



U.S. CHAMBER  
Institute for Legal Reform

# 101 Ways to Improve State Legal Systems

FOURTH  
EDITION

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

.....

SEPTEMBER 2015





**U.S. CHAMBER**  
**Institute for Legal Reform**

An Affiliate of the U.S. Chamber of Commerce

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# How to Use This Guide

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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. 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 damages "run wild"? This report answers these questions and more.

*101 Ways* also 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 the latest trend in legal abuse: over-enforcement. This problem occurs when elected officials, regulators, and the trial bar team up to bring a series of enforcement actions against companies at

the federal, state, and local levels—and invite follow-on lawsuits by plaintiffs’ lawyers. *The Economist* recently wrote that America’s enforcement system is “the world’s most lucrative shakedown operation.”

The report presents legal reform options in a conceptual manner. It then directs readers to and summarizes approximately 101 legal reform bills enacted over the past several 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 the 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, and the order in which reforms are presented does not necessarily 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](http://www.InstituteForLegalReform.com).

# Address Over-Enforcement

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Everyone—consumers, investors, and legitimate businesses—benefits when companies that have engaged in fraud or other unlawful conduct are identified and receive a punishment that fits the crime. However, a troubling trend has emerged in which self-interested government officials and plaintiffs’ lawyers are increasingly making law enforcement decisions and setting the public policy of the state.

For example, multiple state attorneys general and 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 multiple 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 (regardless of the underlying merits), 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.

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

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. State legislators can:

1. Adopt a transparent process with close government oversight when states decide to hire private lawyers on a contingency fee basis.
2. Ensure that unfair and deceptive trade practices laws help consumers, rather than provide a means for private lawyers to enforce laws intended for government enforcement, regulate conduct 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 insurance rates for drivers and homeowners.

These changes would go a long way toward preventing today's enforcement abuses and ensuring that enforcement 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 in Hiring of Private Lawyers by State Officials

## 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 (AGs) across the country until they find one or more “buyers.” The lawsuits filed by plaintiffs’ lawyers on behalf of the government often mimic lawsuits brought by the same lawyers in private class actions.

The current lack of disclosure and legislative oversight in many states can leave the

public with a perception that the state hires attorneys based primarily on their personal and political connections and not their experience.

The government’s use of private lawyers, particularly on a contingency fee basis, also raises the troubling potential for enforcement of state law that is motivated by profit, rather than the public interest.

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 the taxpayer-paid government lawyers.

## 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, are 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 of \$50 million, exclusive of reasonable costs and expenses. States that have enacted TIPAC legislation more recently have included lower fee percentages and aggregate caps. For example, Nevada's legislation, S.B. 244, enacted in 2015, includes an aggregate cap of \$10 million.
  - *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 recognizing that government attorneys have exclusive settlement authority (enacted in several states).
    - *Eliminate financial motive to punish*: A contingency fee may not be based on penalties or civil fines awarded, as enacted in Arkansas, Mississippi, Nevada, North Carolina, Ohio, and Wisconsin.
  3. Address attempts by AGs to circumvent existing safeguards that require them to obtain express statutory or legislative authority before hiring outside counsel.
    - Louisiana enacted such a law in 2014, as did Nevada in 2015.

### RECENT ENACTMENTS

Thirteen states have followed Florida in enacting AG transparency legislation. Each law varies but includes a combination of the elements above.

- *Arkansas S.B. 204 (2015) (to be codified at Ark. Code Ann. § 25-16-714)*
- *Nevada S.B. 244 (2015) (to be codified in Nev. Rev. Stat. ch. 228)*
- *Ohio S.B. 38 (2015) (to be 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) (to be 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)*
- *Arizona H.B. 2423 (2011), as amended by S.B. 1132 (2012) (codified at Ariz. Rev. Stat. § 41-4801 et seq.)*
- *Indiana S.B. 214 (2011) (codified at Ind. Code Ann. § 4-6-3-2.5)*
- *Missouri S.B. 59 (2011) (codified at Mo. Rev. Stat. §§ 34.376, 34.378, and 34.380)*

# 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 FTCs to stop fraudulent acts within their jurisdictions. Unlike the federal FTC Act, however, most state unfair and deceptive trade practices acts (UDTPAs) (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 or statutory damages (known as treble damages) as well as attorneys’ fees and legal costs.

Plaintiffs’ lawyers are increasingly asserting UDTPAs claims where traditional tort claims fail. More specifically, UDTPAs claims are increasingly tacked on or brought as

an alternative to product liability, public nuisance, 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 UDTPAs to bring lawsuits claiming violations of regulations that the legislature intended government agencies to monitor and enforce. UDTPAs also form the basis of massive consumer class actions brought on behalf of people who may not have been injured by the challenged advertising, labeling, or other practice.

## RECENT EXAMPLE

The Massachusetts Supreme Judicial Court ruled that even after a jury finds that a small business owner’s negligence did not cause a patron’s injury or death, a judge may impose treble damages and attorneys’ fees on the basis of a technical violation, such as lack of a building permit, under the state’s consumer law. *See Klairmont v. Gainsboro Restaurant, Inc.*, 987 N.E.2d 1247 (Mass. 2013).

## Options

1. Require a plaintiff to show: (1) reliance on an unfair or deceptive act or practice that is objectively reasonable; (2) an

- ascertainable loss of money or property; and (3) proof that the conduct at issue caused the plaintiff’s injury.

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 required or permitted by or in accord with state or federal law, rule or regulation, judicial or administrative decision, or formal or informal agency action.
  - 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, West Virginia, and Wyoming.
5. Provide that the UDTPA may not be used by plaintiffs' lawyers to 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.
  - Alabama, Georgia, Louisiana, Mississippi, Montana, Tennessee, and South Carolina do not allow consumer protection claims to be brought as class actions. 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

- *West Virginia S.B. 315 (2015)* (amending *W. Va. Code §§ 46A-6-101, 105, 106*): Requires proof of an actual out-of-pocket loss proximately caused by a violation of the statute. Provides any party with the right to demand a jury trial. Excludes from scope of coverage “actions or transactions otherwise permitted or regulated by the Federal Trade Commission or any other regulatory body or officer acting under statutory authority of this state or the United States.”
- *Tennessee H.B. 2008, §§ 14-20 (2011)* (amending *Tenn. Code Ann. §§ 47-18-104(b)(27), 47-18-109*): Provides that a “catch all” provision generally prohibiting “any other act or practice which is deceptive” is to be exclusively enforced by the government, not through private lawsuits. Clarifies that a court may not award treble (triple) damages authorized for willful or knowing violations and punitive damages for the same conduct. Does not permit class actions under the consumer fraud statute.

# Avoid Excesses in False Claims Act Litigation

## Purpose

Over the last five years, false claims litigation brought under federal law has exploded. 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 (DRA). 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. As an in-depth exploration of state false claims acts published by ILR 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. See Jonathan L. Diesenhaus, *The Great Myths of State False Claims Acts: Alternatives to Qui Tam Statutes* 10 (Inst. for Legal Reform, Oct. 2013).

With approximately two-thirds of states having enacted their own False Claims Acts, plaintiffs' lawyers are now 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 that companies operating compliance programs certified as meeting criteria set by an independent body benefit from liability protections including:

- 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, *qui tam* actions would be barred 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.
    - 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.
    - 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 government employees from cashing in on their government service.
  - Define the phrase "false or fraudulent claim" to exclude the judicially-created concept of "implied false certification" liability, so that liability is imposed when a claim is "materially false or fraudulent on its face," or when a claim is presented or made "when the claimant has knowingly violated a requirement that is expressly stated by contract, regulation, or statute to be a condition of payment of the claim."
  - 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 agencies and 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.”
3. Repeal unnecessary and duplicative false claims laws.

### RECENT LEGISLATIVE ACTION

- *Wisconsin S.B. 21, § 945n (2015) (effective July 14, 2015)*: Repeals Wisconsin’s False Claims 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.
- *West Virginia H.B. 4001 (2014) (rejected)*: The West Virginia Legislature rejected a plaintiffs’ lawyer-sponsored proposal to enact a state false claims act. A national organization, Taxpayers Against Fraud, whose largest donors include individuals and lawyers who obtain millions of dollars in *qui tam* bounties, drove the legislation. Members of the House of Delegates expressed concern that the bill would duplicate existing anti-fraud laws, damage the state’s business climate, and lead to more lawsuits that primarily benefit plaintiffs’ lawyers.
- *Maryland H.B. 867 (2014) (postponed indefinitely in the Senate)*: The Maryland Senate rejected a broad false claims act with expansive liability and potential damages exceeding federal law. Senators recognized that the law would provide an unwarranted incentive for litigation and harm the state’s business environment.

# 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 are becoming 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 increased 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 control enforcement without adequate oversight and accountability. States should take proactive steps and adopt best practices that ensure the fair and transparent enforcement of state 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. 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.
2. Require posting of all government contracts with private audit firms on the unclaimed property administrator's website.
3. 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.
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 or resolution of, or legal justification for, 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. 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.

## OTHER RECENT LEGISLATION

- *Delaware S.B. 215 (2014)*: This bill prohibited the State Escheator from hiring contract auditors that are paid on a commission or a contingency fee basis and would have limited contracts with third-party auditors to no more than three years. The bill died in the Senate Banking Committee.
- *Michigan H.B. 5524 (2012)*. This bill provided that if the unclaimed property administrator contracts with a private firm to conduct an audit, "the audit shall not be performed on a contingent fee basis or any other similar method that may impair an auditor's independence or the perception of independence by the public." The bill died in the House Committee on Tax Policy.

# Reject Expansions of Bad Faith Liability that Drive Up Insurance Rates

## 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 in a tort action 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 and unintended technical violations of an insurance statute may constitute bad faith for the purposes of a tort 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, and then diluting 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 insurance consumers onto whom higher premiums are passed. Higher premiums may price

*“ Ultimately, costs associated with such lawsuits are not borne by a ‘wealthy insurer,’ but rather by individuals, small businesses, and other insurance consumers onto whom higher premiums are passed. ”*

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. Approximately a dozen states permit claims by someone other than the insured individual (i.e., third-party claimant). 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).

- A recent study found that Florida's virtually unrestricted ability to file third-party bad faith lawsuits may have resulted in over \$800 million in additional auto liability claim payments in 2013 alone. See Insurance Research Council, *Third-Party Bad-Faith in Florida's Automobile Insurance System* (2014).

## Options

1. Provide a safe harbor from bad faith claims, during which the insurer can properly investigate the claim and decide whether to pay the policy limits.
2. Provide or clarify that the standard for any private bad faith statutory right of action is that the insurer must act intentionally to unjustly deny payment under a claim or act in reckless disregard of the claimant's interests.
3. Eliminate dual enforcement of bad faith actions under statute and common law such 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.
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.

### RECENT DEVELOPMENTS

Legislation was introduced that would have placed reasonable limits on bad faith actions against insurers. Examples include:

- *Florida H.B. 1197 / S.B. 1088 (2015)*: Would have required a claimant bringing a bad faith action under either statute or common law to provide an insurer with a written notice of the alleged loss. The bill provided a safe harbor from bad faith liability to an insurer that offers to pay the claimant the lesser of the amount that the claimant is willing to accept or the policy limit within 45 days of receiving the notice. The bill did not advance.
- *Missouri H.B. 1344 / S.B. 617 (2014)*: Would have limited a judgment against an insurer to a policy's applicable limits

where the insurer breached its duty to defend but did not act in bad faith. The bill died in the House Committee on Insurance Policy.

Several plaintiffs' bar-supported bills also failed. Examples include:

- *New Jersey A.B. 231 (2014)*: Would have established a private cause of action for bad faith in the settlement of insurance claims arising out of a declared disaster and authorized punitive damages, attorneys' fees and interest payments related to such actions.
- *Michigan H.B. 5523 (2014)*: Would have created a statutory presumption of bad faith whenever an insurer failed to meet the technical requirements of other statutory provisions related to the handling of an insurance claim.

# Safeguard the Integrity of the Litigation Process

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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.

First, defendants are immediately placed at a distinct disadvantage in some jurisdictions. 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. State statutes and rules against frivolous lawsuits are also notoriously lax, leaving those hit with such suits to pay the cost even if the lawsuit is ultimately dismissed.

Next, defendants are often forced into settling lawsuits by pre-trial rulings that stack the deck against them. States in which judges do not act as gatekeepers over the reliability of purported expert testimony run a risk of junk science invading the trial and an outcome that is unsupported by sound science. The bet-the-company nature of class action lawsuits, once certified, often leads businesses to quickly settle claims even when many of the purported class members have no concern with the product or its marketing.

At the same time, 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. The lawyers then 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.

Finally, appeal of an extraordinary verdict may be beyond the reach of civil defendants due to unconstrained appeal bond rules that require the defendant to post 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. These laws place undue pressure on defendants to settle rather than exercise their right to appeal.

*“ Unfortunately, in some areas of the country, the litigation system is slanted against defendants. ”*

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 may also be misled by attorney advertising and solicitation practices that do not fully educate them on their rights and options in obtaining legal representation.

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

# Stop Predatory and Unsound Lawsuit Lending Practices

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## Purpose

In recent years, an industry has emerged in which lawsuit lenders offer to lend funds in exchange for a portion of the expected settlement to plaintiffs, often in personal injury lawsuits. These loans are typically attached to sky-high interest rates that can exceed 200 percent, leaving borrowers with little to no recovery. *The Wall Street Journal* has called lawsuit lending “the legal equivalent of the payday loan.” 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.

Lawsuit lending encourages prolonged litigation and artificially inflated settlements. Injecting a third-party lender into a case incentivizes plaintiffs to reject reasonable settlement offers because of their obligation to share their recoveries 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. To make matters worse, the longer a lawsuit drags on, the more the consumer owes the lender as high interest rates compound monthly on the principal.

Interjecting a third-party lender also 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.

## 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 regarding consumer lawsuit lending transactions by requiring a plaintiff who has received consumer lawsuit lending to produce in discovery any documents he or she may have shared with the consumer lawsuit lender and to file with the court a copy of the lending contract.
  4. Prohibit lawsuit lending. Courts in several jurisdictions have invalidated agreements providing for third-party financing of litigation. Legislatures can provide greater clarity in the law by codifying these rulings.

percentage rate (APR). Provides that a violation is a deceptive and unconscionable trade practice.

- *Tennessee S.B. 1360 (2014) (to be codified at Tenn. Code Ann. §§ 47-51-101 et seq.):* 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. Mandates certain contract disclosure information. Requires litigation financiers to register with the state and file a 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. Subjects agreements to the Uniform Consumer Credit Code. Mandates certain contract disclosure information. Requires consumer lawsuit lender to obtain a license and file a bond or irrevocable letter of credit. Prohibits lender from making decisions relating to the conduct, settlement, or resolution of the underlying legal claim.

## RECENT ENACTMENTS

- *Arkansas S.B. 882 (2015) (to be 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 of 17%. Requires written contract with prominent disclosure of annual

“*Lawsuit lending encourages prolonged litigation and artificially inflated settlements. Injecting a third-party lender into a case incentivizes plaintiffs to reject reasonable settlement offers because of their obligation to share their recoveries with the lender.*”

# Protect the Rights of Consumers of Legal Services

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## 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 become more informed shoppers.

### NOTE

This proposal may be used as an amendment to legislation that would broaden liability or damages under state consumer protection acts.

## 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 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 plaintiff, and the attorney shall thereupon 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

- *Wisconsin S.B. 12 (Spec. Sess. 2011) (codified at Wis. Stat. § 814.045):* Provides a presumption that reasonable attorneys' fees are no more than three times the amount of the compensatory damages awarded. This presumption may be overcome if the court determines, after considering factors provided by the Wisconsin law, that a greater amount is reasonable.

# 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.

## 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.
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.

### RECENT ENACTMENTS

- *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)*: 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.
- *Louisiana H.B. 464 (2012) (codified at La. Civ. Code Art. 38)*: Provides that a business's residence (domicile) for venue purposes is either the state of its formation or the state of its principal place of business, whichever is most pertinent to the particular issue.

“ 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. ”

- *Alabama S.B. 212 (2011) (amending Ala. Code § 6-5-410)*: Requires wrongful death actions to be brought in the county where the decedent could have filed suit, preventing the practice of naming a personal representative in a plaintiff-favorable county solely for purposes of obtaining venue there.
- *Tennessee H.B. 2008, § 2 (2011) (amending Tenn. Code Ann. § 20-4-104)*: Provides that civil suits against businesses must be filed in the county where all or a substantial part of the events or omissions giving rise to the cause of action accrued, or the county where any defendant maintains its principal office. If the defendant is an out-of-state business, the action must be filed in the county where the defendant's registered agent for service of process is located; or, if the defendant does not maintain a registered agent within Tennessee, the county where the person designated by statute as the defendant's agent for service of process is located.

# Ensure that Juries Represent the Entire Community

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## Purpose

Representative juries that include people from all walks of life reduce the potential for outlier decisions. The jury service laws of some states exempt certain professionals, make it easy for citizens to simply avoid jury service, and provide inadequate compensation for working jurors to serve on particularly long, high-stakes trials. More representative juries can be secured by reducing the burdens of jury service and more effectively requiring 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. *Best practices.* Consider updating state jury service laws to:
  - provide a procedure to automatically reschedule jury service;
  - limit the term of service to no more than one day or one trial;
  - strengthen hardship excuse standard;
  - eliminate all exemptions based on profession or occupation;
  - prohibit employers from 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. *Innovations.* In coordination with the state’s judiciary, consider adopting legislation to authorize, study, or fund jury service innovations included in the National Center for State Courts Jury Trial Innovations (2d ed. 2006) guide or the recommendations of the American Bar Association’s Principles for Juries and Jury Trials (2005). These guides support several of the reforms bulleted above but also recommend additional practices, such as allowing juror note-taking.

3. *Lengthy Trial Fund.* Adopt a lengthy trial fund providing supplemental compensation to jurors selected to serve on trials of more than 5 or 10 days who do not receive their full regular compensation during jury service from their employers or who are self-employed. This fund may be financed by a nominal fee on the 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 10 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 10 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. *Preserve 12-member juries.* 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 and deliberation, and are less representative of the community. They have a greater chance of reaching outlier decisions. Resist efforts—pushed by plaintiffs’ lawyers and enticed as a means to cut costs or increase juror pay—to reduce civil juries to six members.

#### RECENT ENACTMENTS

- *Arizona S.B. 1248 (2014) (amending Laws 2003, ch. 200, § 13):* Extends the Lengthy Trial Fund that was set to expire on July 1, 2014 for an additional five years (June 30, 2019).
- *Arizona H.B. 2133 (2012) (amending Ariz. Rev. Stat. § 21-222):* Modifies the Lengthy Trial Fund to allow jurors who serve on a trial lasting more than five days to receive wage supplementation or replacement beginning on the first day of jury service.
- *Oregon H.B. 3034 (2011) (amending Or. Rev. Stat. §§ 10.055, 10.090):* Provides that a judge or court clerk may grant a summoned juror’s second request for a deferral of jury service if the person provides a list of no fewer than 10 dates within the six-month period following the date of the request on which the person would be able to serve. An employer may not require that an employee use vacation, sick, or annual leave for time spent in responding to summons for jury duty and must permit the employee to take leave without pay for time spent.

# Make Losers Pay for Filing Frivolous Lawsuits

## Purpose

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. A loser-pays system has strong appeal. 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. Legislation strengthening rules against frivolous claims, requiring losing parties to pay discovery expenses, or addressing vexatious litigants may provide better options.

### NOTE

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” defending 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 to chase after an unattainable reimbursement.

## Options

1. *Require those who file frivolous lawsuits to pay the defendant’s attorneys’ fees related to dismissal of the suit.* 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.

- Require courts to impose sanctions when a judge finds that a claim or defense is frivolous.
- Recognize that a court may use sanctions to reimburse a party for reasonable attorneys' fees and costs incurred as a result of the frivolous claim.
- Place the cost of frivolous legal claims or defenses on the attorney responsible.
- 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.

2. *Impose the costs of discovery on the losing party.* This option would not place the full costs of the litigation on the losing party, but would discourage litigants from imposing excessive, time-consuming, and costly document production obligations on opponents in order to pressure them into an unfair settlement. Current law in many states already permits the prevailing party to seek recovery of costs. This approach would expand the definition of reimbursable costs to include expenses incurred in responding to written and oral discovery and producing documents.

“ *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.’* ”

3. *Adopt vexatious litigant law.* This law would require that 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 California, Florida, Hawaii, Ohio, Texas, and, most recently, New Hampshire.

### RECENT ENACTMENTS

Strengthening the state's rule against frivolous claims:

- *Wisconsin S.B. 1, § 28, Spec. Sess. (2011) (codified at Wis. Stat. § 895.044):* Provides a more limited safe harbor than the federal rule and permits the use of sanctions to reimburse victims of frivolous lawsuits. Allows a judge to award court costs and attorneys' fees to the defendant even if the plaintiff's

attorney withdraws the frivolous action within 21 days. If the frivolous action is not withdrawn, then the defending party is entitled to recovery of reasonable court costs and attorneys' fees. Requires reimbursement of attorneys' fees if the sanctioned party pursues and loses an appeal. Costs and fees may be assessed fully against the party bringing the action or the attorney representing the party, or both, jointly and severally, or may be assessed so that the party and the attorney each pay a portion of the costs and fees.

Requiring 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:

- *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. This loser-pays provision has several broad exceptions. 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.

- *Texas H.B. 274 (2011) (adding Tex. Gov't Code § 22.004(g),(h))*: Directs the Supreme Court to adopt rules to provide for the early dismissal of causes of action that have no basis in law or fact. *See also* Tex. R. Civ. Proc. 91a: Provides rule governing "Dismissal of Baseless Causes of Action" that requires filing a motion to dismiss within 60 days of the first pleading and the court to award the prevailing party all costs and reasonable and necessary attorneys' fees incurred with respect to the challenged cause of action.

Adopting a vexatious litigant law:

- *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.

# Stem Class Action Abuse

## Purpose

Class action abuse is a long-standing issue at both the federal and state levels. 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, must fill out paperwork to obtain a nearly worthless recovery.

Courts that improperly certify class actions place tremendous pressure on defendants to settle cases as the alternative is to “bet the company” on a colossal lawsuit. Several states protect a defendant’s ability to appeal erroneous class certification decisions that undermine due process by allowing for immediate judicial review.

As the value of class action litigation to consumers has become increasingly questionable, the practice of distributing class funds to third-party charities instead of class members, known as *cy pres*, has grown. This practice, often used to distribute unclaimed funds, encourages class actions where purported class members do not view themselves as injured or do not benefit from the lawsuit. It also undermines the fundamental goal of civil litigation: to provide compensation for those who have experienced an injury. State legislatures can provide close scrutiny of class action settlements and help ensure that class members—not entrepreneurial lawyers—are the primary beneficiaries of these lawsuits.

## Options

1. 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:

- Ala. Code § 6-5-642
- Ariz. Rev. Stat. Ann. § 12-1873
- Ark. R. App. P. 2(a)(9)
- Conn. Gen. Stat. § 42-110h
- Fla. R. App. P. 9.130(a)(3)(C)(iv)
- Ga. Code Ann. § 9-11-23(g)
- Iowa R. Civ. P. 1.264(3)
- Ky. R. Civ. P. 23.06
- La. Code Civ. Proc. Ann. art. 592 (A)(3)(b)
- N.D. R. Civ. P. 23(d)(3)
- Ohio Rev. Code § 2505.02(B)(5)
- Okla. Stat. tit. 12, § 993(A)(6)
- Tenn. Code Ann. § 27-1-125
- Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(3)

2. Provide that classes may be certified only after the class representative makes a preliminary factual showing of a reasonable likelihood of success on the merits.
3. Reform attorneys' fee arrangements through adoption of a "declining percentage principle," whereby the percentage of recovery allocated to attorneys' fees decreases as the size of the recovery increases.
4. Instruct courts to provide greater scrutiny to class action settlements, especially those involving coupons or other noncash settlements.
5. Tie attorneys' fees in class action settlements to the value of money and benefits actually received by class members—not the amount of funds or coupons available or money that a defendant agrees to give to a charity. For example, the federal Class Action Fairness Act of 2005 (CAFA) links attorneys' fees in coupon class actions to the value of coupons actually redeemed by class members. States can take a similar approach in *cy pres* settlements.

## RECENT ENACTMENTS

- *Oklahoma H.B. 1013X (Spec. Sess. 2013) (amending Okla. Stat., tit. 12, § 2023) (reenacted 2009 law)*: 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. Subjects class certification orders to closer appellate review (*de novo*). 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." Establishes factors for awarding attorneys' fees. 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.

- *Louisiana H.B. 472 (2013) (codified at La. Code Civ. Proc. art. 591, 592):* Clarifies that plaintiffs' lawyers must show that a proposed class action satisfies certification criteria and provides that a proposed class does not meet the criteria if, at the certification stage, a court needs to inquire into the merits of each potential class member's cause of action. Specifies that the proponent of certification has the burden of proof to establish all requirements are met.
- *New Jersey A.B. 3123 (2013) (codified at N.J. Stat. Ann. §§ 14A:3-6.1 to 14A:3-6.9):* Establishes procedures for commencing and maintaining a shareholder class action and derivative lawsuit.
- *Louisiana H.B. 464 (2012) (codified at La. Code Civ. Proc. §§ 593.1, 593.2):* Permits a defendant to have duplicative class actions filed in multiple Louisiana courts transferred to the district court where the event occurred, or, where their conduct occurred at multiple locations, to the district court where the first suit was brought. If within 30 days of certification of a class action there are related putative class actions pending, then courts may transfer those actions to the court that certified the related action.

# Prevent Suppression of Evidence of Plaintiff Exposures in Asbestos Cases

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## Purpose

Asbestos litigation is the longest-running mass tort in U.S. history. Asbestos-related liabilities have helped force approximately 100 employers into Chapter 11 bankruptcy. Scores of trusts have been created to pay claims related to those companies' asbestos products. A U.S. Government Accountability Office report estimated that asbestos trusts held a combined total of over \$36.8 billion in assets in 2011.

In litigation, plaintiffs' lawyers claim that their clients' injuries stem from exposure to asbestos from products of solvent companies. Trust claim filings 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, thus suppressing key evidence of the responsibility of bankrupt companies. As a result, solvent companies are forced to pay inflated settlements because of the difficulty of proving alternative causation.

U.S. Bankruptcy Judge George Hodges recently 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." 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..." Evidence Garlock needed to attribute plaintiffs' injuries to insulation products often "disappeared" once those companies filed bankruptcy. The judge said, "[t]his 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 trusts until after obtaining recoveries from Garlock (and other viable defendants)." *In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (W.D.N.C. Bankr. 2014).

As asbestos litigation continues to force otherwise viable corporations into bankruptcy, employers left to defend asbestos lawsuits have struggled to convince some judges to account for bankruptcy trust claims in asbestos lawsuits. 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 totality of their asbestos exposures.

## Options

1. Require plaintiffs to file and produce all asbestos bankruptcy trust claims before trial.
2. 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.
3. Clarify that asbestos trust claims materials are admissible in court to prove alternative causation for a plaintiff's injuries or to allocate liability for the plaintiff's injury.
4. Provide a setoff in civil litigation for money that has or will be received by the plaintiff from asbestos bankruptcy trusts.

## RECENT ENACTMENTS

- *Arizona H.B. 2603 (2015) (to be codified at Ariz. Rev. Stat. § 12-782)*: Requires a plaintiff, within 45 days of the defendant's filing of an answer, to provide to all parties a sworn statement identifying each claim the plaintiff has filed or reasonably anticipates filing against an asbestos trust. The plaintiff must provide each party with the claim and all trust documents. If the plaintiff indicates that he or she anticipates filing additional claims against asbestos trusts, the court must stay the litigation until the trust claim is filed. A court may not schedule a trial until at least 180 days after the plaintiff makes the required disclosures. Trust

“ Judge Hodges concluded that Garlock’s settlements in the tort system were ‘infected by the manipulation of exposure evidence by plaintiffs and their lawyers.’ 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...’ ”

materials are admissible into evidence and may be considered by the jury in determining liability and apportioning fault. Defendants are entitled to a setoff to reflect amounts the plaintiff received from asbestos trusts.

- *Texas H.B. 1492 (2015) (to be codified at Tex. Civ. Prac. & Rem. Code § 90.051 et seq.)*: Requires a plaintiff who has filed an asbestos- or silica-related lawsuit to make a trust claim against each asbestos or silica trust the plaintiff believes may owe compensation or damages to the plaintiff for the injury that is the basis of the lawsuit. A plaintiff must make each trust claim no later than the 150th day before trial. The plaintiff must serve each party notice

of the trust claim along with the claim material. The plaintiff has an obligation to supplement the notice or materials if they are incomplete or incorrect. A trial court may not begin a trial unless the plaintiff has made each trust claim and served the parties with the required material. A defendant can request a stay of proceedings if the defendant has a good faith belief that the plaintiff can make a successful claim against additional trusts.

- *West Virginia S.B. 411 (2015) (to be codified at W. Va. Code §§ 55-7E-1 et seq.):* Requires a plaintiff to provide parties with a sworn statement identifying all asbestos trust claims that have been filed by the plaintiff or by anyone on the plaintiff's behalf no later than 120 days prior to trial. The plaintiff must make available to all parties all trust claims materials for each asbestos trust claim. A defendant in an asbestos action may seek discovery from an asbestos trust. A court must stay an asbestos action if the plaintiff fails to make the disclosures required. A court may stay a claim if the plaintiff intends to file additional trust claims. If a plaintiff proceeds to trial before an asbestos trust claim is resolved, the filing of

the asbestos trust claim may support a jury finding that such exposure may be a substantial factor in causing the plaintiff's injury that is at issue in the asbestos action. A defendant is entitled to a setoff or credit in the amount of the valuation established by the trust. A plaintiff who fails to provide all of the information required is subject to sanctions.

- *Wisconsin A.B. 19 (2014) (to be codified at Wis. Stat. § 802.025):* Requires an asbestos plaintiff to provide to all parties a sworn statement identifying each personal injury claim the plaintiff has filed or reasonably anticipates filing against an asbestos trust. Provides that trust claim materials are admissible at trial. Authorizes courts to stay litigation until the plaintiff has filed trust claims.
- *Oklahoma S.B. 404 (2013) (codified at Okla. Stat. tit. 76, §§ 81 to 89):* Requires a plaintiff, within 90 days of filing a personal injury lawsuit, to provide all parties with a statement identifying all claims the plaintiff has filed or anticipates filing with a personal injury trust. A plaintiff must produce a final executed proof of claim and all other trust claims materials relevant to each filed claim. Provides that trust claim materials

are admissible at trial. Requires the court to stay litigation if a plaintiff anticipates filing a claim against a personal injury trust until the plaintiff files with the trust and provides a proof of claim. Provides that a defendant is entitled to a setoff or credit in the amount awarded from the trust or the value established for a pending claim.

- *Ohio H.B. 380 (2012) (codified at Ohio Rev. Code §§ 2307.951 to 2307.954)*: Within 30 days after the commencement of discovery, an asbestos plaintiff must provide to

all parties a statement identifying all existing asbestos trust claims filed and produce all trust claims material pertaining to each claim. If the plaintiff subsequently files claims with additional trusts, the plaintiff must file an updated statement and produce the filed material. Not less than 75 days before trial, a defendant may file a motion to stay the litigation by showing credible evidence that the plaintiff has not disclosed trust claims.

# Support Sound Science and Expert Evidence in the Courtroom

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## 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 as reliable 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's landmark decision in *Daubert* emphasized the obligation of the trial court to serve as a "gatekeeper," guarding the courthouse against untrustworthy expert testimony. 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 clear gap remains between evidentiary standards in federal courts and some state courts.

## 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.

- 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.
- Most states follow *Daubert* or consider their state rule consistent with its approach: Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, South Dakota, Texas, West Virginia, Wisconsin, and Wyoming.
- About one-third of states use a hybrid standard of *Daubert* or apply their own standard: Colorado, Hawaii, Idaho, Iowa, Maine, Minnesota, Missouri, Nevada, New Jersey, Rhode Island, South Carolina, Tennessee, Utah, Vermont, and Virginia.

## 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)

- *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)*
- *Alabama S.B. 187 (2011) (amending Ala. Code § 12-21-160)*
- *North Carolina H.B. 542, 1.3 (2011) (amending N.C. Gen. Stat. § 8C-702)*
- *Wisconsin S.B. 1 (Spec. Sess. 2011) (amending Wis. Stat. §907.02, 907.03)*
- *Arizona S.B. 1189 (2010) (codified at Ariz. Rev. Stat. § 12-2203) and Arizona Supreme Court amendment to Rule of Evidence 702 (effective Jan. 1, 2012)*

# Safeguard the Right to Appeal

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## 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 does not have an intermediate appellate court, approved a proposed constitutional amendment to establish such a court in November 2014.

### APPEAL BONDS

Defendants, in order to stay the execution of a judgment and protect their assets during an appeal, must post appeal bonds, which can run up to 150% of the judgment against them in some states. If a defendant cannot post 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. By way of contrast, 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

### 1. Appellate review:

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

### 2. Appeal bonds:

- Apply appeal bond limits to all civil case judgments regardless of legal theory or type of defendant.
- Provide a separate, lower cap for small businesses or a limit based on a defendant’s net worth.

- Limit the necessary appeal bond to the compensatory damages portion of the verdict (exclude the need to post bond to cover the punitive damages portion of the award, if any).

## RECENT ENACTMENTS

### Appellate review:

- *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.

### Appeal bonds:

- *Nevada S.B. 134 (2015) (to be codified in Nev. Rev. Stat. ch. 20)*: Limits appeal bonds to the lesser of \$50 million or the amount of the judgment, \$1 million for small businesses, and provides courts with discretion to set a lower bond for good cause shown.

“*Intermediate appellate courts also promote consistency and predictability in the law by providing more decisional case law that establishes binding precedent.*”

- *Maryland H.B. 164 (2015) (to be codified at Md. Cts. & Jud. Proc. Code § 12-301.1)*: Limits appeal bonds to \$100 million, \$1 million for small businesses, and 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.
- *Arizona S.B. 1212 (2011) (amending Ariz. Rev. Stat. § 12-2108)*: Limits the amount of an appeal bond to the lesser of the total amount of damages awarded excluding punitive damages, 50% of the appellant's net worth, or \$25 million.
- *South Carolina H. 3775 (2011) (amending S.C. Code Ann. § 18-9-130)*: Limits the amount of an appeal bond to \$25 million for businesses with 50 or more employees and gross revenue of more than \$5 million, and \$1 million for all other entities.
- *Tennessee H.B. 2008 (2011) (amending Tenn. Code Ann. § 27-1-24)*: Reduces the maximum amount of an appeal bond from \$75 million to \$25 million, not to exceed 125% of the judgment.

# Promote Fairness in Judgment Interest Accrual

## Purpose

Many state legislatures have enacted laws that allow for interest 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 these judgment interest awards 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 3%, a plaintiff's recovery would far exceed the real dollar value of the judgment. This excess interest payment, in effect, acts as a penalty against 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 defendant may be penalized simply by resolving to exercise his or her legal rights.

### 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%), Kentucky (12%), Maryland (10%), Massachusetts (12%), Montana (10%), Rhode Island (12%), South Dakota (10%), Vermont (12%), and Wyoming (10%). These fixed rates are grossly disproportionate and arbitrary when compared to existing market rates.

## Options

1. Set a reasonable interest rate. Examples of sensible prejudgment interest 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*: New York Federal Reserve prime rate, with a floor of 5% and a ceiling of 15%.
  - *Washington*: U.S. Treasury bill rate plus 2%.
2. Provide that prejudgment interest may not be awarded for future economic or noneconomic damages.
3. Provide that prejudgment interest may not be awarded for punitive damages.

### RECENT ENACTMENTS

- *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 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.

**“ 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. ”**

- *Tennessee H.B. 2982 (2012) (to be codified at Tenn. Code Ann. § 47-14-121)*: Provides that the interest rate on judgments is 2% less than the Federal Reserve System's published average prime loan rate.
- *Alabama S.B. 207 (2011) (codified at Ala. Code § 8-8-10)*: Reduces the post-judgment interest rate from 12% to 7.5%.
- *Arizona S.B. 1212 (2011) (amending Ariz. Rev. Stat. § 44-1201)*: Lowers the judgment interest rate from 10% to the lesser of 10% or 1% plus the prime rate as published by the Board of Governors of the Federal Reserve System.
- *Florida H.B. 567 (2011) (amending Fla. Stat. §§ 55.03, 17.1341)*: Provides that, absent contractual agreement, the pre- and post-judgment interest rate is set by Florida's chief financial officer based on the discount rate of the Federal Reserve Bank of New York for the preceding 12 months plus 4%.
- *Wisconsin S.B. 14 (2011) (amending Wis. Stat. §§ 807.01(4), 814.04(4) and 815.05(8))*: Lowers the post-judgment interest rate on judgments from 12% to 1% plus the prime rate, as reported by the Federal Reserve Board.

# Promote Rational Liability Rules

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There are many ways that states can tailor liability rules to strike the appropriate balance of fairly compensating individuals for injuries and protecting the public without imposing unwarranted liability on defendants. 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, or beyond the court’s jurisdiction. 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

“ States are also moving away from joint and several liability... Such laws lead plaintiffs’ lawyers to target businesses based on deep pockets rather than their responsibility for an injury. ”

fault. States are also ensuring that juries are allowed to consider and allocate fault among all parties involved, regardless of whether they are named as defendants. 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, individuals and businesses

know 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 primarily responsible for his or her own injury. 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

Thirteen 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, South Dakota, and Washington follow this approach.

Five jurisdictions follow “contributory negligence,” which provides a defense to liability if the 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.

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 cannot recover if his or her negligence was greater than the negligence of the person against whom recovery is sought (see, e.g., *Colo. Rev. Stat. § 13-21-11*; *Minn. Stat. Ann. § 604.01*), or if he or she bears a greater percentage of fault than the combined percentage of fault attributed to others (see, e.g., *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*); *§ 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)*.
2. Provide or clarify that the jury is permitted to consider all of the 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.*

### RECENT ENACTMENTS

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

# Fairly and Proportionately Allocate Liability Based on Fault

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## 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.

### NOTE

States most in need of reform (those with pure joint liability) 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.
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 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 equal 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)*: Limits the liability of each party in a multi-defendant lawsuit to that party's proportionate responsibility and provides that juries can allocate fault among all those who contributed to an injury, including nonparties.
- *Oklahoma S.B. 862 (2011) (amending Okla. Stat. tit. 23, § 15.1)*: Replaces modified joint and several liability with pure several liability except in lawsuits brought by the state.
- *Pennsylvania S.B. 1131 (2011) (amending Pa. Consol. Stat. tit. 42, § 7102)*: Bars the application of the rule of joint and several liability in the recovery of all damages, except when a defendant has been: (1) found liable for intentional fraud or tort; (2) held at least 60% liable; (3) held liable for environmental hazards; or (4) held civilly liable as a result of drunk driving.

# Provide Transparency as to When Legislatures Create New Ways to Sue

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## 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 fat content of fast food, but attorneys may use this regulatory law to attempt to create a new type of private lawsuit. The 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. 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. Whether a private right to sue exists may also have implications for government policymaking and enforcement of a law. For these reasons, legislation should be clear as to whether any act of the legislature creates a new right to sue. This proposal would provide greater transparency in the legislative process and clarity in the courts. If a state legislature is going to create a new way to sue, it should say so directly.

## Options

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 the 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.

## 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 in order for legislation enacted by the general assembly to create or confer a private right of action, the legislation must contain express language creating or conferring the right. Courts are precluded from construing or interpreting a statute to impliedly create or confer a private right of action in the absence of such express language.

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“ [L]egislation should be clear as to whether any act of the legislature creates a new right to sue. This proposal would provide greater transparency in the legislative process and clarity in the courts. ”

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# Improve Product Liability Law

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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 would help restore balance. They would 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 short-cuts 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.

*“ [P]laintiffs’ 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. ”*

The options would also prevent plaintiffs’ lawyers and courts from transforming consumer protection laws from a means of recovery for economic loss in everyday 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. A manufacturer that complies with and even substantially exceeds such standards, however, does not receive a commensurate benefit in most states. 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

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## 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 a "deep-pocket," often regardless of fault.

For example, in high-profile litigation, some have tried to subject manufacturers to public nuisance liability for harms caused by individuals who misused the products. In these cases, it is not alleged that the products are defective, which is the linchpin for liability under product liability law. Lawsuits have also 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 their 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.

## RECENT EXAMPLES OF THE EXPANSION OF PRODUCT LIABILITY

- The Alabama Supreme Court is 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. *See Wyeth, Inc. v. Weeks*, 159 So. 3d 649 (Ala. 2014).
- The Pennsylvania Supreme Court ruled that, in some circumstances, manufacturers are subject to liability for negligently designing a prescription drug. *See Lance v. Wyeth, Inc.*, 85 A.3d 434 (Pa. 2014). Traditionally, courts reject such claims because a drug’s design cannot be altered without fundamentally changing the FDA-approved product. Courts generally do not consider a drug that is accompanied by adequate directions and warnings defective.

## Options

1. If the 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. *See Aaron D. Twerski & James A. Henderson, Jr., Fixing Failure to Warn*, 90 Ind. L.J. 237 (2015).

“ *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 a ‘deep-pocket,’ often regardless of fault.* ”

## RECENT ENACTMENTS

- *Alabama S.B. 80 (2015)*: 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. Overturns the Alabama Supreme Court's decision in *Wyeth v. Weeks*.
- *Oklahoma H.B. 3365 (2014) (to be codified at Okla. Stat. tit. 76, § 57.2)*: Provides that, in a negligence action, a product seller is only liable if it sold the product involved, did not exercise reasonable care in making the product or passing on warnings or instructions, and the failure to exercise reasonable care caused the plaintiff's harm.
- *Wisconsin S.B. 1 (2011) (codified at Wis. Stat. §§ 895.046, 895.047)*: Provides that a manufacturer, distributor, seller, or promoter of a product may be held liable only if the claimant proves, in addition to any other elements required to prove his or her claim, that the manufacturer, distributor, seller, or promoter of a product manufactured, distributed, sold, or promoted the specific product alleged to have caused the claimant's injury or harm, with narrow exceptions. Requires proof of a "reasonable alternative design," moving Wisconsin away from the broad "consumer expectation" test. Overturns a court decision adopting a "risk contribution" theory in lead-paint cases that allowed plaintiffs to sue without identifying which company's product was responsible for their injury.

# 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. § 78-15-6(3); 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 complies 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 § 2307.80; Or. Rev. Stat. § 30.927; Tenn. Code Ann. §§ 29-28-104(b), 29-39-104(d), (e); Utah Code § 78-18-2.

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 is 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 to drugs and medical devices approved by the FDA.
- Apply 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.

- Apply to 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)*: Provides a rebuttable presumption that a product manufacturer or seller is not liable for an injury caused by some aspect of the formulation, labeling, or design of the product if that aspect of the product complied with or exceeded mandatory safety standards or was subject to premarket licensing or approval by a federal government 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.
- *Wisconsin S.B. 1 (2011) (codified at Wis. Stat. § 895.047(3)(b))*: Provides that “[e]vidence that the product, at the time of sale, complied in material respects with relevant standards, conditions, or specifications adopted or approved by a federal or state law or agency shall create a rebuttable presumption that the product is not defective.”
- *Tennessee H. 2008, §§ 10, 11 (2011) (codified at Tenn. Code Ann. §§ 29-28-104, 29-39-104)*: Prohibits the award of punitive damages against

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“ [E]ven the most closely regulated businesses face lawsuits advancing theories of liability that create tension with the reasoned decisions of government regulators. ”

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drug or device manufacturers when the product was manufactured in accordance with relevant federal law, with certain exceptions. Prohibits the award of punitive damages when the defendant was in compliance with relevant federal and state regulations setting forth specific standards applicable to the activity in question to protect a class of persons or entities that includes the plaintiff.

# Protect Innocent Product Sellers

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## 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 court of choice. In addition, the small, local business, while not a true target in the litigation, is forced to expend precious business time and pay substantial legal fees.

### NOTES

A majority of 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 states 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.

## Options

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, manufacturing, 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 regarding the product independent of any express warranty made by a manufacturer, the product failed to conform to the product seller's warranty, and the failure of the 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

- *Oklahoma H.B. 3365 (2014) (to be 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.
- *Alabama S.B. 184 (Ala. 2011) (codified at Ala. Code § 6-5-501)*: Provides that no product liability action may be brought against a product seller that is not the manufacturer unless: (1) the product seller is also the manufacturer; (2) the product seller exercised substantial control over the aspect of the product at issue; or (3)

**“** *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.* **”**

the product seller altered or modified the product in a manner that was a substantial factor in causing the injury. A product liability action may also be brought against a product seller if the plaintiff files an affidavit asserting that he or she is unable to identify the manufacturer of the defective product. If the product seller files an affidavit identifying the manufacturer, the plaintiff must file an action against the manufacturer and dismiss all claims against the product seller.

- *Tennessee H.B. 2008 (Tenn. 2011) (amending Tenn. Code Ann. § 29-28-106)*: No “product liability action” shall be commenced or maintained against any seller other than the manufacturing, unless: (1) the seller exercised substantial control over that aspect of the design, testing, manufacturing, packaging, or labeling of the product that caused the alleged harm for which recovery of damages is sought; (2) the 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; (3) the seller gave an express warranty; (4) the manufacturer or

distributor of the product or part in question is not subject to service of process in Tennessee and the state’s long-arm statutes do not provide a basis for obtaining service of process; or (5) the manufacturer has been judicially declared insolvent.

- *Wisconsin S.B. 1, § 31 (2011) (codified at Wis. Stat. § 895.047(2), (3)(e))*: A seller or distributor of a product is not subject to strict liability unless: (1) the seller or distributor contractually assumed one of the manufacturer’s duties to manufacture, design, or provide warnings or instructions with respect to the product; (2) neither the manufacturer nor its insurer is subject to service of process within this state; or (3) the claimant would be unable to enforce a judgment against the manufacturer or its insurer. The court must dismiss a product seller or distributor as a defendant if the manufacturer or its insurer submits itself to the jurisdiction of the court in which the suit is pending. A seller or distributor of a product is not liable if it receives the product in a sealed container and has no reasonable opportunity to test or inspect the product.

# Recognize that 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 have laws that limit the length of time that a manufacturer is exposed to liability after the sale of a product.

The following states have enacted generally applicable statutes of repose: 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.

## 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, so that a product liability claim would be precluded after the statutory period has elapsed.
2. This reform should apply 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 this period.

## RECENT ENACTMENTS

- *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

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## 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.” 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. 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.” A former plaintiffs’ attorney candidly described the litigation as an “endless search for a solvent bystander.” Editorial, *Lawyers Torch the Economy*, Wall. St. J., Apr. 6, 2001.

## 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. 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, and West Virginia in 2015. Tennessee enacted medical criteria procedures for silica cases in 2006.

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.

## Options

1. 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.

### RECENT ENACTMENTS:

- *West Virginia S.B. 411 (2015) (to be codified at W. Va. Code §§ 55-7F-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.
- *Oklahoma S.B. 14X (Spec. Sess. 2013) (codified as Okla. Stat. tit. 76, § 90) (enacting the Asbestos and Silica Claims Priorities Act, described above)*
- *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.

“ *Filings by unimpaired claimants have created judicial backlogs and exhausted resources needed to compensate sick claimants with legitimate claims.* ”

# Address Damages "Run Wild"

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The civil justice system is intended to make whole a person who suffered an injury, restoring the plaintiff 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, the 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 economic damages, noneconomic damages, and punitive damages, and avoiding excessive awards.

For example, 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. As a result, damages for medical expenses in personal injury lawsuits are often inflated. 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. 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.

In addition, juries receive no guidance when asked to reach an award for the pain and suffering of a plaintiff. As a result, these noneconomic damages are entirely subjective and fluctuate widely from case-to-case. While once a small part of tort damages, pain and suffering awards have grown to become the largest part of tort costs. Most states have responded by enacting reasonable bounds for noneconomic damages in personal injury or medical malpractice claims.

States have safeguarded due process by ensuring that punitive damages awards are decided through a fair process and reserved for proven misconduct. They have also

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*“ Jackpot verdicts and windfall awards, however, damage respect for and public confidence in the civil justice system. ”*

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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 the U.S. Supreme Court decisions on unconstitutionally excessive punitive damages 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

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## Purpose

Plaintiffs' lawyers argue in personal injury cases that their clients should receive damages for medical expenses for 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 billed amounts 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. It does not go as far as eliminating the collateral source rule and therefore permits 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

1. About one-third of the states have limited recovery of "phantom damages" through court rulings or legislation: Alabama, California, Connecticut, Florida, Idaho, Indiana, Maryland, Massachusetts, Minnesota, Missouri, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Texas, and West Virginia.
  - 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.
2. The following states permit recovery of phantom damages: Arizona, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Mississippi, Nebraska, Oregon, South Carolina, South Dakota, Virginia, Washington, and Wisconsin.

3. In the remainder of states, the ability to recover phantom damages is unclear or inconsistently applied.
4. Texas was the first state to address phantom damages through legislation in 2003 (Tex. Civ. Prac. & Rem. Code § 41.0105). 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." The Texas Supreme Court has applied this provision to preclude admission of billed amounts that do not reflect actual costs as evidence at trial. *Haygood v. De Escabedo*, 356 S.W.3d 390 (Tex. 2011).
5. The California and Delaware supreme courts are the most recent state high courts to rule that phantom damages are inadmissible evidence. *Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130 (Cal. 2011); *Stayton v. Delaware Health Corp.*, 2015 WL 3654325 (Del. June 12, 2015).
6. State high courts in Montana, West Virginia, and Wisconsin, however, recently permitted phantom damages. See *Meek v. Montana Eighth Jud. Dist. Ct.*, 349 P.3d 493 (Mont. 2015); *Kenney v. Liston*, 760 S.E.2d 434 (W. Va. 2014); *Orlowski v. State Farm Mutual Auto. Ins. Co.*, 810 N.W.2d 775 (Wis. 2012). The West Virginia Legislature responded by enacting a law that limits a verdict for past medical expenses to the amount paid by or on behalf of the plaintiff and the total amount incurred for which the plaintiff or another person on behalf of the plaintiff is obligated to pay. *West Virginia S.B. 6 (2015) (to be codified at W. Va. Code § 55-7B-9d)*.

**“ Since it is not uncommon for billed amounts to be three or four times the amounts paid by patients or their insurers...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. ”**

## Options

1. Provide that amounts billed that do not reflect the amounts actually paid are inadmissible at trial. California, North Carolina, Oklahoma, and Texas are among the states that follow this ideal approach.
2. 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.
3. Permit the jury to learn only the amount billed, but then permit or require the judge to reduce the verdict due to phantom damages. 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.
  - Missouri law provides a rebuttable presumption that the amount accepted by a healthcare provider as full payment for a medical bill represents the value of the medical treatment rendered and allows the judge, outside the presence of the jury, to consider other evidence of the value of the medical treatment based on the medical bills incurred, the amount actually paid, and the amount of the medical bills that have not been paid but which the plaintiff is obligated to pay. *See Mo. Rev. Stat. § 490.715 (enacted 2005).*
4. Close loopholes, such as Letters Of Protection, that allow plaintiffs' lawyers to circumvent laws intended to prevent phantom damages.

### RECENT ENACTMENTS:

- *West Virginia S.B. 6 (2015) (to be 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".
- *Oklahoma H.B. 2023 (2011) and S.B. 789 (2015) (codified at Okla. Stat. tit. 12, § 3009.1)*: Provides that the actual amounts paid for medical bills, not the amounts billed, are admissible at trial, and that where a bill remains unpaid, Medicare reimbursement rates are admissible if the provider will accept payment at this rate.
- *North Carolina H.B. 542 (2011) (codified at N.C. Gen. Stat. ch. 8C, Rule 414)*: Limits evidence offered to prove past medical expenses to amounts actually paid to satisfy the bills, regardless of the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied.

# Provide Juries with Full Information on the 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 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 treatment 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 pre-existing condition.

The shift in the landscape under the ACA significantly alters these assumptions. The "individual mandate," which went into effect in 2014, now 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. These changes may fuel new interest in collateral source reform.

## NOTES

1. 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.
2. The proposal to eliminate phantom damages provides a related, but limited way of addressing collateral source benefits. While elimination of phantom damages does not preclude recovery of collateral sources, it confines recovery of medical bills that were paid by a collateral source to amounts actually paid rather than the higher amounts initially billed.

## 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.

## PREVIOUS ENACTMENTS

- *Washington H.B. 2292 (2006) (amending Wash. Rev. Code § 7.70.080)*: Permits admissibility of evidence of collateral source payments in medical liability cases. Plaintiff may present evidence of an obligation to repay any compensation and evidence of any amount paid by the plaintiff, or his or her representative or immediate family, to secure the right to the compensation.
- *Ohio Am. Sub. S.B. 80 (2004) (codified at Ohio Rev. Code § 2315.20)*: Permits introduction of collateral source benefits into evidence, except under certain circumstances. The plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the right to receive the collateral source benefits.

# Place Reasonable Bounds on Subjective Noneconomic Damages 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. In recent 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 damages awards in personal injury litigation now constitute the largest single item of recovery, exceeding medical expenses and lost wages. 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

Twenty states limit noneconomic damages in healthcare liability lawsuits.

- Alaska, California, Colorado, Florida, Indiana, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, 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.

- Alaska, Colorado, Hawaii, Idaho, Kansas, Maryland, Mississippi, Ohio, Oklahoma, and Tennessee.

Federal courts and most state courts have held that limits on noneconomic damages are constitutional. Some state courts have struck down such laws, however, based on unique state constitutional provisions or outlier interpretations of such provisions.

- The Florida Supreme Court struck down the state's limit on noneconomic damages as applied to wrongful death cases involving multiple claimants in 2014.
- 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.

## 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 damages 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 the 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 the injured person's life expectancy in years multiplied by \$25,000).
4. Authorize higher noneconomic damages awards in cases involving defined catastrophic injuries. *See, e.g., Tenn. Code Ann. § 29-39-102*.
5. Provide for periodic adjustment of the noneconomic damages limit to account for inflation. *See, e.g., Idaho Code § 6-1603* (adjusts the \$250,000 limit set in 2004 based on the state's average annual wage adjustments).

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

## RECENT ENACTMENTS

- *Missouri S.B. 239 (2015) (to be 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.

- *California Proposition 46 (Nov. 2014) (rejected)*: Would have increased the state's cap 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.
- *Kansas S.B. 311 (2014) (amending Kan. Stat. Ann. § 60-19a02)*: Incrementally raises the \$250,000 limit on noneconomic damages by \$50,000 every four years until 2022.
- *North Carolina S.B. 33 (2011) (codified at N.C. Gen. Stat. § 90-21.19)*: Limits noneconomic damages in medical liability cases to \$500,000 subject to adjustments, every three years starting on January 1, 2014, based on the Consumer Price Index. Does not apply if: (1) the plaintiff suffered disfigurement, loss of use of part of the body, permanent injury or death; and (2) the defendant's acts or failures, which are the proximate cause of the plaintiff's injuries, were committed in reckless disregard of the rights of others, grossly negligent, fraudulent, intentional, or with malice.
- *Oklahoma H.B. 2128 (2011) (amending Okla. Stat. tit. 23, § 61.2)*: Reduces the limit on the amount of noneconomic damages that may be awarded for noneconomic loss arising from a claim of bodily injury from \$400,000 to \$350,000. Does not apply if the defendant's actions were: (1) in reckless disregard for the rights of others; (2) grossly negligent; (3) fraudulent; or (4) intentional or with malice.
- *Tennessee H.B. 2008 (2011) (codified at Tenn. Code § 29-39-102)*: Limits noneconomic damages to \$750,000 or \$1 million if the injury or loss is catastrophic in nature. Does not apply if the defendant intended to inflict serious injury, intentionally destroyed or falsified records, or acted under the influence of drugs or alcohol.

# Protect Due Process in Punitive Damages Determinations

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## 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." In recent years, courts have adopted helpful practices with respect to punitive damages that may be more specifically addressed through legislation.

## 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. Stop 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. Many states follow this approach, but it is still needed in Connecticut, Delaware, Illinois, New Mexico, Pennsylvania, Rhode Island, Vermont, Virginia, West 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.

## RECENT ENACTMENTS

- *West Virginia S.B. 421 (2015) (to be codified at W. Va. Code § 55-7-27)*: Requires the 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 the defendant.
- *Tennessee S.B. 222 (2013) (codified at Tenn. Code Ann. § 29-39-104)*: Provides that a defendant that is only vicariously liable for the conduct of another is subject to punitive damages in limited circumstances.
- *South Carolina H. 3375 (2011) (codified at S.C. Code Ann. § 15-32-520) and Tennessee H.B. 2008 (2011) (codified at Tenn. Code Ann. § 29-39-104)*: Requires clear and convincing evidence and bifurcated trial.

# Prevent Excessive Punitive Damages Awards

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## Purpose

In a surprising number of decisions, the U.S. Supreme Court has observed that punitive damages have "run wild." 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 cases only), Mississippi, Montana, Nevada, New Jersey, North Carolina, North

Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, 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.

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“ Although the [U.S. Supreme] 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. ”

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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 verdict.
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

- *West Virginia S.B. 421 (2015) (to be codified at W. Va. Code § 55-7-27)*: Punitive damages may not exceed \$500,000 or four times the amount of compensatory damages, whichever is greater.
- *South Carolina H. 3375 (2011) (codified at S.C. Code Ann. § 15-32-530)*:
  - Limits punitive damages to the greater of three times compensatory damages awarded to each claimant or \$500,000.
  - Permits punitive damages of up to the greater of four times compensatory damages awarded to each claimant or \$2 million if the trial court determines that: (1) the wrongful conduct was motivated primarily by unreasonable financial gain, and the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was known or approved by the person responsible for making policy decisions; or (2) the defendant's actions could subject the defendant to conviction of a felony.
  - Limit if the trial court determines: (1) the defendant had an intent to harm the claimant; (2) the defendant has pled guilty to or been convicted of a felony arising out of the same act or course of conduct; or (3) the defendant acted or failed to act while under the influence of alcohol, drugs, or other substances.

- *Tennessee H.B. 2008 (2011) (codified at Tenn. Code Ann. § 29-39-104):* Limits punitive damages to two times compensatory damages or \$500,000, whichever is greater. Does not apply if the defendant intended to inflict serious injury, intentionally destroyed or falsified records, or acted under the influence of drugs or alcohol.
- *Wisconsin S.B. 1 (2011) (codified at Wis. Stat. § 895.043(6)):* Limits punitive damages to \$200,000 or two times compensatory damages, whichever is greater. Does not apply to defendants who drive under the influence of an intoxicant.

# Protect Access to Healthcare Through Medical Liability Reform

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## Purpose

The societal impact of excessive civil liability is nowhere more evident than in medical liability. Widely disparate awards across states for the same or substantially similar injuries demonstrate medical liability's systemic problems. These inequities and inefficiencies negatively affect the affordability and accessibility

of healthcare. They also encourage the practice of defensive medicine as a means of reducing or avoiding tort liability, 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.

## Options

1. Establish a limit on noneconomic damages in medical liability cases. Such limits exist, in various forms, in more than half of the states.
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:

- *West Virginia S.B. 6 (2015) (to be 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.
- *Alaska H.B. 250 (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 correct 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(12))*: Provides that a witness may not testify on the professional standard of care unless the 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 healthcare 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 the filing of a certificate of merit finding a 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 is claiming injuries as a result of negligence by a healthcare 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, and 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.







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