawyers."²⁷ Judge Hodges also found that "[t]he withholding of exposure evidence by plaintiffs and their lawyers was significant and had the effect of unfairly inflating the recoveries ..."²⁸ Evidence Garlock needed to attribute plaintiffs' injuries to insulation products often "disappeared" once those companies filed bankruptcy. The judge said, "This occurrence was a result of the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos

“ Plaintiffs' lawyers often delay these filings, however, until after the resolution of the tort case, suppressing key evidence of the responsibility of bankrupt companies. ”

trusts until after obtaining recoveries from Garlock (and other viable defendants)."²⁹

As asbestos litigation continues to push otherwise viable corporations into bankruptcy, employers left to defend asbestos lawsuits in the tort system have struggled to convince some judges to account for bankruptcy trust claims. Existing statutes and judicial precedents do

not account for the unique phenomenon of tens of billions of dollars flowing to tort claimants outside of the civil justice system. The present lack of transparency between the asbestos bankruptcy trust and tort systems makes it extremely difficult—if not impossible—for solvent defendants to discover inconsistent or conflicting statements by plaintiffs regarding the sources of their asbestos exposures.

Options

1. Require plaintiffs within a certain number of days of filing an asbestos action or a certain number of days before trial to file a sworn statement indicating an investigation of all asbestos trust claims has been conducted and all asbestos trust claims that could be made by the plaintiff have been filed.
2. Require plaintiffs to provide the parties with all asbestos bankruptcy trust claim materials.
3. Give defendants an opportunity to move the court to stay the litigation and require plaintiffs to file additional trust claims not identified by the plaintiff if the defendant can show that the plaintiff satisfies the eligibility criteria.
4. Establish that asbestos trust claims materials are presumed relevant and are admissible in court to prove alternative causation for a plaintiff's injuries or to allocate liability for the plaintiff's injury.
5. Provide a set off in civil litigation for money that has been or will be received by the plaintiff from asbestos bankruptcy trusts.
6. Authorize courts to impose sanctions when a plaintiff fails to comply with the law, including dismissal of the claim or vacating a judgment rendered in the action.

RECENT ENACTMENTS

Twelve states have enacted asbestos trust claim disclosure laws.

- *Mississippi H.B. 1426 (2017) (to be codified at Miss. Code Ann. §§ 11-67-1 et seq.)*
- *North Dakota H.B. 1197 (2017) (to be codified within N.D. Cent. Code tit. 32)*
- *Iowa S.F. 376 (2017) (to be codified at Iowa Code Ann. §§ 686A.1 et seq.)*
- *South Dakota S.B. 138 (2017)*

- *Tennessee S.B. 2062 (2016) (codified at 29 Tenn. Code Ann. §§ 29-34-601 et seq.)*
- *Utah H.B. 403 (2016) (codified at Utah Code Ann. §§ 78B-6-2001 et seq.)*
- *Arizona H.B. 2603 (2015) (codified at Ariz. Rev. Stat. § 12-782)*
- *Texas H.B. 1492 (2015) (codified at Tex. Civ. Prac. & Rem. Code §§ 90.051 et seq.)*
- *West Virginia S.B. 411 (2015) (codified at W. Va. Code §§ 55-7E-1 et seq.)*
- *Wisconsin A.B. 19 (2014) (codified at Wis. Stat. § 802.025)*
- *Oklahoma S.B. 404 (2013) (codified at Okla. Stat. tit. 76, §§ 81 to 89)*
- *Ohio H.B. 380 (2012) (codified at Ohio Rev. Stat. §§ 2307.951 et seq.)*

Support Sound Science and Expert Evidence in the Courtroom

Purpose

Prior to 1993, federal courts permitted parties to present expert testimony involving novel scientific or technical theories if the underlying theory or basis of opinion was generally accepted within the expert's particular field. The general acceptance test, known as the *Frye* standard, was applied liberally to favor admissibility of expert testimony. The U.S. Supreme Court adopted a more rigorous approach to evaluating the reliability of proposed expert testimony in its landmark decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*³⁰ Its ruling emphasized the obligation of the trial court judges to serve as "gatekeepers," guarding the courthouse against untrustworthy expert testimony.

When courts evaluate expert testimony under this approach, they consider such factors as whether the method has been empirically tested, whether the method has been subject to peer review and publication, the potential rate of error associated with the technique, and whether the method is generally accepted in the relevant scientific community. Courts applying this approach have also considered whether the expert developed the theory for purposes of testifying in litigation, jumped to an unfounded conclusion, or did not account for obvious alternative explanations.³¹

The *Daubert* decision, however, is binding only in federal courts. While many states have adopted the core requirements of *Daubert*, some have not. For this reason, a gap remains between evidentiary standards in federal courts and some state courts. States that take a lax approach to admitting expert testimony attract claims that are unsupported by science and that are thrown out in other jurisdictions.

NOTES

- Organizations and scholars differ on how many states still maintain the *Frye* standard and how many have transitioned to the *Daubert* standard because some jurisdictions apply different standards depending on the type of evidence at issue:
 - o Just seven states continue to apply the less rigorous *Frye* standard for admission of expert testimony: California, Illinois, Maryland, New York, North Dakota, Pennsylvania, and Washington. These states are in greatest need of expert testimony reform.
 - o Most states follow *Daubert* or consider their state rule consistent with its approach: Alabama, Alaska, Arizona, Arkansas, Connecticut,

Delaware, Georgia, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, South Dakota, Texas, West Virginia, Wisconsin, and Wyoming. Adoption of *Daubert*, however, does not guarantee that state courts will closely scrutinize expert testimony. Problems remain in some of these states.

- o About one-third of states use a hybrid standard of *Daubert* or apply their own standard, such as Colorado, Hawaii, Idaho, Iowa, Maine, Minnesota, Nevada, New Jersey, Rhode Island, South

Carolina, Tennessee, Utah, Vermont, and Virginia. In some of these states, courts may consider the *Daubert* factors but do not necessarily follow them.

- The District of Columbia's highest court abandoned the *Frye* approach and adopted *Daubert* in 2016, finding that "[t]he ability to focus on the reliability of principles and methods, and their application, is a decided advantage that will lead to better decision-making by juries and trial judges alike."³²
- The Florida Legislature adopted *Daubert* in 2013, but the Florida Supreme Court declined to adopt the new standard in 2017, leaving Florida law uncertain.³³

Options

1. Amend state rules for admission of expert testimony to be consistent with the Federal Rules of Evidence Rule 702 as amended in 2000 to reflect *Daubert*. Rule 702 provides that "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.
2. Provide that the state's standard for admission of expert testimony is to be interpreted consistently with *Daubert* and its progeny, including the "gatekeeping" function.
3. Require courts to hold a pretrial hearing on an expert's proposed testimony upon motion of a party.
4. Mandate pretrial disclosure of expert testimony.

RECENT ENACTMENTS (ADOPTING OR CODIFYING THE *DAUBERT* APPROACH)

- *Missouri H.B. 153 (2017) (repealing and replacing Mo. Rev. Stat. § 490.065)*
- *Kansas S.B. 311 (2014) (amending Kan. Stat. Ann. § 60-456)*
- *Louisiana H.B. 624 (2014) (amending La. Code of Evidence Art. 702)*
- *Florida H.B. 7015 (2013) (codified at Fla. Stat. Ann. §§ 90.702, 90.704)*
- *Oklahoma S.B. 6X (Spec. Sess. 2013) (codified at Okla. Stat. tit. 12, §§ 2702, 2703) (reenacting law passed in 2009)*

Safeguard the Right to Appeal

Purpose

A critical element of the civil justice system is the right of a party to appeal an adverse verdict. In some states, the structure of the judicial system, statutes, or court rules place obstacles to the ability of a party to exercise this right. Intermediate appellate courts also promote consistency and predictability in the law by providing more decisional case law that establishes binding precedent.

STRUCTURE OF THE JUDICIARY AND THE RIGHT TO APPEAL

States vary in the opportunity they provide for appellate review. While most states have a supreme court and intermediate appellate court or appellate division (with two layers of review), eleven, mostly smaller, states provide only a single appellate court. Most states provide litigants with at least one appeal as a matter of right (mandatory review). Many states that have two levels of review provide that review in the state supreme court is discretionary, similar to the federal system in which the U.S. Supreme Court grants certiorari in a relatively small number of cases each year to decide issues of broad impact. As smaller states increase in population and litigation, they may wish to consider developing intermediate appellate courts to ensure thorough appellate review and relieve the burden placed on the state's high court. Justice demands that every litigant have the right to at least one full appellate review.

- West Virginia lacks both an intermediate appellate court and full appellate review

as a matter of right in the state's high court. In 2011, the West Virginia Supreme Court of Appeals rejected an independent commission's proposal to create an intermediate appellate court, opting instead to marginally expand its own appellate review of cases.

- Voters in Nevada, another state that did not have an intermediate appellate court, approved a constitutional amendment to establish such a court in November 2014. Nevada's new Court of Appeals began hearing cases in January 2015.

APPEAL BONDS

In order to stay the execution of a judgment and protect their assets during an appeal, defendants must post appeal bonds, which can run up to 150% of the judgment in some states. If a defendant cannot afford the required bond, then it may have no way to protect against the plaintiff seizing its assets during the appeal besides filing for bankruptcy. Most states adopted bonding requirements before the creation of novel and expansive theories of liability, at a time when judgments were generally more reasonable in scale. Appeal bond rules stand as unfair roadblocks to appeals of such crushing verdicts and place inordinate pressure to settle even cases that are likely to be reversed on appeal. Such requirements can pose a particularly significant challenge for small businesses that are hit with excessive verdicts.

More than two-thirds of states currently have appeal bond limits of some sort. Five states do not require a defendant to post an appeal bond. On the other hand, Alaska, Delaware, Illinois, Montana, New York, and the District of Columbia require appeal bonds and place no limit on their size. Several states have

limited the size of appeal bonds, but applied the reform only to signatories to the “Master Settlement Agreement” (tobacco companies). In a few states, an appeal bond limit applies only to the punitive damages portion of the judgment, if any.

Options to Address Appellate Review

1. Establish an intermediate appellate court with mandatory review.
2. Provide interlocutory (immediate) appeal orders granting or denying class certification.

RECENT ENACTMENTS

- *Nevada Ballot Question 1 (2014)*: Amended Article 6 of the Nevada Constitution to create an intermediate

appellate court, the Nevada Court of Appeals. All appeals will be filed with the Nevada Supreme Court, which may then assign certain cases to the intermediate appellate court.

- *Nevada S.B. 463 (2013) (codified in Nev. Rev. Stat., tit. 1)*: Proposing constitutional amendment and making various statutory changes to establish the Court of Appeals).

Options to Address Appeal Bonds

1. Apply appeal bond limits to all civil case judgments regardless of legal theory or type of defendant.
2. Provide a separate, lower cap for small businesses or a limit based on a defendant’s net worth.
3. Limit the necessary appeal bond to the compensatory damages portion of the verdict (exclude the need to post bond to cover the punitive damage portion of the award, if any).

RECENT ENACTMENTS

- *Mississippi H.B. 1529 (2016) (codified at Miss. Code Ann. § 11-51-31)*: Limits appeal bonds to 50% of appellant’s net worth not to exceed \$35 million.
- *Nevada S.B. 134 (2015) (codified at Nev. Rev. Stat. § 20.037)*: Limits

appeal bonds to the lesser of \$50 million for all appellants or the amount of the judgment. Limits appeal bonds for a small business to the lesser of \$1 million or the amount of the judgment. Provides courts with discretion to set a lower bond for good cause shown.

- *Maryland H.B. 164 (2015) (codified at Md. Cts. & Jud. Proc. Code § 12-301.1)*: Limits appeal bonds to the lesser of \$100 million for each appellant or the amount of the judgment. Provides courts with discretion to set a lower bond for good cause shown.
- *Montana H.B. 224 (2013) (codified at Mont. Code Ann. § 25-12-103)*: Limits appeal bonds to \$50 million.

Promote Fairness in Judgment Interest Accrual

Purpose

Many state laws provide for interest on court judgments to compensate plaintiffs for the often considerable lag between the event giving rise to the cause of action or filing of the lawsuit and the actual payment of damages.

Interest can accrue for both prejudgment and post-judgment time delays.

Prejudgment interest is awarded for the time between the injury or loss and the time that judgment is entered (after trial). Post-judgment interest is awarded for the period between the final judgment and the time when the full amount owed is paid.

The primary purpose of judgment interest is to compensate a prevailing party for the time value of money, which reflects the general principle that getting a dollar today is worth more than getting a dollar tomorrow due to inflation, lost opportunity cost, or other factors. Judgment interest is a form of compensatory recovery designed to leave the parties with the real dollar value of their judgment when it is or should have been paid. It can also have the effect of encouraging parties to engage in early settlement and providing an incentive for defendants to pay damages quickly.

Although well-intended, the practical effects of judgment interest statutes can be inequitable and punitive in nature where the statutory interest rate fails to approximate prevailing market rates. Statutory interest rates that greatly exceed market rates can result in overcompensation and a windfall recovery for plaintiffs. For example, if a statute provides a judgment interest rate of 12% and prevailing market rates are only 2%, a plaintiff's recovery would far exceed the real dollar value of the judgment. Since prejudgment interest begins to accrue even before a case reaches a jury (and may reach back several years to when the injury at issue occurred), an excessive interest rate is especially problematic.

This inflated interest rate, in effect, acts as a penalty for defendants. Further, because awards of judgment interest are generally unrelated to the merits of a claim or conduct of the parties, this penalty is unconnected to any willful or reckless misconduct, which is the traditional linchpin for allowing punitive recovery. As a result, a business may be punished simply for defending itself in court.

NOTE

Examples of states that retain fixed rates in the double-digits to calculate judgment interest include Arkansas (10%), California (10%), Connecticut (10%), Hawaii (10%), Maryland (10%), Massachusetts (12%), Rhode Island (12%), South Dakota (10%),

Vermont (12%), and Wyoming (10%). In Colorado, prejudgment interest on a tort claim is a minimum of 9% and the post-judgment interest rate is 8%. These fixed rates are grossly disproportionate and arbitrary when compared to existing market rates.

Options

1. Set a reasonable post-judgment interest rate. Examples of sensible rates include the following:
 - Alaska: Twelfth Federal Reserve District discount rate plus 3%.
 - Georgia: Federal Reserve prime rate plus 3%.
 - Iowa: U.S. Treasury rate constant maturity index plus 2%.
 - Nebraska: Two percentage points above the U.S. Treasury bill rate in effect on the date of entry of the judgment. Interest accrues from the date of the plaintiff's first offer of settlement that is exceeded by the judgment until the entry of judgment if certain conditions are met.
 - South Carolina: Prime rate plus 4%.
 - Texas: Prime rate published by the Board of Governors of the Federal Reserve System with a floor of 5% and a ceiling of 15%.
 - Washington: U.S. Treasury bill rate plus 2%.
2. Where prejudgment interest is available:
 - Provide that prejudgment interest may not be awarded for future economic or noneconomic damages.
 - Provide that prejudgment interest may not be awarded for punitive damages.

RECENT ENACTMENTS

- *Kentucky H.B. 223 (2017) (amending Ky. Rev. Stat. § 360.040)*: Lowers the rate for both pre- and post-judgment interest from 12% to 6%. A judgment on a contract, note, or other written obligation will follow the interest rate specified in the contract.
- *Montana S.B. 293 (2017) (amending Mont. Code Ann. §§ 25-9-205, 27-1-210)*: Lowers the judgment interest rate from 10% to the prime rate published by the federal reserve system plus 3%.
- *West Virginia H.B. 2678 (2017) (amending W. Va. Code Ann. § 56-6-31)*: Sets the prejudgment interest rate for special or liquidated damages and post-judgment interest rate at two percentage points above the Fifth Federal Reserve District secondary discount rate provided the rate does not fall below 4% or exceed 9%.

- *Utah S.B. 69 (2014) (amending Utah Code § 78B-5-824)*: Sets the prejudgment interest rate for special damages actually incurred as two percentage points above the prime rate, as published by the Federal Reserve, but not lower than 5% or higher than 10%. Requires a plaintiff to tender an offer of settlement that does not exceed $1\frac{1}{3}$ the amount of a judgment awarded at trial to qualify for prejudgment interest. Any prejudgment interest shall be computed as simple interest.
- *Oklahoma S.B. 1080 (2013) (codified at Okla. Stat. tit. 12, § 727.1)*: Clarifies that courts must apply the post-judgment interest rate agreed upon in a contract.

Curb Predatory and Unsound Lawsuit Lending Practices

Purpose

An industry has emerged in which lawsuit lenders or litigation funders offer to provide financing in exchange for a portion of the plaintiffs' recovery.

These arrangements come in two forms. The first form is consumer lawsuit lending, which *The Wall Street Journal* has called "the legal equivalent of the payday loan."¹³ In these cases, lawsuit lenders offer immediate cash to plaintiffs in personal injury lawsuits. The loans often come with sky-high interest rates that can exceed 200 percent, leaving borrowers with little to no recovery. Plaintiffs who lose their cases are not obligated to repay the loan. This distinction allows lawsuit lenders to call the process "non-recourse funding" and claim it is not a loan subject to safeguards applicable to other lenders.

The second form of financing, referred to as third-party litigation funding, involves businesses or individuals that invest in big-ticket litigation. These investors front money to plaintiffs' law firms in exchange for an agreed-upon cut of any settlement or money judgment.

Lawsuit lending encourages prolonged litigation and artificially inflated settlements. Injecting a lender into a case incentivizes plaintiffs to reject reasonable settlement offers because of the plaintiffs' obligation

to share the recovery with the lender. By the same token, a lender may pressure a borrower to reject a settlement offer that does not reimburse the lender's full investment. In addition, third-party litigation funding enables lawsuits of questionable merit because lenders that spread their risk of loss may be more willing to take a risk than a plaintiffs' law firm acting alone.

Interjecting a third-party lender weakens the traditional attorney-client relationship and raises serious questions about the lender's place in that relationship. There can be no question that a company with a substantial amount of money invested in a lawsuit will seek to influence strategy and will seek access to confidential information. These motivations raise troubling ethical concerns because, in contrast to lawyers, lenders have no established or enforceable duty to represent their clients zealously or guard their confidences.

State legislatures should consider bills that would prohibit lawsuit lending, reject proposals to authorize or expand such practices, and, at minimum, subject lawsuit lenders to existing state consumer lending laws or similar requirements. State legislatures should also require a party to disclose to the court when a third party is funding litigation.

“ *There can be no question that a company with a substantial amount of money invested in a lawsuit will seek to influence strategy and will seek access to confidential information.* **”**

NOTES

- In January 2017, the U.S. District Court for the Northern District of California amended its standing order to require parties to automatically disclose third-party funding agreements in any proposed class, collective, or representative action.¹⁴
- In November 2015, the Colorado State Supreme Court unanimously decided that litigation finance companies that agree to advance money to tort plaintiffs in exchange for future litigation proceeds make loans that are subject to the state’s existing consumer lending law.¹⁵

Options

1. Reject legislation that would expand the availability of lawsuit lending.
2. Clarify that consumer lawsuit lending falls within the ambit of states’ existing fair-lending laws by:
 - capping the interest consumer lawsuit lenders can charge at the state’s existing usury rate;
 - requiring consumer lawsuit lenders to make the same disclosures regarding their loans as other providers of consumer credit; and
 - subjecting consumer lawsuit lenders to the state’s existing regulations governing other providers of consumer credit.
3. Provide much-needed disclosure by requiring any party that is receiving financing for the litigation from a third party to disclose this relationship and provide a copy of the lending agreement to the court and the parties.
4. Prohibit lawsuit lending. Courts in several jurisdictions have invalidated consumer lawsuit lending and third-party litigation financing arrangements. Legislatures can provide greater clarity in the law by codifying these rulings.

RECENT ENACTMENTS

- *Indiana H.B. 1127 (2016) (codified at Ind. Code Ann. § 24-4.5-1-201.1):* Requires businesses that provide “civil proceeding advance payment contracts” to be licensed by, and post a \$50,000 bond or irrevocable letter of credit with, the Indiana Department of Financial Institutions. Limits the annual interest rate consumer lawsuit lenders can charge to 36% and service fees to 7%. Includes notice and disclosure requirements, a prohibition of attorney referral fees, and other safeguards.
- *Vermont H.B. 84 (2016) (codified at 8 Vt. Stat. Ann. §§ 2251-2260):* Requires businesses that provide

consumer litigation funding to be licensed by the Vermont Department of Financial Regulation and post a surety bond or letter of credit that is either twice the amount of the largest fund they have provided in a three-year period, or \$50,000, whichever is greater. Requires lawsuit lenders to file an annual report that includes the interest rates it charges. Includes notice and disclosure requirements, a prohibition of attorney referral fees, and other safeguards.

- *Arkansas S.B. 882 (2015) (codified at Ark. Code Ann. § 4-57-109)*: Places the consumer lawsuit lending industry under the state's usury laws, providing for a maximum interest rate. Requires written contract with prominent disclosure of annual percentage rate (APR). Provides that a violation is a deceptive and unconscionable trade practice.
- *Tennessee S.B. 1360 (2014) (codified at Tenn. Code Ann. §§ 47-16-101 et seq.)*: Provides consumers with a 5-day, no-obligation loan-cancellation period. Mandates certain contract disclosure information. Permits lenders to charge an annual administrative fee of no more than 10% of the amount provided to the consumer and a "yearly fee" (interest rate) of up to 36%. Limits the terms of loans to three years. Does not permit lawsuit lending with respect to workers' compensation claims. Requires litigation financiers to register with state and file surety bond.
- *Oklahoma S.B. 1016 (2013) (codified at Okla. Stat. tit. 14A, §§ 3-801 et seq.)*: Permits lawsuit lending only with respect to existing legal claims. Provides consumers with a 5-day, no-obligation loan-cancellation period. Mandates certain contract disclosure information. Requires consumer litigation funder to obtain license and file bond or irrevocable letter of credit. Prohibits funder from making decisions relating to the conduct, settlement, or resolution of the underlying legal claim. Subjects agreements to the Uniform Consumer Credit Code.

Protect the Rights of Consumers of Legal Services

Purpose

For the average person, the legal process is confusing and expensive. The often complex path to justice is strewn with undisclosed costs and is further complicated by the abuse of contingency fees. Many consumers cannot comparison shop for cost-effective legal services because they lack the background to make informed decisions about their own legal

actions. Consequently, plaintiffs may emerge from the legal system twice injured—once by the accident that spawned their lawsuit and once by the legal system itself at the hands of their own lawyers. A legal consumers’ “bill of rights” would help those who need representation to become more informed shoppers.

Options

1. Forbid an attorney and any of his or her representatives from making unsolicited contact with a potential claimant for 45 days after an event resulting in personal injury or death that could give rise to a cause of action by that claimant.
2. Require attorney advertisements that use the word “free” or any other phrase indicating that legal services are provided at no cost to the client to also state, in the same size print, whether the client will be responsible for costs associated with litigation and the possible range of contingency fees that will be charged if the client does recover.
3. Require attorneys in personal injury cases to provide a full written explanation of the fee agreement and alternative billing options, as well as an up-front estimate of the probability of success, likely recovery, hours of work to be expended, and all expenses that may be incurred.
4. Mandate that, in any retention agreement, attorneys disclose all fees and costs anticipated and explain the calculation of contingency fees and responsibility for paying expenses. Give a prospective client at least three days to review the agreement for services.
5. Mandate that attorneys keep accurate time records and at the end of the case provide the client with detailed information regarding the amount of time spent on the case and any fees and expenses to be charged.

6. Require attorneys to provide copies of all major documents and to notify clients within a reasonable time of any settlement offer, dispositive motion, or court ruling.
7. Require that an attorney disclose any agreement or intent to have an outside counsel provide any of the legal services, including the scope and anticipated costs associated with engaging outside counsel. If the decision to use outside counsel is made after the legal services agreement is entered into, the attorney must receive the client's consent in writing.
8. Require attorneys to advise clients of their ability to obtain an objective review of a contingency fee by a court or through a bar association committee, and to provide clients with a closing statement and complete accounting of all financial transactions related to the provision of legal services.
9. Require attorneys who maintain a fiduciary or escrow account with collective deposits in excess of \$1 million during a calendar year to file a certification from an outside financial expert that the account has been maintained in accordance with all applicable laws and regulations.
10. Provide that failure to comply with these requirements renders the fee agreement voidable at the option of the client, and the attorney shall then be limited in recovery to a reasonable fee for services rendered.
11. Provide that failure to meet these disclosure obligations is considered an unfair or deceptive trade practice under state law.
12. Provide that the legislation is in addition to and not in lieu of any other available remedies or penalties, including any ethics rules applicable to attorneys that provide additional protections for legal consumers. An attorney who fails to comply shall be subject to court sanctions, disciplinary action by the state bar association or other such professional organization through existing procedures, and civil liability in an action brought by a party alleging injury from failure to comply with legislation.
13. Provide that an attorney who intentionally fails to disclose to a claimant any information required shall additionally be liable for treble or exemplary damages.
14. Offer an exception to these provisions when the client is a "knowledgeable consumer of legal services," including a sole proprietorship or a business that has counsel to review such an agreement or has at least 30 employees.

RECENT ENACTMENTS

- *Arkansas S.J.R. 8 (2017)*: Endorses a constitutional amendment that would limit contingency fees to one-third ($33\frac{1}{3}\%$) of the net amount of recovery, whether obtained by settlement, arbitration, or judgment. Authorizes the legislature to adopt laws amending the maximum amount and imposing penalties for violations. Voters will consider the measure in November 2018.
- *Michigan H.B. 4770, 4771 (2013)* (codified at Mich. Comp. Laws § 750.410b): Provides that it is a criminal offense for lawyers or non-lawyers working on their behalf to contact car accident victims for legal business through a verbal or written solicitation or offer within 30 days of an accident. For 30 days after an auto accident report is filed, prohibits lawyers and non-lawyers working on their behalf from accessing these reports to retrieve a victim's personal information in order to solicit the victim's legal business.

Promote Rational Liability Rules

There are many ways that states can tailor liability rules to strike an appropriate balance that fairly compensates individuals for injuries and protects the public without imposing unwarranted liability. This section highlights three options.

At the foundation of a fair civil justice system is the method by which responsibility for an injury is allocated among those involved. For many years, the law barred a person who was partially at fault for his or her own injury from recovery. Now, most states have replaced this doctrine of contributory negligence with a system known as “modified comparative fault.” Under modified comparative fault, a plaintiff’s damages are reduced by that person’s percentage of fault, and the person can recover so long as the plaintiff is not the primary cause of his or her own injury (50% or 51% at fault, depending on the state). Some state laws, however, encourage risky behavior by plaintiffs, raise liability costs for businesses, and drive up the number of lawsuits filed by allowing plaintiffs who are largely responsible for their own injury (even 99% at fault) to “roll the dice” in court.

States are also moving away from joint and several liability, which unjustly requires a defendant that is as little as 1% at fault for an injury to pay the entire damage award if others responsible are immune, judgment proof, beyond the court’s jurisdiction, or not named as a defendant for some other reason. Such laws lead plaintiffs’ lawyers to target businesses based on deep pockets rather than their responsibility for an injury. Instead, more states are determining a defendant’s liability proportionally based on fault. In order to properly allocate fault, states are clarifying that juries should consider everyone that may have

“ *This system ensures that defendants pay their fair share, not for an injury caused by someone else.* ”

contributed to an injury, regardless of whether a person or business is named as a defendant. This system ensures that defendants pay their fair share, not for an injury caused by someone else.

The reforms included in this section also ensure that when a state legislature regulates an industry's products or practices, the public knows whether the law is enforced through government

officials, private lawsuits, or both. The suggested reform allows courts to recognize a new cause of action under a statute only when the legislature expressly states its intent to create a new means to sue. Such transparency is vital to the democratic process, protects due process, and promotes predictability and consistency in regulation of goods and services.

Preclude Recovery When a Plaintiff is Primarily Responsible for His or Her Own Injury

Purpose

Fairness and common sense suggest that a party should not be required to compensate an individual who was the primary cause of his or her own injury. Rules of apportionment have evolved to reflect this basic principle; however, some states require defendants to pay damages even when a plaintiff was hurt largely as a result of his or her own careless or reckless conduct. A modified comparative fault system corrects this unfair result.

Legislation has also sought to ensure that juries are permitted to fairly allocate fault to anyone whose conduct contributed to the plaintiff's injury, not just those who are present in court. Failure to consider the responsibility of all involved in the incident that allegedly caused a plaintiff's injury prejudices the named defendants, who are required to pay more than their fair share of the plaintiff's loss.

NOTES

Twelve states follow a pure comparative fault system, under which a plaintiff who is 90% at fault for his or her own injury may still require a defendant to pay 10% of the losses.

- Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, and Washington follow this approach. These are the states in which reform is needed most.

Five jurisdictions follow "contributory negligence," which provides a defense to liability when a plaintiff is responsible to any degree for his or her injuries, subject to various exceptions.

- Alabama, District of Columbia, Maryland, North Carolina, and Virginia follow this approach. South Dakota bars recovery when a plaintiff's contributory negligence was more than "slight in comparison to the negligence of the defendant."

The remaining states follow a modified comparative fault system under which a plaintiff who is primarily responsible for his or her own injuries may not recover damages. States have adopted various thresholds with respect to the percentage of fault that precludes recovery. States also vary in whether, and how, juries allocate fault to parties that may have contributed to the plaintiff's injury but are not present in the litigation.

Options

1. Provide that a plaintiff who is at fault cannot recover if:
 - The plaintiff's negligence was greater than the negligence of the person against whom recovery is sought (see, e.g., Colo. Rev. Stat. § 13-21-11; Idaho Code § 6-1404; Minn. Stat. Ann. § 604.01);
 - The plaintiff bears a greater percentage of fault than the combined percentage of fault attributed to others (see, e.g., Ind. Code § 34-51-2-6; Iowa Code § 668.3; N.H. Rev. Stat. Ann. § 507:7-d; N.D. Cent. Code § 32-03.2-02; Ohio Rev. Code § 2315.33); or
 - The plaintiff is 50 percent or more responsible for the injury or damages claimed (see, e.g., Ga. Code Ann. § 51-12-33(g), Tex. Civ. Prac. & Rem. Code § 33.001; Wyo. Stat. § 1-1-109).
2. Provide or clarify that the jury is permitted to consider all potentially responsible parties when allocating fault, including parties that settled before suit and those that are otherwise not before the court. Some state laws require defendants to provide notice to plaintiffs of responsible third parties before trial. See, e.g., Ark. Code Ann. § 16-55-202(b)(1); Colo. Rev. Stat. § 13-21-111.5(2); Fla. Stat. Ann. § 768.81; Ga. Code Ann. § 51-12-33(c); Ohio Rev. Code § 2307.23(c); Tex. Civ. Prac. & Rem. Code Ann. § 33.003(a); Utah Code Ann. § 78-27-38(4)(A).
3. Provide that juries may consider whether individuals seeking to recover in an automobile accident were wearing their seatbelts for the purpose of apportioning responsibility. Many states have statutes or court decisions that prohibit admission of such evidence.³⁴ These outdated laws came about before states required seatbelt use, before the public widely accepted the importance of wearing seatbelts, and before states moved from contributory negligence to comparative fault. States are now changing their laws to reflect that this highly pertinent information should not be hidden from jurors.³⁵

RECENT ENACTMENT

- *West Virginia H.B. 2002 (2015)* (codified at *W. Va. Code §§ 55-17-13a, 55-7-13c(c)*): Codifies modified comparative fault. A plaintiff's fault does not bar recovery unless his or her fault is greater than the combined fault of all other persons responsible for the total amount of damages. When a plaintiff's fault is less than the combined fault of all other persons, recovery is reduced in proportion to the plaintiff's degree of fault.

Fairly and Proportionately Allocate Liability Based on Fault

Purpose

Joint and several liability reform is intended to allocate liability fairly and proportionately based on the percentage of fault attributed to each party's responsibility for an injury. Where multiple defendants are named, the fact finder attributes to each party a percentage of fault in causing the plaintiff's injuries under the presumption that each defendant will pay his or her corresponding percentage of damages.

Problems arise, however, where a defendant or other party that contributed to the injury is insolvent, has already settled with the plaintiff, or is otherwise unable to pay the apportioned amount of damages. Under a system of "pure" joint liability, a

defendant found to be 1% at fault can be forced to pay 100% of the damages if others who contributed to the injury are judgment proof, beyond the court's jurisdiction, or otherwise not a party to the litigation. This reform corrects such fundamental unfairness by tailoring the law to have defendants pay only the percentage of fault for which they are responsible and not for damages attributed to others.

NOTES

States most in need of reform are those with pure joint liability, which include Alabama, Delaware, Maryland, North Carolina, Rhode Island, and Virginia.

Options

1. Adopt pure several liability. Limit a defendant's liability only to the percentage of fault attributed to that defendant.
 - Currently law in Alaska, Arizona, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Oklahoma, Michigan, Mississippi, Tennessee, Utah, and Wyoming.

“ Joint and several liability reform is intended to allocate liability fairly and proportionately based on the percentage of fault attributed to each party's responsibility for an injury. ”

2. Authorize the fact finder to apportion fault among all individuals and entities that contributed to the plaintiff's injury, regardless of whether they are parties in the litigation.
3. Implement modified joint and several liability. Joint liability is barred for defendants found to be less than 50% at fault.
 - Variants of this approach are currently law in Iowa, Minnesota, Missouri (less than 51%), Montana, New Hampshire, New Jersey (less than 60%), Ohio (for economic damages), Pennsylvania (less than 60%), South Carolina, Texas, and Wisconsin (less than 51%).
4. Bar joint liability for recovery of noneconomic damages, retaining joint or modified joint liability for economic damages only.
 - Currently law in California, Nebraska, and New York (for defendants less than 50% at fault).

RECENT ENACTMENTS

- *West Virginia H.B. 2002 (2015) (to be codified at W. Va. Code § 55-17-13c)*: Replaces law imposing joint liability on parties 30% or more at fault with pure

several liability. After a good-faith effort to collect the judgment, the law permits the plaintiff to move for reallocation of uncollectable shares of liable defendants among other liable defendants in proportion to each party's percentage of fault. A defendant who is equally or less at fault than the plaintiff is not subject to reallocation. Joint liability continues to apply to defendants found to have engaged in conspiracy, driven under the influence, engaged in criminal conduct, or illegally disposed of hazardous waste.

- *Tennessee S.B. 56 (2013) (codified at Tenn. Code Ann. § 29-11-107)*: Provides that the liability of each party in a multi-defendant lawsuit is that party's proportionate responsibility. Joint liability continues to apply to civil conspiracy claims and product liability actions alleging breach of warranty or strict liability. Provides that juries can allocate fault among all those who contributed to an injury, including nonparties. The law does not affect the doctrines of vicarious liability or respondeat superior.

Provide Transparency When Legislatures Create New Ways to Sue

Purpose

On occasion, courts create an “implied” cause of action or a right to sue based on their subjective views about whether a state legislature intended to do so. For example, the legislature may intend for a state health department to enforce a law regulating restaurant practices in disclosing the fat content of fast food, but attorneys may use this regulatory law to attempt to create a new type of private lawsuit.

The guiding principles for when courts will or will not create these implied causes of action are vague and uncertain. As a result, defendants may face unexpected, new, and expanded liability. Whether a private right

to sue exists may have implications for government policymaking and enforcement of a law. In addition, plaintiffs waste time and money litigating claims that courts may later find do not exist. Courts spend substantial judicial resources considering such issues.

For these reasons, legislation should be clear as to whether it creates a new right to sue. This proposal provides greater transparency in the legislative process and clarity in the courts. When a state legislature is going to create a new way to sue, it should say so directly.

Option

1. Provide that any legislation that creates a private right of action or affirmative duty of care shall contain express language providing for such a right or duty. Instruct courts that they are not to interpret a statute to imply a private right of action or affirmative duty in the absence of such express language.

Clarify that this law does not in any way impair courts’ ability to develop causes of action or duties under the common law in the absence of a legislative act, or use the violation of a statute to show negligent or unlawful conduct.

“Whether a private right to sue exists may have implications for government policymaking and enforcement of a law.”

RECENT ENACTMENTS

- *Kansas H.B. 2313 (2012) (codified at Kan. Stat. Ann. § 60-5201)*: Precludes courts from interpreting a statute to authorize a private right of action in the absence of express language in the statute providing a new right to sue.
- *Tennessee S.B. 2140 (2012) (codified at Tenn. Code Ann. § 1-3-119)*: Provides that legislation enacted by the general assembly does not create or confer a private right of action unless the legislation contains express language creating or conferring that right. In the absence of such express language, a court, licensing board or administrative agency cannot construe or interpret a statute to impliedly create or confer a private right of action.

Improve Product Liability Law

Product liability law is intended to ensure that people who are injured by a defective product can receive fair compensation from the business that sold it. Proper application of product liability law is important for both product safety and consumer choice. Holding manufacturers liable can protect consumers when a product's design is unreasonably dangerous and a reasonable alternative design exists that would have prevented the harm, or when a product's warnings are insufficient to inform a reasonable consumer of nonobvious product risks. But when courts impose liability on businesses viewed as "deep pockets" that are not responsible for injuries, prices needlessly rise and valuable products may be removed from the market.

Product liability exposure has soared since the 1960s and 1970s. That trend continues today, as plaintiffs' lawyers propose new theories that would either impose liability on a company that is not at fault for the plaintiffs' harm or attempt to circumvent traditional requirements of product liability law. Many courts properly reject such invitations, but some have occasionally engaged in unprecedented expansions of liability.

The proposals presented in this section help maintain balance. They codify core principles of product liability law and curb

excesses allowed by some courts. For example, plaintiffs would be required to identify the particular manufacturer and product that caused injury. They would not be able to take shortcuts to establishing liability based on a company's market share in the industry. Nor could they seek to make a brand-name manufacturer pay a plaintiff who used a generic product made by a competitor.

The options would also prevent plaintiffs' lawyers and courts from transforming consumer protection laws from a means of recovery for economic loss in everyday

“ States can encourage safety by adopting a presumption that a product is not defective or by precluding punitive damages when a product is approved by regulators or meets government requirements. ”

purchases to a way of recovering for personal injuries stemming from alleged product defects where unsupported by product liability law.

Product liability law is often all “stick” and no “carrot.” For example, a product’s failure to comply with government safety standards may establish liability. In most states, however, a manufacturer that complies with and even substantially exceeds such standards does not receive a commensurate benefit. States can encourage safety by adopting a presumption that a product is not defective or by precluding punitive damages when a product is approved by regulators or meets government requirements.

Product liability law can hurt both small businesses and larger retailers that simply sold a product in their stores without knowledge of a danger. Through “product seller reform,” states can provide that a seller that did not participate in developing a product’s design or warnings is not subject to liability unless the plaintiff cannot recover from the actual manufacturer. This section’s suggested reforms also include limiting product liability exposure to a set number of years, recognizing that, after a decade or more of use, an injury stemming from a product is more likely a result of deterioration than a defect at the time it was manufactured.

No discussion on product liability would be complete without exploring ways to fairly address asbestos litigation, the nation’s longest running mass tort. Asbestos litigation has been tainted by mass screenings, lawsuits filed on behalf of people who are not sick, and findings of manipulation and fraud. This section highlights one successful and fair reform which prioritizes the claims of plaintiffs’ who have an asbestos-related disease above unimpaired claimants who were merely exposed to asbestos.

Prevent Lawyers from Circumventing Core Product Liability Requirements

Purpose

Some plaintiffs' lawyers attempt to circumvent the core requirements of product liability law. They pursue novel theories or applications of traditional tort law to go after a business viewed as a "deep-pocket," often regardless of fault.

For example, some high-profile lawsuits have claimed that legal products are a public nuisance, even when misused. These cases do not allege that the products themselves are defective, which is the linchpin for liability under products liability law. Lawsuits have sought to impose liability on entire industries based on market share, conspiracy, or other theories rather than on the individual or business actually responsible for the plaintiff's harm.

In pharmaceutical litigation, some plaintiffs' lawyers allege claims against manufacturers of brand-name drugs even when they fully acknowledge that their clients took only generic versions. This litigation violates the bedrock product liability law principle that one can sue only the company that made, sold, or distributed the actual product that allegedly caused the harm—not its competitors. Attempts to hold manufacturers liable for products that they did not make, sell, or distribute extend

beyond the pharmaceutical industry. Without reform, this trend will continue.

Plaintiffs' lawyers also routinely cast product liability claims as consumer protection claims to avoid the need to show that an alleged defect caused a physical injury. For example, a class action brought on behalf of uninjured cell phone users claimed that radiation from phone use placed them at risk of developing cancer, but that the manufacturers represented such products as safe. Likewise, plaintiffs' lawyers often attack the safety of prescription drugs, automobiles, and other products on behalf of people who bought the product, but are unharmed, by alleging creative theories of damages based on hypothetical future injuries and statistical models with the aid of hired experts. These types of theories attempt to eliminate the need to show the product had an inadequate warning or caused actual harm, as required by product liability law.

States can codify their product liability laws or update their existing product liability statutes to ensure that those who claim injury from a product fulfill the basic elements of proof necessary to recover.

Options

1. When a state has codified a product liability act, clarify that the act establishes the exclusive theories of liability for any civil action for harm caused by a product.
 2. Clarify that a defendant may be held liable only if it manufactured or sold the actual product that was the cause of harm for which the claimant seeks to recover compensatory damages. Require plaintiffs to identify the specific product and manufacturer that allegedly caused the plaintiff's injury. Provide that a product seller may not be held liable in a product liability action based on market share, enterprise, or industry-wide liability.
 3. Require plaintiffs who claim a product's design is defective to show that a technologically feasible and practical alternative design would have reduced or avoided a foreseeable risk of harm without significantly impairing the usefulness or desirability of the product to its intended users.
 4. Require plaintiffs who allege that a product's warnings are inadequate to specify a reasonable alternative warning that would have prevented harm to the plaintiff.³⁶
- *Tenn. S.B. 2062 (2017) (to be codified at Tenn. Code Ann. § 29-34-11(b))*: Provides that a defendant in an asbestos action is not liable for exposures from a product or component part made or sold by a third party, even if the third party is insolvent or otherwise not amenable to suit.
 - *West Virginia S.B. 15 (2016) (codified at W. Va. Code Ann. § 55-7-30)*: Adopts the learned intermediary doctrine which recognizes that a manufacturer or seller of a prescription drug or medical device must provide adequate warnings or instructions to healthcare providers who are in the position of reducing the harm based on each patient's condition, rather than directly to consumers.
 - *Alabama S.B. 80 (2015) (codified at Ala. Code Ann. § 6-5-530)*: Overturns *Wyeth, Inc. v. Weeks*, 159 So. 3d 649 (Ala. 2014), in which the Alabama Supreme Court became the first and only state high court to recognize "innovator liability," imposing liability on a brand-name drug maker for the injuries of a plaintiff who only took a generic version of the drug. Provides that a manufacturer is not liable under any theory for personal injury, death, or property damage resulting from a product unless the manufacturer designed, manufactured, sold, or leased the particular product alleged to have caused the injury.

RECENT ENACTMENTS

- *Iowa S.F. 376 (2017) (to be codified at Iowa Code § 686B.7)*: Provides that a defendant in an asbestos or silica action is not liable for exposures from products or component parts made or sold by a third party.

Encourage Compliance with Government Regulations

Purpose

State legislatures and Congress have charged certain government agencies with ensuring that products are safe for public use and services are provided in a manner that adequately protects consumers. Nevertheless, even the most closely-regulated businesses face lawsuits advancing theories of liability that create tension with the reasoned decisions of government regulators. Such claims impose liability, and sometimes even punitive damages, on businesses that faithfully comply with the law. By bringing congruity between government regulations and the liability system, state reforms can provide much needed clarity, stability, and predictability in the law; treat manufacturers, product sellers, and service providers with fairness; and protect the public interest.

NOTES

Several states provide some level of protection from liability where a defendant's conduct was in compliance with federal or state regulations or a government agency approved the product or warnings at issue. These provisions typically establish a "rebuttable presumption" that a product or service that complies with government regulations is

not defective unless a plaintiff provides sufficient proof to overcome that presumption.

- See, e.g., Colo. Rev. Stat. § 13-21-403(1)(b); Kan. Stat. Ann. § 60-3304(a); Ky. Rev. Stat. Ann. § 411.310(2); Mich. Comp. Laws § 600.2946(4); Okla. Stat. tit. 76, § 57.2; Tenn. Code Ann. § 29-28-104(a); Tex. Civ. Prac. & Rem. Code § 82.008; Utah Code Ann. § 78B-6-703(2); Wis. Stat. § 895.047(3)(b).

This reform is sound public policy because it reduces unnecessary and cumbersome litigation where a product or service has already undergone a lengthy approval process or complied with detailed government safety standards. Moreover, product liability litigation has many examples of inconsistent verdicts regarding the safety of the same product. A regulatory compliance statute encourages safety and lawful conduct, and promotes consistency, while allowing claims to proceed in the legal system where there is strong evidence that the government's regulation of the product or service at issue was out of date or compromised with respect to safety.

In addition, several state laws recognize that punitive damages are not appropriate when a government agency approved the product or service at issue or the product or service was in compliance with government regulations. Such protection typically does not apply if the manufacturer knowingly, in violation of applicable regulations, withheld from or misrepresented to the agency information known to be material and relevant to the harm that the plaintiff allegedly suffered. These laws recognize that a manufacturer whose product is evaluated and considered safe and effective by a government agency charged with protecting the public should not be punished through a private lawsuit seeking punitive damages.

- See, e.g., Ariz. Rev. Stat. §§ 12-689, 12-701; N.J. Stat. § 2A:58C-5; Ohio Rev. Code Ann. § 2307.80; Or. Rev. Stat. § 30.927; Tenn. Code Ann. §§ 29-28-104(b), 29-39-104(d), (e); Utah Code § 78B-8-203.

Earlier enactments in New Jersey, Ohio, Oregon, and Utah are limited to U.S. Food and Drug Administration (FDA)-approved pharmaceuticals and medical devices. The Arizona, Oklahoma, and Tennessee laws apply to all products approved by a government agency. The Arizona and Tennessee laws also apply to government-approved services.

Options

1. Establish a rebuttable presumption that a product or service that complies with government regulations is not subject to liability.
2. Provide that punitive damages are not available when the product at issue was approved by a government agency or in compliance with government regulations absent evidence that the manufacturer wrongfully withheld or misrepresented information related to the risk of harm at issue in the litigation. Apply this prohibition to:
 - Any product where the design or warning at issue was approved by any state or federal agency or the aspect of the product at issue met or exceeded government safety standards.
 - Drugs and medical devices approved by the FDA.
 - Any service where the act or transaction forming the basis of the claim involves terms of service, contract provisions, representations or other practices authorized by, or in compliance with, the rules, regulations, standards or orders of, or a statute administered by, a government agency.

RECENT ENACTMENTS

- *Oklahoma H.B. 3365 (2014) (codified at Okla. Stat. tit. 76, § 57.2):*
 - o Provides a rebuttable presumption that a manufacturer or seller is not liable for an injury caused by some aspect of the formulation, labeling, or design of a product if the formulation, labeling, or design complied with or exceeded mandatory federal safety standards or regulations that applied when the

product was made and addressed the product risk that allegedly caused the harm. Permits a plaintiff to rebut the presumption by showing the federal standards were inadequate to protect the public or that the manufacturer withheld or misrepresented information relevant to the agency's determination of adequacy of the safety standards or regulation.

- o Applies a similar rebuttable presumption that a product manufacturer or seller is not liable in a product liability action when the product was subject to premarket licensing or approval by a federal agency. Does not apply when a product is subject to a recall or is no longer marketed pursuant to an order, consent decree, or agreement between the manufacturer and a federal agency.

- *Arizona H.B. 2503 (2012) (codified at Ariz. Rev. Stat. § 12-689)*: Prohibits an award of punitive damages against any manufacturer, service provider, or product seller when the product or service at issue was approved by a government agency or in compliance with government safety standards with respect to the aspect at issue in the lawsuit, with certain exceptions.

Protect Innocent Product Sellers

Purpose

Strict liability imposes responsibility for injuries related to a defective product on any business in the chain of distribution for the product. Thus, a retailer that took no part in designing or labeling a product is subject to suit and may be required to pay the plaintiff's damages. Personal injury lawyers will often name a local retailer or wholesaler as a defendant, even though they have few assets and no responsibility beyond selling or distributing the product, as a way to avoid the jurisdiction of a "neutral" federal court and be heard, instead, in a more favorable local court. By naming a local defendant, a plaintiff may be able to keep an out-of-state defendant in the plaintiff's choice of court. In addition, the small, local business, while not a true target in the litigation, is forced to expend precious time away from work and to pay substantial legal fees.

NOTES

Most states have acted to protect innocent sellers, including Alabama, Colorado,

Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Washington, and Wisconsin.

These statutes vary from state to state. Some state laws simply provide that a product seller is not liable as a manufacturer under strict liability. Other states provide that a seller is not strictly liable if the product was sold in a sealed container and the seller had no knowledge of the defect and could not have discovered the defect while exercising reasonable care. Many states do not limit the seller's liability when the seller had a substantial part in designing, manufacturing, or labeling the product, or made an express warranty regarding the product. A seller also remains liable under several state laws when the manufacturer is insolvent, not subject to the jurisdiction of the court, or cannot be identified.

“By naming a local defendant, a plaintiff may be able to keep an out-of-state defendant in the plaintiff's choice of court.”

Option

1. Limit the scope of product liability actions such that they may be permitted only against the manufacturer of the allegedly defective product and not a seller that had no knowledge of or control over the defect. Consider exceptions in which the product seller may be held strictly liable, such as:
 - the product seller exercised substantial control over the aspect of the design, testing, manufacture, packaging, or labeling of the product that caused the alleged harm for which recovery of damages is sought;
 - the product seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought;
 - the product seller made an express warranty as to such product independent of any express warranty made by a manufacturer as to such product, such product failed to conform to the product seller's warranty, and the failure of such product to conform to the warranty caused the harm alleged by the claimant;
 - the claimant is unable, despite a good faith exercise of due diligence, to identify the manufacturer of the product;
 - the manufacturer is not subject to service of process under the laws of the state; and/or
 - the court determines that the claimant would be unable to enforce a judgment against the manufacturer.

RECENT ENACTMENTS

- *West Virginia H.B. 2850 (2017) (to be codified at W. Va. Code Ann. § 55-7-31)*: Provides that a seller that did not manufacture a product is not subject to a product liability action unless the seller: (1) had actual knowledge of a defect in the product; (2) exercised substantial control over the aspect of manufacture, construction, design, installation, assembly, or instructions of the product; (3) altered, modified, or installed the product in a way not authorized or requested by the manufacturer; (4) provided an express warranty; (5) resold the product not in the same condition that it left the manufacturer; (6) failed to exercise reasonable care in storing, maintaining, or transporting the product; (7) removed labels, warnings, or instructions; (8) is a subsidiary of the manufacturer; or (9) repackaged the product or placed its own brand name or label on the product in some circumstances. A product seller is also subject to a product liability claim if the court determines by clear and convincing evidence that the party asserting the product liability action would be unable to enforce judgment against the manufacturer.

- *Oklahoma H.B. 3365 (2014) (codified at Okla. Stat. tit. 76, § 57.2)*: Provides that a product liability action cannot be asserted against a product seller other than the manufacturer unless the product seller exercised substantial control over the aspect of the product that caused the alleged harm, the seller modified or altered the product

in a manner that caused the alleged harm, the seller made an express warranty, the claimant is unable to identify the manufacturer, the manufacturer is not subject to service of process, or the claimant would be unable to enforce a judgment against the manufacturer.

Recognize Product Liability Ends at the Expiration of a Product's Useful Life

Purpose

Statutes of repose recognize that, after a certain number of years, the useful life of a product ends and an injury allegedly stemming from use of that product does not result from a defect at the time of sale. About half of the states limit the length of time that a manufacturer is exposed to liability after the sale of a product.

NOTES

The following states have enacted generally applicable statutes of repose: Alabama (common law), Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, North Carolina, Ohio, Oregon, Tennessee, Texas, Washington, and Wisconsin. Courts in some states have

found statutes of repose unconstitutional, but most courts have upheld such laws.

In 2016, a divided Indiana Supreme Court struck down a section of the Indiana Product Liability Act that provided a ten-year statute of repose specifically for asbestos-related claims. The court held that the statute violated the privileges and immunities provision of the state constitution because it did not apply to asbestos plaintiffs injured by defendants who both mined and sold raw asbestos, but it did apply to asbestos plaintiffs who were injured by defendants outside that category.³⁷ The Chief Justice's dissent observed that the majority "chip[ped] a little bit away" at the rule of law by not following its own 2013 court decision on the same issue.³⁸

Options

1. Establish a statute of repose (e.g., 10, 12, or 15 years) for products, starting at the time of initial sale to consumers, which precludes a product liability claim after the statutory period has elapsed.
2. Apply this reform only to those products with a useful life under a specified period of time (e.g., 10 years) and not where the product is specifically warranted to have a useful life longer than the statute of repose period.

PREVIOUS ENACTMENT

- *Wisconsin S.B. 1, § 31 (2011) (codified at Wis. Stat. § 895.047(5))*: Provides that "[a] defendant is not liable to a claimant for damages if the product alleged to have caused the damage was manufactured 15 years or more before the claim accrues, unless the manufacturer makes a specific representation that the product will last for a period beyond 15 years." Does not apply to an action based on a claim for damages caused by a latent disease.

Prioritize Asbestos Claims to Benefit Legitimate Claimants With Credible Injuries

Purpose

For decades, courts have struggled with an avalanche of asbestos lawsuits. As far back as 1997, the U.S. Supreme Court described the litigation as a “crisis.”³⁹ Cardozo Law School Professor Lester Brickman, an expert on asbestos litigation, has said, “the ‘asbestos litigation crisis’ would never have arisen” if not for the claims filed by the non-sick.⁴⁰ Most of these filings have been generated through lawyer-sponsored screenings, which are notoriously unreliable.

Filings by unimpaired claimants have created judicial backlogs and exhausted resources needed to compensate sick claimants with legitimate claims. Plaintiffs’ lawyers have responded to asbestos-related bankruptcies by dragging many small and medium-size companies into the litigation. *The Wall Street Journal* has editorialized that “the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing.”⁴¹ A former plaintiffs’ attorney candidly described the litigation as an “endless search for a solvent bystander.”⁴²

NOTES

A growing number of states have responded to the serious problems created by mass filings generated by for-profit litigation screeners by enacting “medical criteria” procedures for asbestos and silica cases. These laws generally require claimants to submit credible and objective evidence of physical impairment caused by asbestos or silica to bring or maintain an asbestos or silica claim.

The presently unimpaired are protected from having their claims time-barred should they develop an impairing condition in the future. Thus, sick claimants with legitimate claims are given priority so they can receive more timely and adequate recoveries; defendants are relieved from having to spend critical resources on premature or meritless claims; the non-sick have their claims preserved; and court dockets are unclogged.

Option

1. Require claimants to submit credible and objective evidence of physical impairment caused by asbestos or silica to bring or maintain a claim.
 - Medical criteria procedures for asbestos and silica cases were enacted in Ohio in 2004, Florida and Texas in 2005, Kansas and South Carolina in 2006, Georgia in 2007, Oklahoma in 2013, West Virginia in 2015, and Iowa in 2017. Tennessee separately enacted medical criteria procedures for silica cases in 2006 and for asbestos cases in 2016.
- *Tennessee S.B. 2062 (2016) (codified at Tenn. Code Ann. §§ 29-34-701 et seq.)* (enacting Asbestos Claims Priorities Act, described above).
 - *West Virginia S.B. 411 (2015) (codified at W. Va. Code Ann. §§ 55-7F-1 et seq.)* (enacting Asbestos and Silica Claims Priorities Act, described above).
 - *Oklahoma S.B. 14X (Spec. Sess. 2013) (codified at Okla. Stat. tit. 76, § 90 et seq.)* (enacting Asbestos and Silica Claims Priorities Act, described above).

RECENT ENACTMENTS

- *Iowa S.F. 376 (2017) (to be codified at Iowa Code 686B.1 et seq.) (enacting the Asbestos and Silica Claims Priorities Act)*: Gives priority to the claims of individuals who can demonstrate actual physical impairment caused by exposure to asbestos or silica, establishes medical criteria for determining impairment, requires certain medical documentation to support a claim, and preserves the legal rights of people who have been exposed to asbestos or to silica, but who have no present physical impairment.
- *Texas H.B. 1325 (2013) (codified at Tex. Civ. Prac. & Rem. Code Ann. §§ 90.007, 90.010)*: Provides a mechanism for state courts to dismiss long dormant claims where asbestos and silica plaintiffs have not shown proof of impairment under criteria established by Texas's 2005 reform. Preserves a claimant's ability to re-file a dismissed case should the claimant develop an impairing condition.

Address Damages “Run Wild”

The civil justice system is intended to restore a person to the position he or she would be in but for another party’s carelessness or wrongful act. In rare instances in which a party has engaged in malicious conduct, courts may impose punitive damages to punish a defendant. Jackpot verdicts and windfall awards, however, damage respect for and public confidence in the civil justice system. This section provides approaches for accurately measuring each type of damages—economic damages, noneconomic damages, and punitive damages—and avoiding excessive awards.

Damages for medical expenses in personal injury lawsuits are often inflated. In many states, a person can receive damages for medical bills that no one ever paid. If an employee sought reimbursement for items picked up at a grocery store but submitted the list price, rather than the amount actually paid after sales and “club card” use, he or she would likely be fired. Similarly, a driver who destroys a new car and expects an insurer to pay the full MSRP, rather than the price actually paid or

the bluebook value, would be sorely disappointed. But in the civil justice system, plaintiffs’ lawyers seek—and receive—the list price printed on medical bills even though the amount actually paid by the patient or the patient’s insurer and accepted by the healthcare provider is far less. Legislatures can eliminate these “phantom damages,” which serve no compensatory purpose.

Furthermore, juries are often blindfolded from learning that a plaintiff already received full or substantial compensation for the very injury at issue in the lawsuit before he or she sued. What is known as the “collateral source rule” prevents introduction of evidence of payments received by the plaintiff from insurers or other sources. As a result, plaintiffs may receive double compensation for an injury.

“Damages for medical expenses in personal injury lawsuits are often inflated.”

Some states either allow the court to deduct compensation the plaintiff already has received for an injury after a verdict or allow the jury to consider such evidence in reaching its award, particularly when unnecessary liability adversely affects the public's access to affordable healthcare.

Unpredictable and excessive awards for noneconomic damages, such as pain and suffering, are also cause for concern. While once a small part of damages, noneconomic damages are now often the largest part of awards. Juries receive no guidance when asked to reach such an award. As a result, these noneconomic damages are entirely subjective and fluctuate widely from case to case. Most states have responded by enacting reasonable bounds for noneconomic damages in personal injury or medical malpractice claims.

States are also safeguarding due process by ensuring that punitive damage awards are decided through a fair process and reserved for proven misconduct. They have also adopted laws that require proportionality between the harm caused by the defendant's conduct and the punishment imposed by the judicial system. Such laws are guided by U.S. Supreme Court decisions on unconstitutionally excessive punitive damage awards and help avoid lengthy, costly appellate litigation.

The section concludes by highlighting reforms that address excessive liability in the healthcare system, where the societal impact of inequities and inefficiencies is most immediately felt.

Ensure that Damages for Medical Expenses Reflect Actual Costs

Purpose

Plaintiffs' lawyers argue in personal injury cases that their clients should receive damages for medical expenses based on the amount billed by their healthcare providers, even when providers accepted a substantially lower amount as payment in full. Since it is not uncommon for amounts that appear on invoices to be three or four times the amounts paid by patients or their insurers (including private insurers, Medicare, or Medicaid) due to negotiated rates, discounts, and write-offs, defendants typically pay significantly inflated awards to reimburse a plaintiff for nonexistent medical expenses. Such damages serve no compensatory purpose and are passed on to consumers in the form of higher costs for goods and services and higher insurance rates. These "phantom damages" can also unjustly place costs on small businesses and nonprofits that are sued for common accidents such as slip-and-falls.

The following options present a modest, commonsense approach to reducing excessive damages. They do not go as far as eliminating the collateral source rule and therefore permit plaintiffs to continue to recover expenses even if those expenses were covered by insurance. Those who oppose such an approach must explain why

plaintiffs should recover amounts that are vastly in excess of the medical expenses actually paid.

NOTES

About one-third of the states have limited recovery of "phantom damages" through court rulings or legislation. These states include Alabama, California, Connecticut, Delaware (where medical expenses are paid by Medicare or Medicaid), Florida, Idaho, Indiana, Kansas, Maryland, Massachusetts, Minnesota, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Texas, and West Virginia.

- Texas was the first state to address phantom damages through legislation in 2003. The one-line statute provides: "In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant."⁴³ The Texas Supreme Court has applied this provision to preclude admission of billed amounts that do not reflect actual costs as evidence at trial.⁴⁴
- In some states that limit phantom damages, such as Florida, plaintiffs' lawyers engage in tactics that

continue to allow inflated recovery. They do so through "Letters of Protection," where a patient, by not paying a healthcare provider for services during pending litigation, avoids evidence of the true value of a service that he or she would actually pay.

The following states permit recovery of phantom damages: Arizona, Arkansas,

Colorado, Delaware (where medical expenses are paid by private insurers), District of Columbia, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Mississippi, Nebraska, Oregon, South Carolina, South Dakota, Virginia, Washington, and Wisconsin.

In the remainder of states, the ability to recover phantom damages is unclear or inconsistently applied.

Options

1. Provide that amounts billed that do not reflect the amounts actually paid are inadmissible at trial. California, Missouri, North Carolina, Oklahoma, and Texas are among the states that follow this ideal approach.
 2. Provide that the amount actually paid or incurred is based on the amount the treating physician would normally be paid for similar services in a non-litigation context: (1) if the plaintiff was covered by private insurance, Medicare, or Medicaid, the amount that insurer and the patient would pay to the healthcare provider; (2) if the plaintiff did not have health benefits or did not access those benefits, an amount limited to a factor of the Medicare reimbursement rate.
 3. Allow the jury to hear evidence of both the amount billed and amount paid and reach their own determination of the reasonable value of the medical services.
 4. Permit the jury to learn only the amount billed, but then permit or require the judge to reduce the verdict due to phantom damages, as provided for in some states. This approach is not ideal because, by misleading jurors to believe that the plaintiff has higher medical expenses, they may reach an inflated award for pain and suffering.
- Florida allows the jury to hear evidence of the amounts billed only in cases in which the bill was paid in whole or in part by private insurance. After the verdict, Florida law requires the judge to "set off" (subtract) the amount of phantom damages.
5. Close loopholes that allow plaintiffs' lawyers to circumvent laws intended to prevent phantom damages, such as through using Letters of Protection.

RECENT COURT RULINGS

- The Delaware Supreme Court ruled that plaintiffs cannot collect more than the amount actually paid in cases in which Medicare or Medicaid paid an injured party's expenses. The court reasoned that allowing the plaintiff "to recover amounts that are paid by no one" does not make an injured party whole.⁴⁵ The court's ruling does not

extend to cases in which medical expenses are paid by private insurers, however, which continues to allow phantom damages in many cases.

- The Indiana Supreme Court ruled that the amount accepted as full payment by a healthcare provider is admissible in court as evidence of the reasonable value of the medical services. The court emphasized that Indiana tort law "seeks to make injured parties whole," not more than whole.⁴⁶ The ruling allows the jury to consider both the billed charges and the accepted amounts in determining damages.
- The Oklahoma Supreme Court upheld the state's 2011 law precluding phantom damages.⁴⁷

RECENT ENACTMENTS

- *Missouri S.B. 31 (2017) (amending Mo. Rev. Stat. § 490.715)*: Provides that parties may introduce evidence of the actual cost of medical care or treatment. Defines "actual costs" as a sum that does not exceed amounts paid by or on behalf of the plaintiff or patient whose care is at issue plus any remaining amount necessary to satisfy the financial obligation for medical care or treatment by a health care provider after any adjustment for any contractual discounts, price reduction, or write-off by any person or entity.
- *West Virginia S.B. 6 (2015) (codified at W. Va. Code § 55-7B-9d)*: Limits a verdict for past medical expenses to "the total amount paid by or on behalf of the plaintiff" and incurred but unpaid amounts that "the plaintiff or another person on behalf of the plaintiff is obligated to pay."

Provide Juries with Full Information on a Plaintiff's Actual Losses

Purpose

Generally, the collateral source rule prohibits admission of evidence that all or some of a plaintiff's damages will be or have been paid by a source other than the defendant(s), such as through health insurance, workers' compensation, or previous settlements. As a result, the plaintiff may receive double recovery—first from the collateral source and again from the defendant. To prevent double dipping by plaintiffs and needless litigation, some states allow a judgment to be offset by the amount a claimant has received for the injuries giving rise to the lawsuit from sources other than the defendant(s).

Policy arguments supporting retention of the collateral source rule are severely undermined by certain provisions of the Affordable Care Act (ACA). Historically, courts applied the common law collateral source rule so that a person who voluntarily obtained insurance is not penalized by his or her prudence in doing so. The common law collateral source rule also presumes that a plaintiff may not have insurance for future medical expenses. For example, a plaintiff could lose his or her job (and employer-provided insurance) and be

denied future coverage from other sources due to a pre-existing condition. The shift in the landscape under the ACA significantly alters these assumptions. The "individual mandate," which went into effect in 2014, requires most people to secure health insurance. Health insurance is now compulsory, not "collateral." The law prohibits health insurers from denying coverage based on pre-existing conditions, eliminating the uninsurability concern that supported the collateral source rule. Assuming these provisions are retained, they may fuel new interest in collateral source reform.

NOTES

Several states have eliminated the collateral source rule in cases asserting negligent medical care, but continue to bar a jury from considering collateral source evidence in other cases.

The proposal to eliminate phantom damages provides a related, but limited way of addressing collateral source benefits. It confines recovery of medical bills that were paid by a collateral source to amounts actually paid rather than the higher amounts initially billed.

“ To prevent double dipping by plaintiffs and needless litigation, some states allow a judgment to be offset by the amount a claimant has received for the injuries giving rise to the lawsuit from sources other than the defendant(s). ”

Options

1. Permit the jury to consider collateral source payments in all civil actions.
2. Permit the jury to consider collateral source evidence in medical malpractice cases.
 - States such as Arizona, California, Delaware, Massachusetts, Nevada, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, and Washington follow this general approach.
3. Provide in all civil actions that the judge must consider after the verdict but prior to judgment any evidence showing that a plaintiff received compensation for the injuries or harm that gave rise to the cause of action from a source other than the defendant and must deduct from the judgment the amount of the payments from collateral sources.
 - Variations of this approach are currently law in states such as Alaska, Colorado, Connecticut, Florida, Idaho, Michigan, Minnesota, New Jersey, New York, North Dakota, and Oregon. Additional states use a similar set-off approach in medical malpractice cases.

RECENT LEGISLATION

- *Colorado S.B. 17-181 (2017) (proposed amendment to Colo. Rev. Stat. § 10-1-135) (passed Senate, died in House):* Allows introduction of evidence of compensation for an injury that the plaintiff has received or may receive from insurance or other collateral sources unless the plaintiff agrees to have the award reduced by the lesser of the amount paid or available to the plaintiff from collateral sources or the amount of premiums or other contributions the plaintiff paid to those collateral sources. Establishes a procedure for determining these amounts and the conditions under which the plaintiff may elect to invoke the collateral source rule.

Place Reasonable Bounds on Subjective Noneconomic Damage Awards

Purpose

Historically, pain and suffering damages were modest in amount and often had a close relationship to a plaintiff's actual pecuniary loss, such as medical expenses. Over the years, a confluence of factors has led to a significant rise in the size of pain and suffering awards, creating the need for legislation to guard against excessive and unpredictable outlier awards. Noneconomic damage awards in personal injury litigation now constitute the largest single item of recovery, exceeding medical expenses and lost wages.⁴⁸

Such awards may occur due to juries being improperly influenced by sympathy for the plaintiff, bias against a deep-pocket defendant, or a desire to punish the defendant rather than compensate the plaintiff. Pain and suffering awards are subjective, unpredictable, and inconsistent. Excessive pain and suffering awards raise the costs of goods and services for the public, increase insurance rates, and limit the availability of medical care.

NOTES

At least 23 states limit noneconomic damages in healthcare liability lawsuits, including Alaska, California, Colorado, Florida, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nevada,

North Carolina, North Dakota, Ohio, South Carolina, Texas, Utah, West Virginia, and Wisconsin.

- Several additional states limit total damages (economic and noneconomic) in medical liability lawsuits.

Ten states limit noneconomic damages in some or all personal injury claims, including Alaska, Colorado, Hawaii, Idaho, Kansas, Maryland, Mississippi, Ohio, Oklahoma, and Tennessee. Michigan limits noneconomic damages in product liability actions.

Federal courts and most state courts have ruled that limits on noneconomic damages are constitutional. A few state courts have struck down such laws, but these rulings are generally based on unique state constitutional provisions or outlier interpretations of such provisions.

- The Nevada Supreme Court unanimously upheld a \$350,000 limit on noneconomic damages in actions against healthcare providers.⁴⁹
- The Oregon Supreme Court explicitly overruled a 1999 decision that invalidated a statutory limit on noneconomic damages.⁵⁰
- The Florida Supreme Court struck down the state's limit on

noneconomic damages as applied to wrongful death cases involving multiple claimants in 2014,⁵¹ and completely invalidated the statutory limit in 2017.⁵²

- After the Missouri Supreme Court invalidated a limit on noneconomic

damages as unconstitutionally limiting damages available under common law in 2012, the legislature, in 2015, replaced the common law cause of action for medical malpractice claims with a statutory action subject to a limit on noneconomic damages.

“Noneconomic damage awards in personal injury litigation now constitute the largest single item of recovery, exceeding medical expenses and lost wages.”

Options

1. Limit noneconomic damages in all personal injury actions to a specific amount. See, e.g., Nev. Rev. Stat. Ann. § 41A.035 (limiting noneconomic damages to \$350,000 in any action for injury against a healthcare provider based on professional negligence).
2. Limit noneconomic damages to the greater of a specific amount or a multiplier of the compensatory damage award. See, e.g., Ohio Rev. Code Ann. § 2315.18 (greater of \$250,000 or three times economic loss up to a maximum of \$350,000).
3. Limit noneconomic damages to a certain amount per year of the plaintiff's life expectancy. See, e.g., Alaska Stat. § 09.17.010 (limiting noneconomic damages to the greater of \$400,000 or injured person's life expectancy in years multiplied by \$8,000 and, in cases involving severe permanent injuries, to the greater of \$1 million or injured person's life expectancy in years multiplied by \$25,000).
4. Authorize higher noneconomic damage awards in cases involving defined catastrophic injuries. See, e.g., Tenn. Code Ann. § 29-39-102.
5. Provide for periodic adjustment of the noneconomic damage limit to account for inflation. See, e.g., Idaho Code § 6-1603 (adjusts \$250,000 limit set in 2004 based on the state's average annual wage adjustments).

RECENT ENACTMENTS

- *Arkansas S.J.R. 8 (2017)*: Endorses a constitutional amendment that would limit noneconomic damage awards in all personal injury actions to \$500,000 for each claimant and \$500,000 for all beneficiaries in an action for injuries that result in death. The amount would be adjusted for inflation based on the Consumer Price Index. Voters will consider the measure in November 2018.

- *Iowa S.F. 465 (2017) (to be codified at Iowa Code § 147.136A)*: Limits noneconomic damages in actions against healthcare providers to \$250,000 regardless of the number of plaintiffs, derivative claims, theories of liability, or defendants in the action. The limit does not apply if the jury finds there is a substantial or permanent loss of a bodily function, substantial disfigurement, or death, which warrants a finding that imposition of such a limitation would deprive the plaintiff of just compensation for the injuries sustained. The limit also does not apply if the defendant acted with actual malice.
- *Nevada S.B. 292 (2015) (amending Nev. Rev. Stat. § 41A.035)*: Clarifies that the state's existing \$350,000 statutory limit on noneconomic damages in any action for injury against a healthcare provider based on professional negligence applies "regardless of the number of plaintiffs, defendants or theories upon which liability may be based."
- *Missouri S.B. 239 (2015) (codified at Mo. Rev. Stat. §§ 1.010, 538.205, 538.210)*: Provides a statutory cause of action for medical malpractice subject to a \$400,000 limit on noneconomic damages, which rises to \$700,000 in defined cases of catastrophic injury or wrongful death.
- *Kansas S.B. 311 (2014) (amending Kan. Stat. Ann. § 60-19a02)*: Incrementally increases the \$250,000 limit on noneconomic damages to \$350,000 by raising it \$50,000 every four years until 2022.

OTHER RECENT ACTION

- *California Proposition 46 (Nov. 2014)*: Would have increased the state's limit on non-economic damages in medical negligence lawsuits from \$250,000 to \$1.1 million and would have increased the level annually for inflation. The initiative failed by a 2:1 margin without gaining the support of a majority of voters in a single California county.

Protect Due Process in Punitive Damages Determinations

Purpose

The Supreme Court of the United States has ruled that the lack of adequate court procedures to guard against arbitrary and inaccurate deprivations of property violates a defendant's due process rights. In so doing, the Court considers whether a lower court's method of determining punitive damages departs from traditional procedures. The adequacy of procedural protections is particularly important when they involve punitive damages because

such awards "pose an acute danger of arbitrary deprivation of property" and come with "the potential that juries will use their verdicts to express biases against big business, particularly those without strong local presences."⁵³

In recent years, courts have adopted helpful practices with respect to punitive damages. State legislatures can codify these protections and adopt other safeguards to protect due process rights.

Options

1. Allow optional bifurcation. Upon motion by any party, in the first stage of a proceeding, the trier of fact would determine whether and to what extent compensatory damages should be awarded. Only if the trier of fact awards compensatory damages does the proceeding continue to the second stage, where evidence relevant to the question of punitive or exemplary damages is presented.
2. Prevent duplicative punishment for the same conduct. Punitive damages may not be awarded if the defendant establishes before trial that punitive damages have previously been awarded against it for the same action or course of conduct. If the court determines by clear and convincing evidence that the punitive damages award was insufficient, then the court may permit the jury to consider a subsequent award.
3. Require "clear and convincing" evidence to support an award of punitive damages. Most states follow this approach, but it is still needed in Connecticut, Delaware, Illinois, New Mexico, Pennsylvania, Rhode Island, Vermont, Virginia, and Wyoming. Clear and convincing evidence is a standard in between "beyond a reasonable doubt" of criminal law and "preponderance of the evidence" of civil liability.

4. Eliminate prejudgment interest on punitive or exemplary damages.
5. Defer or prohibit punitive damages in asbestos litigation to help ensure timely and adequate compensation for sick claimants and because imposing such damages no longer serve a corrective purpose.⁵⁴

RECENT ENACTMENTS

- *Tennessee S.B. 2062 (2017) (to be codified at Tenn. Code Ann. § 29-34-711(c))*: Provides that punitive damages shall not be awarded in an asbestos action.
- *West Virginia S.B. 421 (2015) (codified at W. Va. Code Ann. § 55-7-29)*: Requires plaintiff to establish by clear and convincing evidence that the

damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others. Provides for bifurcation at request of defendant.

- *Tennessee S.B. 222 (2013) (codified at Tenn. Code Ann. § 29-39-104)*: Provides that a defendant that is vicariously liable for the conduct of another is only subject to punitive damages in limited circumstances.

Prevent Excessive Punitive Damages Awards

Purpose

The U.S. Supreme Court has observed that punitive damages have “run wild.”⁵⁵ Although the Court has provided constitutional guidelines for determining whether an award is excessive, state court decisions frequently evade both the letter and spirit of these rulings. To promote a more stable legal climate, some states have adopted statutory limits on punitive damages. Statutory limits provide greater predictability and certainty in litigation, eliminate outlier verdicts, and avoid constitutionally excessive awards.

NOTES

About half of the states that permit punitive damages have statutory limits in place:

- Alabama, Alaska, Colorado, Connecticut (product liability only), Florida, Georgia, Idaho, Indiana, Kansas, Maine (wrongful death only), Mississippi, Montana, Nevada, New

Jersey, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin.

Six states generally do not permit punitive damages awards:

- Louisiana, Massachusetts, Michigan, Nebraska, New Hampshire, and Washington.

The following states have no statutory limit:

- Arizona, California, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Kentucky, Maryland, Minnesota, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, and Wyoming.

The Arkansas Supreme Court and Missouri Supreme Court struck down their states’ statutory limits on punitive damages in 2011 and 2014, respectively. Other state high courts have upheld such measures.

Options

1. Limit punitive damages awards to the greater of three times compensatory damages or a specific cap (possibly adjusting periodically for inflation).
2. In cases where the fact finder finds a specific intent to harm or malice, limit punitive damages awards to the greater of four times compensatory damages or a specific cap.
3. For individuals or small businesses, limit punitive damages awards to the lesser of three times compensatory damages or a certain percentage of net worth.
4. Provide that the limit shall not be disclosed to the trier of fact, but applied by the court to any punitive damages award.
5. When compensatory damages are above a certain amount, provide that punitive damages are not to exceed compensatory damages.
6. Do not punish businesses that follow the law by precluding punitive damages in cases in which the product or service at issue was approved by a government agency or complied with government regulations.

RECENT ENACTMENTS

- *Arkansas S.J.R. 8 (2017)*: Endorses a constitutional amendment that would limit punitive damages awards to the greater of \$500,000 or three times the plaintiff's compensatory damages. The limit would not apply if there is clear and convincing evidence that the defendant intentionally injured the plaintiff. The amount would be adjusted for inflation based on the Consumer Price Index. Voters will consider the measure in November 2018.
- *West Virginia S.B. 421 (2015) (codified at W. Va. Code § 55-7-29)*: Punitive damages may not exceed \$500,000 or four times the amount of compensatory damages, whichever is greater.

Protect Access to Healthcare Through Medical Liability Reform

Purpose

The societal impact of excessive civil liability is nowhere more evident than in medical liability. Widely disparate awards for the same or substantially similar injuries demonstrate medical liability's systemic problems. According to a survey conducted by the American Medical Association, 60% of physicians and 90% of surgeons age 55 or older have been sued at some point during their career, and data shows that 99% of doctors in high-risk specialties have been subject to a lawsuit.⁵⁶ Data also indicates that about two-thirds of these claims are dropped or dismissed.⁵⁷ Yet, as a result of lawsuits, some physicians in

certain states face liability premiums that exceed \$100,000 or even \$200,000 per year.⁵⁸

These inequities and inefficiencies negatively affect the affordability and accessibility of healthcare. Concerns about unwarranted liability also encourage physicians to practice defensive medicine, which is a major contributor to skyrocketing healthcare costs.

Medical liability reforms have dramatically improved the healthcare environment in such states as Mississippi, Pennsylvania, Texas, and West Virginia.⁵⁹

“Widely disparate awards for the same or substantially similar injuries demonstrate medical liability’s systemic problems.”

Options

1. Establish a limit on noneconomic damages in medical liability cases.
2. Allow admission of evidence of payments to the plaintiff from sources other than the defendant, or a set off for collateral source recovery.
3. Require plaintiffs’ lawyers to file medical liability lawsuits where the action arose, preventing such claims from flowing to the county viewed as the most plaintiff friendly in the state.

4. Limit the liability of physicians and other medical professionals who provide voluntary or emergency care.
5. Allow healthcare providers to express statements of apology or regret without fear that such statements can be used against them in litigation.
6. Eliminate phantom damages.
7. Provide a sliding scale for contingency fees in medical liability cases (e.g., up to 40% of the first \$150,000 recovered, 33% of the next \$150,000, 25% of the next \$200,000, and 20% of any amount recovered over \$500,000).
 - States with similar provisions include California, Connecticut, Delaware, Florida, Illinois, Massachusetts, Nevada, New Hampshire, New Jersey, New York, and Wisconsin.
8. Require the plaintiff to obtain from a qualified physician a certificate of merit finding a breach of the duty of care before filing a lawsuit.
9. Set qualifications for expert witnesses that require them to be licensed and trained in the same specialty as the defendant doctor and actively practicing in that specialty at the date of the injury. Prohibit testimony from expert witnesses whose compensation depends upon the outcome of the lawsuit.

RECENT ENACTMENTS

- *Kentucky S.B. 4 (2017) (to be codified as Ky. Rev. Stat. ch. 216C)*: Creates a review panel composed of three eligible health care providers and one nonvoting attorney to ensure that only legitimate claims advance through the justice system. A claimant may not file

a lawsuit until the panel provides an opinion on the claim or nine months has elapsed without an opinion from the panel. The statute of limitations for the medical malpractice action and dependent claims is tolled until 90 days after the claimant receives the panel's opinion.

- *Iowa S.F. 465 (2017) (to be codified at Iowa Code § 147.139)*:
 - o Provides that a person is qualified to testify as an expert witness on the standard of care only if that person: (1) is licensed to practice in the same or a substantially similar field as the defendant; (2) actively practiced in that field or was a qualified instructor at an accredited university in that field in the five years preceding the act or omission alleged to be negligent; (3) is board certified in the same or similar specialty as the defendant, if applicable; and (4) if the defendant is a osteopathic physician, the expert must be a licensed osteopathic physician in Iowa or another state.
 - o Requires plaintiff, prior to discovery and within 60 days of defendant's answer, to serve a certificate of merit upon the defendant signed by an expert witness that meets the qualifications above. Failure to substantially comply will result in dismissal with prejudice of any cause of action that requires expert testimony.

- *S.B. 6 (W. Va. 2015) (codified at W. Va. Code § 55-7B-7)*: Adds a requirement to criteria for an expert to qualify to testify on the standard of care that the opinion is grounded on scientifically valid peer-reviewed studies if available.
- *H.B. 250 (Alaska 2014) (codified at Alaska Stat. § 09.55.544)*: Provides that an expression of apology, sympathy, commiseration, compassion, or benevolence made by a healthcare provider to a patient concerning an unanticipated outcome of medical treatment or the patient's discomfort, pain, suffering, injury, or death is inadmissible as evidence in a civil action. Statements by a healthcare provider indicating it would attempt to remediate an unanticipated outcome, compromise or settle a medical malpractice claim, or pay or write off medical expenses are also inadmissible.
- *Wisconsin A.B. 120 (2014) (codified at Wis. Stat. § 904.14)*: Provides that a healthcare provider's expression of apology, benevolence, compassion, condolence, fault, liability, remorse, responsibility, or sympathy to a patient or his or her relative, made before commencement of a civil action, is not admissible as evidence of liability or as an admission against interest.
- *Florida S.B. 1792 (2013) (codified at Fla. Stat. Ann. § 766.102)*: Provides that a person may not testify on the professional standard of care unless that person is a healthcare provider in the same specialty as the defendant provider and devoted professional time to that specialty in the three years immediately preceding the date of the occurrence that is the basis of the lawsuit through clinic practice, instruction, or research. Clarifies a healthcare provider's right to legal counsel, and permits an attorney for a health care provider to informally discuss the claim with a plaintiff's treating physicians.
- *Oklahoma S.B. 1x (Spec. Sess. 2013) (codified at Okla. Stat. tit. 12, § 19.1)*: Requires filing of certificate of merit finding breach of the relevant standard of care signed by a qualified expert prior to filing a professional negligence claim.
- *Oklahoma H.B. 1007x (Spec. Sess. 2013)*: In any civil action where a patient claims injuries as a result of negligence by a health care professional, factual statements made during any peer review process are not subject to discovery.
- *Virginia H.B. 1545 (2013) (codified at Va. Code Ann. §§ 8.01-20.1, 8.01-50.1, 16.1-83.1)*: Provides that a court may review the expert opinion obtained by the plaintiff regarding a violation of the standard of care, which is a pre-filing requirement for a medical malpractice claim.
- *Wisconsin A.B. 139 (2013) (codified at Wis. Stat. § 448.30)*: Establishes that a physician's duty to inform patients about the risks and benefits of reasonable alternate treatment is determined based on what a reasonable physician in the same or similar specialty would do in the circumstances.

Endnotes

- 1 As the report has grown over five editions, it presents “101 Ways” in a figurative sense. A count of the reform options and recently enacted legislation presented in this report will likely exceed that number.
- 2 *The Economist* has observed that America’s enforcement system is “the world’s most lucrative shakedown operation.” Tom Easton, *The Criminalisation of American Business*, *The Economist*, Aug. 24, 2014.
- 3 See Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. Times, Dec. 18, 2014.
- 4 See Cary Silverman & James Muehlberger, *The Food Court: Trends in Food and Beverage Class Action Litigation* (Inst. for Legal Reform, Feb. 2017).
- 5 See Cary Silverman & Jonathan Wilson, *State Attorney General Enforcement of Unfair or Deceptive Acts and Practices Laws: Emerging Concerns and Solutions*, 65 Kan. L. Rev. 209 (2016).
- 6 Qui tam claims under the False Claims Act increased over the past decade from 365 in 2006 to 702 in 2016. See U.S. Department of Justice, *Fraud Statistics – Overview, October 1, 1987 – September 30, 2016* (Dec. 13, 2016).
- 7 42 U.S.C. § 1396h(b).
- 8 See Jonathan L. Diesenhaus, *The Great Myths of State False Claims Acts: Alternatives to Qui Tam Statutes* 10 (Inst. for Legal Reform, Oct. 2013).
- 9 See Victor E. Schwartz & Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 Am. U. L. Rev. 1477 (2009).
- 10 *Shaffer v. State Farm Mut. Auto. Ins. Co.*, 643 Fed. Appx. 201, 204 (3d Cir. 2016).
- 11 *Rancosky v. Washington Nat’l Ins. Co.*, No. 28 WAP 2016 (Pa.) (oral argument held in April 2017).
- 12 See *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773 (2017); *Daimler AG v. Bauman*, 134 U.S. 746 (2014).
- 13 Ashby Jones, *Loan & Order: States Object to ‘Payday’ Lawsuit Lending*, Wall St. J., Apr. 28, 2013.
- 14 See U.S. District Court for the Northern District of California, *Standing Order for All Judges of the Northern District of California* at 2 ¶ 19 (effective Jan. 17, 2017).
- 15 See *Oasis Lending Fin. Group v. Coffman*, 361 P.3d 400 (Colo. 2015).
- 16 See *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773 (2017); *BNSF R. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *TC Heartland LLC v. Kraft Food Brands Group LLC*, 137 S. Ct. 1514 (2017); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U. S. 915 (2011).
- 17 See Nat’l Ctr. for State Courts Jury Trial Innovations (2d ed. 2006); Am. Bar Ass’n, *Principles for Juries and Jury Trials* (2005).
- 18 *Hoffer v. Shappard*, 380 P.3d 681, 695-96 (Idaho 2016).
- 19 42 Pa. C.S. §§ 8351 *et seq.*
- 20 *Villani v. Seibert*, 159 A.3d 478 (Pa. 2017).
- 21 Gordon W. Nertzorg & Tobin D. Kern, *Proportional Discovery: Making it the Norm, Rather Than the Exception*, 87 Denv. U. L. Rev. 513, 513 (2010).
- 22 John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 550 (2010).
- 23 Carlton Fields, *The 2017 Carlton Fields Class Action Survey* at 16 (Mar. 2017).
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Notes



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