



U.S. CHAMBER

Institute for Legal Reform

101 Ways to Improve State Legal Systems

SIXTH
EDITION

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

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SEPTEMBER 2019





U.S. CHAMBER
Institute for Legal Reform

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Prepared for the U.S. Chamber Institute for Legal Reform by

Victor E. Schwartz and Cary Silverman, Shook, Hardy & Bacon L.L.P.

How to Use This Guide

The American civil justice system is the costliest in the world.¹ Litigation costs affect the ability of businesses to compete and prosper. By adding rationality and predictability to the system and rooting out unnecessary expenses and abuse, civil justice reform can increase confidence in the economy, help businesses expand, and create jobs. Reforms can also foster respect for the judicial system, which is too often characterized by liability that is disproportionate to responsibility, inconsistent outcomes, and jackpot verdicts.

Each year, the tort system results in over \$400 billion in costs, an amount equivalent to 2.3% of the U.S. gross domestic product or about \$3,300 per household.² These costs vary significantly from state to state, reflecting differences in risk exposure, legal liability, and efficiency.

101 Ways to Improve State Legal Systems offers some of the many options available to foster a sound legal system that promotes states' economies.³ It considers fair and effective measures that would safeguard the integrity of the litigation process, promote rational liability rules, address over-regulation and enforcement, improve product liability law, and rein in excessive awards.⁴

101 Ways considers key issues confronting policymakers. For example, when government officials hire contingency fee lawyers, are there safeguards states can put in place to 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, subjective 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.

Among the new areas considered in this Sixth Edition of *101 Ways* are:

- How can states discourage or control duplicative litigation brought by local governments?
- How can states respond to misleading lawsuit advertising that may needlessly scare people away from seeking medical care or lead them to stop taking a prescribed medication?
- How can states proactively avoid liability expansions that may result from recent American Law Institute Restatements?
- How can states encourage adoption of safeguards to protect sensitive consumer information without enabling no-injury class action lawsuits or discouraging use of innovative technologies that improve security?

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

Inclusion of a legal reform in this report does not necessarily mean that 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. The order in which reforms are presented does not reflect their level of importance, priority, or effectiveness. ILR presents these options and recently enacted legislation to provide a useful resource to the reader.

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

Address Over-Regulation and Enforcement

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

For example, multiple state attorneys general, other state regulators, and 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 other similarly vague theories. The company is then forced to defend duplicative investigations and legal actions that are pursued either simultaneously or in succession (forcing targets to litigate the same issues over and over again), imposing huge litigation costs long before any finder of fact might have an opportunity to evaluate the merits of the claims. The public drumbeat regarding these accusations subjects the target to significant, ongoing reputational damage. The company ultimately has little choice but

to agree to whatever settlement government officials and private lawyers demand.

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 hire private lawyers on a contingency fee basis to bring enforcement actions.
2. Adopt safeguards authorizing the state to oversee litigation brought by local government entities when those actions duplicate state enforcement efforts.

3. Ensure that unfair and deceptive trade practices laws help consumers rather than provide a means for private lawyers to circumvent the evidence needed to recover in a tort suit or obtain lucrative fees when no consumers were injured.
4. 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.

These changes would go a long way toward preventing enforcement abuses and ensuring that state actions focus on actual wrongdoing that inflicts real harm on consumers, taxpayers, policyholders, and businesses.

Require Transparency When State Officials Hire Private Lawyers

Purpose

Government officials are increasingly turning to private lawyers to pursue litigation on behalf of the state. These 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 do not stem from a government need to protect the rights of its citizens, but originate in theories developed by private attorneys and pitched to state attorneys general across the country until they find one or more “buyers.”⁵

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

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

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

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

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

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

Options

1. Adopt aspects of the Transparency in Private Attorney Contracting (TIPAC) law, which 16 states have adopted since 2010. Each law varies but includes a combination of the elements below.
 - *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, exclusive of reasonable costs and expenses.
 - *Oversight:* The attorney general must submit an annual report to the legislature describing use of contingency fee contracts in the preceding year and status of pending contingency fee litigation.
2. 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 civil penalties or fines awarded, as enacted in Mississippi, Nevada, North Carolina, West Virginia, and Wisconsin.

- *No improper leverage*: Preclude the state from retaining a law firm when that firm is presently engaged in private litigation against the same defendant involving the same or substantially related subject matter.
3. Address attempts by attorneys general to circumvent existing safeguards that require them to obtain express statutory authority before hiring outside counsel.
- Louisiana enacted such a law in 2014.
- *Arkansas S.B. 204 (2015) (codified at Ark. Code Ann. § 25-16-714)*
 - *Nevada S.B. 244 (2015) (codified at Nev. Rev. Stat. §§ 228.111 et seq.)*
 - *Ohio S.B. 38 (2015) (codified at Ohio Rev. Code Ann. §§ 9.49 et seq.)*
 - *Utah S.B. 233 (2015) (amending Utah Code § 63G-6a-106)*
 - *North Carolina S.B. 648 (2014) (codified at N.C. Gen. Stat. §§ 114-9.2 et seq.)*
 - *Louisiana Act No. 796 (2014) (amending La. Rev. Stat. §§ 42:262, 49:259)*

RECENT ENACTMENTS

States that have enacted laws during the past five years requiring transparency when state officials retain private lawyers include:

- *Kentucky H.B. 198 (2018) (codified at Ky. Rev. Stat. §§ 45A.690 to 45A.725)*
- *Missouri H.B. 1531 (2018) (codified at Mo. Rev. Stat. § 34.378)*
- *West Virginia H.B. 4007 (2016) (codified at W. Va. Code Ann. § 5-3-3a)*

Mitigate Municipality Litigation

Purpose

There is a growing phenomenon in which cities, counties, and other local entities and officials sue corporate entities to address large-scale policy issues.⁶ While local governments have occasionally brought lawsuits to pursue genuinely local concerns, only recently have municipalities emerged at the forefront of public litigation. On the prompting of contingency fee lawyers, municipalities are bringing a volley of lawsuits seeking compensation from businesses for expenses they attribute to opioid addiction, climate change, data privacy breaches, and other issues. If the outcome of the tobacco litigation is a guide, most of any money obtained through a settlement or judgment will go toward relieving severe, persistent municipal budget constraints and paying the fees of the private lawyers retained by the government. It is not likely to address the concerns that purportedly led to the lawsuits.

Unless addressed through legislation, the opioid litigation illustrates what may become the new normal. Over the past two years, local governments have filed about 2,000 lawsuits against manufacturers, distributors, pharmacies, and retailers seeking costs attributed to opioid addiction. These local claims are in addition to similar lawsuits filed by most state attorneys general and an ongoing multistate investigation.

The local litigation will face challenges in court. For example, a Connecticut state judge dismissed a lawsuit brought by a coalition of 37 municipalities, finding they failed to show how the opioid manufacturers named as defendants directly caused the damages that the cities sought to recoup. Allowing them to proceed, the judge observed, “would risk letting everyone sue almost everyone else about pretty much everything that harms us.” The judge concluded that “[i]t might be tempting to wink at this whole thing and add pressure on parties who are presumed to have lots of money and moral responsibility. Maybe it would make them pay up and ease straining municipal treasuries across the state. But it’s bad law.”⁷

The rise of municipality litigation will adversely affect the civil justice system. The pile-on of lawsuits is counterproductive,⁸ as it will complicate the ability to reach a final, global resolution—whether it is a statewide settlement or a national one.⁹ Rather than facing lawsuits by 51 state attorneys general—already a daunting prospect—businesses may face litigation by thousands of cities and counties. These local lawsuits are likely to lead to inconsistent court rulings, not effective policy solutions that can be achieved legislatively. In addition, municipality litigation challenges the

authority of state attorneys general to pursue litigation of statewide concern.¹⁰

Money that could alleviate the problem will go toward defending duplicative claims and paying numerous contingency fee lawyers, each of whom will feel entitled to a share.

And the potential for local government officials to provide lucrative contracts to private lawyers based on campaign donations and personal ties—and cede control of the litigation to them—is even higher than in the attorney general context.

Options

1. Change laws relating to municipalities' power to sue.
 - Eliminate the ability of municipalities to enforce statutes that are prone to abuse or to bring claims targeting specific practices or industries. This may not be an option in states with a broad "home rule" provision in their state constitution absent an amendment.
 - Provide that municipalities cannot rely on *parens patriae* as a basis for standing to bring certain lawsuits in state courts. In some states, this doctrine allows government entities to bring claims in their quasi-sovereign capacity to vindicate the interests of their citizens.
 - Require that a state official, such as the attorney general, approve the filing of certain types of lawsuits by municipalities. Alternatively, require municipalities to notify the attorney general when they file certain types of lawsuits, and empower the attorney general to take over the suit, permit the municipality to litigate it, or dismiss the claim.
 - Adopt good-government safeguards that apply when municipalities hire outside counsel or require local governments
- to obtain state-level permission to do so. At minimum, require an open and competitive process when municipalities retain outside counsel, mandate disclosure of retention agreements and payments, and place reasonable limits on contingency fees, similar to the TIPAC law (see p. 8).
2. Limit the types of lawsuits that municipalities may pursue.
 - For example, many states have enacted "commonsense consumption acts" that preclude lawsuits against food manufacturers, restaurants, and retailers premised on weight gain, obesity, or related health conditions.
 - States may also enter settlements in which, in exchange for financial recovery or other actions, the state gives up any additional claims that could be asserted on behalf of the general public, whether brought by the state or a political subdivision.
3. Reduce the potential for novel municipal litigation by modifying commonly misused causes of action.
 - More closely define what types of activities may constitute a nuisance

under state law or disallow the use of public nuisance claims premised on certain activities or theories.

- Provide that conduct that is compliant with relevant state or federal regulations does not provide a basis for a nuisance claim.
 - Regulate conduct in a manner that does not permit municipalities to demand inconsistent obligations through a lawsuit.
 - Require municipalities to meet threshold evidentiary requirements before proceeding with a claim, such as by providing proof of damages.
4. Eliminate the authority of state courts to consider lawsuits brought by municipalities that allege certain theories or address specific types of conduct. Legislation can indicate that some issues are appropriately resolved by the state's political branches and are not fit for judicial resolution.

RECENT LEGISLATION

- *Texas H.B. 2826 (2019) (primarily codified at Tex. Gov't Code §§ 2254.1032, .1034, .1036, .1037, and .1038):*
 - Provides that a political subdivision that retains outside counsel on a contingency fee basis must select a well-qualified attorney or law firm and negotiate a fair and reasonable price.
- The governing body must provide written notice to the public of the reasons for pursuing the matter, the qualifications of the selected attorney or firm, any relationship between the political subdivision and the attorney or firm, the reasons why the matter cannot be pursued through the subdivision's own resources without retaining outside counsel and cannot be pursued through an hourly fee, and the reasons why a contingency fee contract is in the best interests of residents.
- The governing body must approve the contract in an open meeting upon making the findings above.
- The contract is public information and may not be withheld in response to a request for disclosure.
- Before a political subdivision may enter into a contingency fee agreement, the attorney general must approve the contract. The attorney general may refuse to approve a contract if the subdivision did not comply with the law governing retention of contingency fee counsel, the matter presents questions of law or fact that the state has already addressed or is pursuing, or pursuit of the matter will not promote the just and efficient resolution of the matter.
- A contract entered in violation of this law is void and no fees may be paid for any work performed in connection with that contract.

Restore Rationality to Unfair and Deceptive Trade Practices Litigation

Purpose

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

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

Plaintiffs’ lawyers often assert UDTPA claims where traditional tort claims fail. More specifically, UDTPA claims are increasingly tacked on or brought as an alternative to product liability and other claims. Plaintiffs’ lawyers do so where they are unable to otherwise satisfy the well-reasoned elements of these claims, such as showing an actual injury, causation, or damages. In addition, plaintiffs’ lawyers use UDTPA laws to bring lawsuits claiming violations of regulations that the legislature intended government agencies to monitor and enforce. UDTPA laws are often the basis of massive class actions brought on behalf of people whose purchase of consumer goods and services had nothing to do with challenged advertising or labeling. For example, in recent years, certain plaintiffs’ law firms have filed cut-and-paste lawsuits targeting food and beverage marketing.¹¹

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

State attorneys general also enforce these laws and some have done so in ways that stray from the laws' intended purpose of protecting consumers. They have brought cases that are not sparked by consumer complaints, but that profit-motivated lawyers pitch to attorneys general to pursue on the state's behalf. These cases often target practices that government agencies charged with protecting the public already regulate. State attorneys general are typically empowered to seek civil

penalties under these laws. These lawsuits may indiscriminately seek the maximum fine then aggregate that fine "per violation," which can lead to penalties that are disproportionate to the alleged misconduct or consumer loss. Some attorneys general have distributed funds from the settlements and judgments resulting from these actions to handpicked outside organizations and politically popular projects, or have retained the money as an office slush fund.¹²

Options to Address Private Lawsuits

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

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

RECENT ENACTMENTS

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

Options to Address Problematic Government Enforcement

1. Provide transparency in the state's hiring and payment of outside counsel and require government control over the litigation.
2. Foster consistency between state attorney general enforcement actions and government regulation by precluding enforcement actions based on conduct that is permitted or required by, or consistent with, federal or state laws or regulations (discussed above).
3. Establish predictability and proportionality in civil penalties by: (1) limiting civil penalties to cases in which there is evidence that a business willfully violated the law; (2) requiring evidence of actual consumer harm; (3) codifying factors to guide courts in determining an appropriate civil penalty level; and (4) placing an aggregate limit on "per violation" civil penalties.
4. Ensure that settlement money furthers consumer and taxpayer interests by: (1) allocating recovered funds through the ordinary legislative appropriation process to address the concern that led to the litigation; (2) capping how much money the attorney general's office may retain in the consumer protection fund; (3) prohibiting allocation of recovered funds to outside organizations; and/or (4) requiring the attorney general to provide the legislature with a quarterly or annual report of settlements and judgments that details amounts recovered and the planned use of the funds.

RECENT ENACTMENTS

- *Texas S.B. 2140 (2019) (amending Tex. Bus. & Com. Code § 17.47(c))*: Reduces the potential for excessive civil penalties by reducing the amount the attorney general may seek from \$20,000 per violation to \$10,000 per violation.
- *Wisconsin S.B. 884 (2018) (amending Wis. Stat § 165.10)*: Requires the attorney general to deposit all settlement funds into the general fund.
- *New Hampshire H.B. 2 (2015) (codified at N.H. Rev. Stat. Ann. § 7:6-f)*: Requires all funds recovered as a result of an attorney general enforcement action to be deposited in the state's consumer protection escrow account and provides that any amount over \$5 million must be deposited in the state's general fund.

Avoid Excesses in False Claims Act Litigation

Purpose

False claims litigation brought by private individuals (known as qui tam claims) under federal law has exploded.¹³ 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. In many instances, these 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 relators or whistleblowers, can bring an action in the name of the government and receive a bounty between 15% and 25% of any government recovery. Companies that take cases to trial face triple damages and the aggregation of "per claim" statutory penalties.

The federal government provides an incentive for states to adopt false claims laws through the Deficit Reduction Act of 2005. States that enact laws 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, may receive a 10% bump in their portion of recoveries in federal FCA cases.¹⁴ That increase may be more than offset by the state's obligation to pay bounties to relators who filed suit under the state law and the administrative cost of reviewing FCA litigation brought by private plaintiffs' lawyers.¹⁵

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

NOTE

In January 2018, the U.S. Department of Justice (DOJ) issued a memorandum in response to "record increases" in federal qui tam lawsuits. The memorandum reminds attorneys in DOJ's Civil Fraud Section that when they decline to intervene in a qui tam case, they may also dismiss the action where the lawsuit is meritless, frivolous, parasitic, or opportunistic, or where the suit interferes in agency policies

and programs, conflicts with DOJ's litigation prerogatives, or would waste government resources.¹⁶ DOJ has applied this guidance to dismiss over a dozen qui

tam cases,¹⁷ including "cloned" complaints filed by shell companies created to bring these suits.¹⁸

Options

States that have enacted False Claims Acts, or are contemplating doing so, should consider the following reforms:¹⁹

1. Provide liability protections to companies with certified compliance programs:
 - A defendant would be liable for treble damages only if it acted with specific intent to defraud; double damages if it acted with knowledge, reckless disregard, or deliberate ignorance; and 1.5 times damages if it made a qualifying self-disclosure to the government of the conduct.
 - With limited exceptions, bar qui tam actions against a company that previously disclosed substantially the same allegations to an appropriate government Inspector General or other 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, which would preserve for the government more of the recoupment of taxpayer money.
 - 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.

- Prohibit actions based on the judicially-created concept of “implied false certification,” which typically alleges liability based on a company’s minor or insubstantial noncompliance with a statute, regulation, or contract.
 - Alternatively, require a plaintiff to show compliance with the specific provision at issue that was material to the government’s decision to pay the claims, consistent with the U.S. Supreme Court’s interpretation of the federal FCA.²⁰
 - 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 as “out-of-pocket monetary losses, less the value of benefits received by the government, and does not include indirect or consequential damages.”
 - Change the current irrational penalty structure of the FCA, so that statutory penalties are assessed only where no damages are awarded and are capped at an amount equal to the sum sought in the claim in addition to all costs to the government attributable to reviewing the claim.
 - Require a state attorney general who receives a qui tam complaint, or initiates a false claims investigation, to notify all relevant government employees of their obligation to preserve relevant documents. If the attorney general’s office fails to provide this notification, the court would “draw or instruct the jury to draw a negative inference from any failure of the government to produce documents requested in the course of litigation based on their loss or destruction.”
 - Codify the unconditional authority of a state attorney general to dismiss meritless qui tam actions brought in the name of the state, similar to recent reforms at DOJ.
3. Repeal unnecessary and duplicative false claims laws.

RECENT ENACTMENTS

- *Washington S.B. 6156 (2016) (codified at Wash. Rev. Code § 43.131.419):* Reauthorizes the Medicaid False Claims Act but repeals qui tam provisions in 2023 unless revisited.
- *Wisconsin S.B. 21, § 945n (2015):* Repeals Wisconsin’s False Claim for Medical Assistance Act, Wis. Stat. § 20.931, which was enacted in 2007. In a memorandum submitted to a Wisconsin legislator, the Wisconsin Department of Justice concluded that repeal of the law “will not reduce dollars recovered but rather, could serve to increase dollars recovered for the [Medical Assistance] program” because

when the state pursues recovery through other laws, the state does not have to share its recovery with qui tam plaintiffs and pay their attorneys' fees.

- *Nevada A.B. 48 (2015) (amending Nev. Rev. Stat. § 357.210)*: Reduces from 33% to 25% the maximum share of any recovery that a private plaintiff is entitled to in a qui tam action brought under the state's Medicaid false claims law

when the attorney general intervenes in the action at the outset, and from 50% to 33% the maximum share of any recovery to which a private plaintiff is entitled when the attorney general does not intervene.

Safeguard the Integrity of the Litigation Process

Individuals and businesses that find themselves named as defendants in civil litigation are often confident that they will prevail against meritless lawsuits if the case is decided through a fair and impartial process. 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.

To gain an advantage, some plaintiffs' lawyers recruit clients across the United States and then file their claims in a state with procedures that favor plaintiffs. They know that defendants are placed at a distinct disadvantage in some jurisdictions. The U.S. Supreme Court recently curbed this practice when it found that a plaintiff cannot sue a business outside its home state unless the lawsuit involves conduct or harm that occurred in the forum state.²¹ The Supreme Court's constitutional limitations on what is known as personal jurisdiction, however, do not address the particular court in which plaintiffs' lawyers can file a claim within a state. That is a matter of state venue laws. Loose state venue laws may allow plaintiffs' lawyers to pick and choose the court where they believe they will receive the most favorable judge or jury, even if that area has no connection to the lawsuit.

Other laws fail to provide parties with a representative jury—one whose diversity reduces the chance of an outlier decision or runaway award. Statutes and rules against

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

frivolous lawsuits are notoriously lax, leaving those hit with such suits to pay the cost even when a court dismisses the claim.

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

Plaintiffs’ lawyers exploit procedural loopholes. In asbestos litigation, for instance, they file claims against solvent companies that have only a remote connection to the claim. 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 been driven into bankruptcy by lawsuits. After a settlement or judgment, the lawyers file claims with trusts established by the bankrupt companies and recover more. Since the trust claims are hidden during the litigation, juries are misled and solvent companies settle for inflated amounts.

After an extraordinary verdict, a defendant may be unable to appeal due to rules that require the defendant to post a bond in an amount as much as, or more than, the

amount of the judgment in order to prevent collection attempts during its appeal. And, during what may be a long litigation process, interest on the judgment continues to accumulate at a rate that, in some states, is 10 times inflation. These types of laws place undue pressure on defendants to settle rather than exercise their right to appeal.

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

Personal injury lawyers specializing in mass tort litigation and the “lead generation” companies that find clients for them place the broader public at risk. Fearmongering lawsuit ads mislead viewers to believe that U.S. Food and Drug Administration (FDA)-approved medications will harm them—some ads even imply they are public service announcements authorized by the FDA—leading some people to discontinue their prescriptions or forego treatment entirely. These ads can also be misused to taint the jury pool and deny a defendant a fair trial.

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

Reduce Forum Shopping

Purpose

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

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

system and taxpayers of these jurisdictions. The proper place to file a lawsuit 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 elsewhere.

NOTE

Recent U.S. Supreme Court decisions have clamped down on the ability of plaintiffs’ lawyers to drag businesses into courts in states that have no connection to the litigation.²² There remains a need for state venue reform, however, to establish rules consistent with constitutional safeguards and to address forum shopping within a state.

Options

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

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

4. Tighten venue rules by providing that owning property and transacting business in a county is insufficient in and of itself to establish the principal place of business for a corporation.
 5. Specify factors pursuant to which a court may dismiss or transfer a case when the lawsuit is more closely related, and is more appropriately decided, in another jurisdiction. Such factors may include where the injury occurred, where the parties are located, the location and availability of witnesses, the ease of access to evidence, the possibility of harassment to the defendant in an inconvenient forum, the enforceability of a judgment, whether the litigant is attempting to circumvent the time limit for bringing a claim in another state, which state's law would govern the case, and the burden on the court and jury of deciding a matter that is not of local concern.
 6. Reject constitutionally problematic legislation that attempts to establish personal jurisdiction over a corporation solely on the basis of the company registering to do business in the state.
- venue, the claim must be transferred to a county where proper venue can be established. If venue cannot be properly established in Missouri, the claim must be dismissed without prejudice.
- *West Virginia H.B. 4013 (2018) (codified at W. Va. Code Ann. § 56-1-1(c))*: Provides that a nonresident of the state may not bring an action unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in West Virginia. Where more than one plaintiff is joined, each plaintiff must independently establish proper venue.
 - *Texas H.B. 1692 (2015) (amending Tex. Civ. Prac. & Rem. Code Ann. § 71.051)*: Curbs the practice of foreign plaintiffs filing personal injury and wrongful death cases in Texas courts. It amends a provision in the state's forum non conveniens law that prohibited courts from dismissing claims filed by nonresident plaintiffs when one plaintiff in the action is a legal resident of Texas. It provides that the legal residency exception to forum non conveniens applies only to plaintiffs who are legal residents of Texas or derivative claimants of legal residents of Texas. It also requires courts to apply a forum non conveniens analysis individually with respect to each plaintiff.

RECENT ENACTMENTS

- *Missouri S.B. 7 (2019) (amending Mo. Rev. Stat. § 507.040)*: Prohibits joining the claims of multiple plaintiffs into a single action on the basis that the claims involve separate purchases of the same product or service or separate incidents involving the same product or service. The law establishes the appropriate venue for certain types of claims. It provides that if the county where the plaintiff's claim is filed is not a proper

Ensure That Juries Represent the Entire Community

Purpose

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

Two states, Arizona and Oklahoma, 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. During the first year in operation in Arizona, the fund provided approximately \$130,000 in additional

compensation to 172 jurors on 40 lengthy trials, allowing these jurors to serve without enduring severe financial hardship.²³ Filing fees collected by Arizona courts have fully financed supplemental payments to jurors and the administrative expenses of managing the fund, and the fund actually retained a surplus for future years.

This system, which has been in place for over a decade, is a model for other states. As *The Denver Post* observed, “Higher pay for jurors on long trials would create a broader and more diverse jury pool, and would also be fairer to all.”²⁴ *The Chicago Tribune* similarly concluded that the Lengthy Trial Fund “would encourage a more diverse cross-section of the public to serve on juries. Most important, in an era of great cynicism about the political process, this would lend overdue support to one of the few public institutions where citizens make big decisions every day.”²⁵

By including a diverse range of experiences, this program may reduce the potential for a “runaway” jury.

Options

1. Consider updating state jury service laws to include the following best practices:
 - provide a procedure to automatically reschedule jury service;
 - limit the term of petit jury service to no more than one day, or, if selected to serve on a jury, the length of one trial;
 - strengthen the standard for obtaining a hardship excuse;
 - eliminate all exemptions based on profession or occupation;
 - prohibit requiring use of leave or vacation time for jury service;
 - protect small businesses that may suffer from a temporary loss of more than one employee on jury service; and
 - increase civil fines for failure to respond to a juror summons (e.g., \$500).
2. In coordination with the state's judiciary, consider adopting legislation to authorize, study, or fund jury service innovations recommended by the National Center for State Courts and American Bar Association.²⁶ Guides published by these organizations support several of the reforms above and recommend additional practices, such as allowing juror note taking.
3. Adopt a lengthy trial fund providing supplemental compensation to jurors selected to serve on trials of more than five or 10 days who do not receive their full regular compensation during jury service from their employers or who are self-employed. This fee may be financed by a nominal fee on filing of civil complaints without the use of taxpayer dollars.
 - *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. 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 as a means to cut costs or increase juror pay—to reduce civil juries to six members.

RECENT ENACTMENTS

- *Arizona H.B. 2246 (2017) (codified at Ariz. Rev. Stat. § 21-222)*: Extends the sunset provision of the Arizona Lengthy Trial Fund from June 30, 2019 to June 30, 2027.
- *Michigan H.B. 4209/4210 (2017) (amending Mich. Comp. Laws § 1344)*: Increases juror compensation effective April 1, 2018, to \$30 for the first day of jury service and \$45 for each subsequent day of service. It also authorizes the state court administrator to allocate money from the Juror Compensation Reimbursement Fund for jury management software designed to ease the process and time commitment of jury service.

Stop Frivolous Lawsuits

Purpose

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

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

NOTE: “LOSER PAYS”

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

individual or business “wins” a lawsuit, the cost of defending against a meritless claim can easily rise into the tens or hundreds of thousands of dollars. These expenses, which typically are 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, about whether the pure form of a loser-pays law, known as the “English Rule,” achieves this result in practice. Some have expressed concern that a loser-pays system will be unevenly applied against defendants—adding attorneys’ fees on top of what may already be excessive liability.

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

a losing plaintiff, in many cases, such individuals are “judgment proof” and a defendant that pursues fees would spend more money chasing after unattainable reimbursement.

The most recent actions on loser pays occurred in Idaho and Oklahoma. In December 2016, the Idaho Supreme Court, in a split decision, found that “prevailing parties in civil litigation have the right to be made whole for attorney fees they have incurred ‘when justice so requires.’”²⁷ The ruling applied prospectively, taking effect on March 1, 2017. One day earlier, the Idaho Legislature passed H.B. 97, which allows a judge to award a prevailing party reasonable attorneys’ fees only “when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation.”²⁸ This law preserved the status quo.

In Oklahoma, a 2017 amendment to legislation extending a statute of limitations inadvertently adopted a loser-pays system for all civil claims.²⁹ Soon after that change was signed into law, the legislature repealed the provision with the support of

all sides, including the business community.³⁰

NOTE: CONSTITUTIONALITY OF LEGISLATIVE ACTION

Plaintiffs’ lawyers may challenge laws that compensate victims of lawsuit abuse, arguing that only the judiciary may regulate the practice of law or court procedure. One such attempt failed in 2017, when the Pennsylvania Supreme Court upheld a longstanding state law that authorized individuals to bring a statutory cause of action for “wrongful use of civil proceedings.” The law, known as the Dragonetti Act,³¹ provides that an attorney who brings a lawsuit can be held liable to a prevailing opposing party if he or she, in prosecuting the underlying action, acts in a grossly negligent manner or without probable cause and primarily for an improper purpose. The state high court ruled that the Dragonetti Act was not designed to regulate the conduct of attorneys; rather, its “[p]urpose [is] to compensate victims of frivolous and abusive litigation and, therefore, [it] has a strong substantive, remedial thrust.”³²

Options

1. Strengthen the state’s existing statute or rule against frivolous claims. A frivolous lawsuit is one that: (1) is presented for an improper purpose; (2) is not supported by existing law or a legitimate argument for extending, modifying, or reversing existing law or for establishing new law; or (3) is not supported by the facts and is unlikely to have evidentiary support after a reasonable opportunity for further investigation or discovery. By way of contrast, a meritless lawsuit is one where a legitimate claim is filed, but the plaintiff cannot, or does not, meet his or her burden of proof.
- Eliminate the 21-day “safe harbor” (available in federal courts and about one-third of state courts), which

allows plaintiffs' lawyers to withdraw frivolous claims without penalty even after imposing significant costs on a defendant.

- Require courts to impose sanctions when a judge finds that a claim or defense is frivolous.
 - Authorize courts to reimburse a victim of lawsuit abuse for reasonable attorneys' fees and costs incurred as a direct result of the frivolous claim.
 - Place the cost of frivolous legal claims or defenses on the attorney responsible.
2. Require a plaintiff whose case is dismissed at an early stage for failure to state a claim to pay the defendant's attorneys' fees and costs. This option would require a court, upon dismissing a claim, to evaluate whether the claim not only lacked merit but was frivolous. If the court finds a claim lacked any basis in law or fact, then the court would require the plaintiff to pay the defendant's attorneys' fees and costs incurred as a direct result of the frivolous claim.
 3. Adopt a vexatious litigant law. This law would require pro se plaintiffs (individuals who file lawsuits without an attorney) who repeatedly file and lose lawsuits to obtain permission from the court and post security before filing additional litigation. Such laws have been enacted in states such as Arizona, California, Connecticut, Florida, Hawaii, Nevada (court rule), New Hampshire, Ohio, and Texas.

RECENT ENACTMENTS

- *California A.B. 1521 (2015) (amending and adding provisions of the Civil Code and Government Code)*: Requires a "high-frequency litigant" (a plaintiff who has filed 10 or more complaints in the preceding year) to disclose the number of previous lawsuits filed, the reason the plaintiff was in the geographic location of the alleged violation, and why he or she visited the site before filing a lawsuit alleging an accessibility violation. It also requires a high-frequency litigant to pay a \$1,000 filing fee in addition to the initial filing fee, among other provisions.
 - *Arizona S.B. 1048 (2015) (amending Ariz. Rev. Stat. §§ 12-302, 12-3201)*: Prohibits courts from waiving court fees and costs in civil actions filed by a pro se vexatious litigant.
4. Provide an opportunity to cure technical compliance issues. Some plaintiffs' law firms and professional plaintiffs troll for minor technical violations of federal or state regulations, then immediately bring "gotcha" lawsuits against a business to collect monetary damages or penalties. Small businesses, which may be unaware of the numerous regulatory requirements, are often targets. States have enacted laws, in a variety of contexts, that allow a business to address a noncompliance with a regulation before a plaintiffs' lawyer resorts to filing a lawsuit seeking damages or penalties.

RECENT ENACTMENTS

- *Texas H.B. 1774 (2017) (amending Tex. Ins. Code § 541.156 and adding § 542A.001 et seq.)*: Addresses a surge of abusive lawsuits alleging damage from hailstorms and other severe nature-related events by requiring claimants to provide notice to an insurer of a claim and a 60-day period for an insurer to address any outstanding issues before the claimant files a lawsuit.
- *Florida H.B. 727 (2017) (codified at Fla. Stat. Ann. § 553.5141)*: Enables businesses and property owners to attempt to avoid frivolous Americans with Disabilities Act (ADA) accessibility lawsuits by retaining a qualified expert to inspect their property and obtain a certificate of conformity confirming compliance. Owners of properties not in compliance may develop a remediation plan. Certificates and remediation plans may be filed with the state's Department of Business and Professional Regulation. A court must consider any remediation plan or certification of conformity filed before the plaintiff's complaint when the court considers whether the plaintiff filed the complaint in good faith and is entitled to attorney fees and costs.
- *Arizona S.B. 1406 (2017) (codified at Ariz. Rev. Stat. Ann. § 41-1492.08(E))*: Provides that before filing a lawsuit alleging that a public accommodation operated by a private entity has a building, facility, or parking lot that fails to comply with certain technical aspects of ADA accessibility requirements, the aggrieved person must provide written notice with sufficient detail to allow the business to cure the violation or comply with the law. A business has 30 days to cure the alleged violation before the plaintiff may file a lawsuit. If the business is required to obtain a building permit or other government approval before making the change, it must provide a corrective action plan to the aggrieved party within 30 days of receiving the notice, and then has another 60 days to comply, which does not include the time during which the business awaits government approval. A court may stay an action if it determines that a plaintiff is a vexatious litigant.
- *Minnesota H.B. 1542 (2017) (amending Minn. Stat. § 363A.331)*: Requires attorneys to provide a business with notice of an alleged architectural barrier that violates accessibility requirements and generally provides the business with 60 days to address the issue before the attorney may file a lawsuit.
- *Texas H.B. 1463 (2017) (codified at Tex. Hum. Res. Code § 121.0041)*: Requires a person intending to file an action alleging that an entity failed to comply with a disability access standard to provide that entity with 60 days' written notice of the alleged violation and an opportunity to correct the issue before filing a lawsuit.

- *West Virginia S.B. 563 (2017) (codified at W. Va. Code Ann. § 46A-5-108)*: Amends the West Virginia Consumer Credit and Protection Act requiring that a consumer give 45 days' notice to a creditor or debt collector before filing a lawsuit, providing the creditor or debt collector an opportunity to make an offer to cure the alleged violation. If the consumer accepts any offer that is made, the business must address the issue within 20 days and litigation is avoided. If no offer is made, the consumer may file the claim. If an offer is made during that 45-day period but is rejected by the consumer, that consumer must be awarded more than that offer at trial in order to recover attorneys' fees.
- *California S.B. 269 (2016) (amending Cal. Civ. Code § 55.56)*: Upon service of a complaint, provides a small business with 15 days to address certain technical violations of accessibility requirements. Upon obtaining compliance within this period, the law provides a presumption that the business is not liable for statutory damages (California law authorizes a \$4,000 penalty per violation). The law also exempts a defendant from full statutory damages if the structure is inspected by a certified access specialist and the business corrects, within 120 days, the violations that are the basis of the lawsuit.

Provide Proportionality in Discovery

Purpose

The standard of “broad and liberal discovery,” which has applied for decades, has become an “invitation to abuse.”³³ The costs associated with civil discovery have grown exponentially, frustrating the goal of obtaining just, speedy, and inexpensive determination of every action and imposing significant burdens on both litigants and the judiciary. It is estimated that discovery costs comprise between 50% and 90% of the total litigation costs in a given case.³⁴ The rapid growth of electronic discovery has forced parties to pay hundreds of thousands (if not millions) of dollars to respond to vexatious requests for documents that are often nothing more than open-ended fishing expeditions in search of a quick settlement.

In response to concerns regarding the growing cost of discovery, the federal judiciary amended its rules effective December 1, 2015. It replaced a provision allowing a party to demand production of

documents, responses to interrogatories, and deposition testimony that is “reasonably calculated to lead to the discovery of admissible evidence” with the concept of proportionality.

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

NOTE

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

Options

1. Include proportionality requirement. Amend the state’s rules of civil procedure consistent with the new standard applied in federal courts to provide that parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the

needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery

outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

2. Provide sanctions for loss of ESI (spoliation of evidence). Provide that if a party loses ESI that it should have preserved in the anticipation or conduct of litigation because that party failed to take reasonable steps to preserve it, and the ESI cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.
- *Wisconsin A.B. 773 (2018) (codified at Wis. Stat. § 804.01)*: Adopts a proportionality requirement, authorizes courts to limit the frequency or extent of discovery, provides rules for discovery of electronically stored information, and limits the number and length of depositions.
 - *Oklahoma H.B. 1570 (2017) (amending 12 Okla. Stat. § 3226)*: Provides that discovery requests must be "reasonably calculated to lead to the discovery of admissible evidence and proportional to the needs of the case."
 - *Wyoming R. Civ. Pro. 26(b), 37(e) (effective Jan. 1, 2017)*: Adopts a proportionality requirement and spoliation sanctions for ESI similar to the federal rule.

RECENT STATE ACTION

- *Missouri S.B. 224 (2019) (amending Mo. Sup. Ct. rules 25.03, 56.01, 57.01, 57.03, 58.01, 59.01, and 61.01)*: Makes Missouri's discovery rules more consistent with the Federal Rules of Civil Procedure by requiring proportionality to the needs of the case, limiting discovery of electronically stored information that is "not reasonably accessible because of undue burden or cost," limiting interrogatories and depositions, and limiting requests for admissions.

Ensure Class Actions Benefit the Public, Not Just Lawyers

Purpose

Class action abuse is a longstanding issue at both the federal and state levels. Courts that improperly certify class actions place tremendous pressure on defendants to settle, the alternative for whom is to spend a significant sum defending the lawsuit and “bet the company” should the case go to trial. A survey conducted by Carlton Fields, a legal consulting service, found that businesses spent \$2.46 billion on class action lawsuits in 2018 alone.³⁵

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

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

administering the claims process. Few class members actually seek compensation, often less than 1% of the class.³⁶ The low claims rate suggests that many people do not view class actions as compensating them for real losses. Class action lawyers bolster their recovery by seeking fees based on a percentage of the total settlement fund (including amounts consumers will never collect) and placing an inflated value on injunctive relief, such as the addition of fine-print disclosures to product labels.

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

Options

1. Require class members to have “suffered the same type and scope of injury” as the named class representative in order to obtain class certification.
2. Prohibit class certification when there is no reliable and feasible way of identifying and distributing money to class members.

3. Require plaintiffs to establish that the class action states a plausible claim before permitting highly expensive and burdensome discovery to move forward.
4. Require class counsel to disclose the circumstances under which each class representative agreed to be included in the complaint. Prohibit class certification when a proposed class representative is a relative, or is a present or former employee, of class counsel.
5. Establish a rule in all class actions that discovery may not proceed until threshold motions challenging the validity of the claims are resolved.
6. Provide a right to interlocutory (immediate) appeal of a trial court's grant or denial of class certification. Several states provide a right to appeal class certification orders through statute or court rule:
 - These states include Alabama, Arizona, Arkansas, Connecticut, Florida, Georgia, Iowa, Kentucky, Louisiana, Montana, North Dakota, Ohio, Oklahoma, Tennessee, Texas, and Wisconsin.
7. Preclude attorneys' fees that dwarf the benefits provided to class members. Options include:
 - Basing attorney fee awards on a reasonable percentage of the money actually received by class members.
 - Determining attorneys' fees through a "declining percentage principle," whereby the percentage of recovery allocated to attorneys' fees decreases as the size of the recovery increases.
 - Prohibiting attorney fee awards that exceed the amount of money distributed to the class members.
8. Instruct courts to provide greater scrutiny to proposed noncash relief, such as settlements involving distribution of coupons, vouchers, or products, or requiring minor labeling changes.
9. Require plaintiffs' lawyers to submit to the court or judicial system an accounting of how class action settlement money is actually distributed in each case.

RECENT ENACTMENTS

- *Wisconsin A.B. 773 (2018) (codified at Wis. Stat. § 803.08)*: Requires an order certifying a class to state the reasons why the action may be maintained and describe all evidence in support of the determination. The law provides for interlocutory appeal of orders granting or denying class certification if a party files a notice of appeal within 14 days of order. It also requires a stay of discovery and all other proceedings during the appeal.

Prevent Suppression of Evidence of Plaintiff Exposures in Asbestos Cases

Purpose

Asbestos litigation is the longest-running mass tort in U.S. history. Asbestos-related liabilities have pushed approximately 120 employers into Chapter 11 bankruptcy.³⁷ Scores of trusts have been created to pay claims related to those companies' asbestos products. Asbestos trusts hold an estimated \$30 billion to \$37 billion in assets.³⁸

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

U.S. Bankruptcy Judge George Hodges documented these problems in an opinion estimating the liability of Charlotte-based gasket and packing manufacturer Garlock Sealing Technologies, LLC, for mesothelioma claims. Judge Hodges concluded that Garlock's settlements in the tort system were "infected by the manipulation of exposure evidence by plaintiffs and their lawyers."³⁹ 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 ..."⁴⁰ Evidence Garlock needed to attribute plaintiffs' injuries to insulation products often "disappeared" once those companies filed for bankruptcy. The judge said, "This occurrence was a result of the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants)."⁴¹

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

As asbestos litigation continues to push otherwise viable corporations into bankruptcy, employers left to defend asbestos lawsuits in the tort system have struggled to convince some judges to account for bankruptcy trust claims. Existing statutes and judicial precedents do not account for the unique phenomenon of tens of billions of dollars flowing to tort

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

Options

1. Require plaintiffs within a certain number of days of filing an asbestos action or a certain number of days before trial to file a sworn statement indicating an investigation of all asbestos trust claims has been conducted and all asbestos trust claims that could be made by the plaintiff have been filed.
2. Require plaintiffs to provide the parties with all asbestos bankruptcy trust claim materials.
3. Give defendants an opportunity to move the court to stay the litigation and require plaintiffs to file additional trust claims not identified by the plaintiff if the defendant can show that the plaintiff satisfies the eligibility criteria.
4. Establish that asbestos trusts claims materials are presumed relevant and are admissible in court to prove alternative causation for a plaintiff's injuries or to allocate liability for the plaintiff's injury.
5. Provide a setoff in civil litigation for

money that has or will be received by the plaintiff from asbestos bankruptcy trusts.

6. Authorize courts to impose sanctions when a plaintiff fails to comply with the law, including dismissing the claim or vacating a judgment rendered in the action.

RECENT ENACTMENTS

Sixteen states have enacted asbestos trust claim transparency laws. States that have acted in the past five years include:

- *Alabama S.B. 45 (2019) (to be codified at Ala. Code § 6-5-690 et seq.)*
- *Kansas H.B. 2457 (2018) (codified at Kan. Stat. Ann § 60-4912 et seq.)*
- *Michigan H.B. 5456 (2018) (codified at Mich. Comp. Laws § 600.3010 et seq.)*
- *North Carolina S.B. 470 (2018) (codified at N.C. Gen. Stat. 1A-1, R. 26(b)(2a))*
- *Mississippi H.B. 1426 (2017) (codified at Miss. Code Ann. §§ 11-67-1 et seq.)*

- *North Dakota H.B. 1197 (2017) (codified at N.D. Cent. Code 32-46.1-01 et seq.)*
- *Iowa S.F. 376 (2017) (codified at Iowa Code Ann. §§ 686A.1 et seq.)*
- *South Dakota S.B. 138 (2017) (codified at S.D. Cod. Laws §§ 21-66-1 et seq.)*
- *Tennessee S.B. 2062 (2016) (codified at 29 Tenn. Code Ann. §§ 29-34-601 et seq.)*
- *Utah H.B. 403 (2016) (codified at Utah Code Ann. §§ 78B-6-2001 et seq.)*
- *Arizona H.B. 2603 (2015) (codified at Ariz. Rev. Stat. § 12-782)*
- *Texas H.B. 1492 (2015) (codified at Tex. Civ. Prac. & Rem. Code §§ 90.051 et seq.)*
- *West Virginia S.B. 411 (2015) (codified at W. Va. Code §§ 55-7E-1 et seq.)*
- *Wisconsin A.B. 19 (2014) (codified at Wis. Stat. § 802.025)*

Support Sound Science and Expert Evidence in the Courtroom

Purpose

Prior to 1993, federal courts permitted parties to present expert testimony involving novel scientific or technical theories if the underlying theory or basis of opinion was generally accepted within the expert's particular field. The general acceptance test, known as the *Frye* standard, was applied liberally to favor admissibility of expert testimony. The U.S. Supreme Court adopted a more rigorous approach to evaluating the reliability of proposed expert testimony in its landmark decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁴² Its ruling emphasized the obligation of the trial court judges to serve as "gatekeepers," guarding the courthouse against untrustworthy expert testimony.

When courts evaluate expert testimony under this approach, they consider such factors as whether the method has been empirically tested, whether the method has been subject to peer review and publication, the potential rate of error associated with the technique, and whether the method is generally accepted in the relevant scientific community. Courts applying this approach have also considered whether the expert developed the theory for purposes of testifying in litigation,

jumped to an unfounded conclusion, or did not account for obvious alternative explanations.⁴³

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

NOTES

Organizations and scholars differ on how many states still maintain the *Frye* standard and how many have transitioned to the *Daubert* standard because some jurisdictions apply different standards depending on the type of evidence at issue:

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

About one-third of states use a hybrid standard of *Daubert* or apply their own standard, such as Colorado, Hawaii, Idaho, Iowa, Maine, Minnesota, Nevada, Rhode Island, South Carolina, Tennessee, Utah, Vermont, and Virginia. In some of these states, courts may consider the *Daubert* factors but do not necessarily follow them.

In 2019, the Florida Supreme Court adopted *Daubert* under its rulemaking authority.⁴⁴ This followed the Florida Legislature's adoption of *Daubert* through legislation in 2013, which the Florida Supreme Court invalidated in 2018, finding the legislation intruded into the judiciary's authority to make rules of procedure.⁴⁵

The New Jersey Supreme Court adopted the *Daubert* standard in 2018, finding that, "[p]roperly exercised, the gatekeeping function prevents the jury's exposure to unsound science through the compelling voice of an expert."⁴⁶

The District of Columbia's highest court adopted *Daubert* in 2016, finding that "[t]he ability to focus on the reliability of principles and methods, and their application, is a decided advantage that will lead to better decision-making by juries and trial judges alike."⁴⁷

Options

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

3. Require courts to hold a pretrial hearing on an expert's proposed testimony upon motion of a party.
4. Mandate pretrial disclosure of expert testimony.

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

- *Missouri H.B. 153 (2017) (repealing and replacing Mo. Rev. Stat. § 490.065)*
- *Kansas S.B. 311 (2014) (amending Kan. Stat. Ann. § 60-456)*
- *Louisiana H.B. 624 (2014) (amending La. Code of Evidence Art. 702)*

Safeguard the Right to Appeal

Purpose

A critical element of the civil justice system is the right of a party to appeal an adverse verdict. In some states, however, the structure of the judicial system, statutes, or court rules hinders the ability of a party to exercise this right.

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), 11, 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. Intermediate appellate courts also promote consistency and predictability in the civil justice system by providing more case law that establishes binding precedent.

West Virginia lacks both an intermediate appellate court and full appellate review as a matter of right in the state's high court. In 2009, an independent commission recommended that West Virginia establish an intermediate appellate court.⁴⁸ Instead, the West Virginia Supreme Court of Appeals marginally expanded its own appellate review of cases in 2011. Since that time, legislation to establish an intermediate appellate court that provides all litigants with full appellate review has been introduced repeatedly but fallen short of enactment.⁴⁹

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

“A critical element of the civil justice system is the right of a party to appeal an adverse verdict.”

hearing cases in January 2015. As a result, “parties waiting for their appeals to be heard now have their cases resolved more quickly” and the Nevada Supreme Court is able “to spend more time on the cases that merit published opinions.”⁵⁰ “In sum,” the Nevada Judiciary concluded, “the Court of Appeals has improved access to justice.”⁵¹

APPEAL BONDS

In order to stay the execution of a judgment and protect their assets during an appeal, defendants must post appeal bonds, which can run up to 150% of the judgment in some states. If a defendant cannot afford the required bond, then it may have no way to protect against the plaintiff seizing its assets during the appeal besides filing for bankruptcy. Most states adopted bonding requirements before the creation of novel and expansive theories of liability, at a time when judgments were generally more reasonable in scale. Appeal bond rules

stand as unfair roadblocks to appeals of such crushing verdicts and place inordinate pressure to settle even cases that are likely to be reversed on appeal. Such requirements can pose a particularly significant challenge for small businesses that are hit with excessive verdicts.

More than two-thirds of states currently have appeal bond limits of some sort. Five states do not require a defendant to post an appeal bond. On the other hand, Alaska, Delaware, Illinois, Montana, New York, and the District of Columbia require appeal bonds and place no limit on their size. Several states have limited the size of appeal bonds but applied the reform only to signatories to the “Master Settlement Agreement” (tobacco companies). In a few states, an appeal bond limit applies only to the punitive damages portion of the judgment, if any.

Options

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

RECENT ENACTMENTS

- *Nevada Ballot Question 1 (2014)*: Amended Article 6 of the Nevada Constitution to create an intermediate appellate court, the Nevada Court of Appeals. All appeals will be filed with the

Nevada Supreme Court, which may then assign certain cases to the intermediate appellate court.

2. Appeal bonds:
 - Apply appeal bonds 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 damage portion of the award, if any).

RECENT ENACTMENTS

- *Kansas S.B. 199 (2018) (amending Kan. Stat. Ann. § 60-2103(d))*: Limits appeal bonds to \$25 million generally and to \$2.5 million for small businesses.
- *Mississippi H.B. 1529 (2016) (codified at Miss. Code Ann. § 11-51-31)*: Limits appeal bonds to 50% of the appellant's net worth, not to exceed \$35 million.
- *Nevada S.B. 134 (2015) (codified at Nev. Rev. Stat. § 20.037)*: Limits appeal bonds to the lesser of \$50 million for all appellants or the amount of the judgment. The law limits appeal bonds
- *Maryland H.B. 164 (2015) (codified at Md. Cts. & Jud. Proc. Code § 12-301.1)*: Limits appeal bonds to the lesser of \$100 million for each appellant or the amount of the judgment. It also provides courts with discretion to set a lower bond for good cause shown.

for a small business to the lesser of \$1 million or the amount of the judgment. It also provides courts with discretion to set a lower bond for good cause shown.

Promote Fairness in Judgment Interest Accrual

Purpose

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

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

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

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

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

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

NOTE

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

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

Options

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

RECENT ENACTMENTS

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

- *Utah S.B. 69 (2014) (amending Utah Code § 78B-5-824)*: Sets the prejudgment interest rate for special damages actually incurred as two percentage points above the prime rate, as published by the Federal Reserve, but not lower than 5% or higher than

10%. The law also requires a plaintiff to tender an offer of settlement that does not exceed $1\frac{1}{3}$ the amount of a judgment awarded at trial to qualify for prejudgment interest. Any prejudgment interest shall be computed as simple interest.

Curb Predatory and Unsound Lawsuit Lending Practices

Purpose

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

These arrangements come in two forms. The first form is consumer lawsuit lending, which *The Wall Street Journal* has called "the legal equivalent of the payday loan."⁵² In these cases, lawsuit lenders offer immediate cash to plaintiffs in personal injury lawsuits. The loans often come with sky-high interest rates that can exceed 200%, leaving borrowers with little to no recovery. Plaintiffs who lose their cases or do not receive a settlement are not obligated to repay the loan. This distinction allows lawsuit lenders to call the process "non-recourse funding" and claim it is not subject to safeguards applicable to other lenders.

The second form of financing, referred to as third-party litigation funding, involves businesses or individuals that invest in big-ticket litigation. These investors front

money to plaintiffs' law firms in exchange for an agreed-upon cut of any settlement or money judgment.

Both types of lawsuit financing may prolong litigation and artificially inflate settlements. Injecting a financier into a case incentivizes plaintiffs to reject reasonable settlement offers because of the plaintiffs' obligation to share the recovery with the lender. Similarly, a financier may pressure a borrower to reject a settlement offer that does not reimburse the lender's full investment.

In addition, third-party litigation funding enables lawsuits of questionable merit because lenders that spread their risk of loss may be more willing to take a risk than the plaintiffs' law firm acting alone. Interjecting a third-party lender also weakens the traditional attorney-client relationship and raises serious questions about the lender's place in that relationship. Litigation funded by a third party raises questions over who is controlling the

“Litigation funded by a third party raises questions over who is controlling the litigation.”

litigation. “The minute you have an involvement of someone else,” observed a federal judge overseeing data breach cases, “you have the benefit of funding, but with that funding, there is a question about is there to be control or not.”⁵³ These arrangements also raise troubling ethical concerns because, in contrast to lawyers, lenders have no established or enforceable duty to represent their clients zealously or guard their confidences.

State legislatures should consider bills that would prohibit lawsuit lending, reject proposals to authorize or expand such practices, and, at minimum, subject lawsuit lenders to existing state consumer lending laws or similar requirements. State legislatures should also require a party to disclose to the court and other parties when a third party is funding litigation, similar to the requirement that parties disclose liability insurance contracts that may satisfy or reimburse all or part of a judgment.⁵⁴

NOTES

In 2017, the U.S. District Court for the Northern District of California amended its standing order to require parties to automatically disclose third-party funding agreements in any proposed class, collective, or representative action.⁵⁵

The federal court overseeing opioid litigation has ordered parties that have obtained or are considering third-party litigation funding to submit a description of the arrangement and other materials to the court.⁵⁶

In 2015, the Colorado State Supreme Court unanimously decided that litigation finance companies that agree to advance money to tort plaintiffs in exchange for future litigation proceeds make loans that are subject to the state’s existing consumer lending law.⁵⁷ By way of contrast, the Georgia Supreme Court ruled in 2018 that “cash advances” provided to plaintiffs in auto accident cases at extraordinarily high interest rates are not “loans” subject to the state’s Payday Lending Act or Industrial Loan Act.⁵⁸

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 lawsuit lending transactions by requiring any party that is receiving financing for the litigation from a third

party to disclose this relationship and provide a copy of the lending agreement to the court and the parties.

4. Prohibit lawsuit lending. Courts in several jurisdictions have invalidated agreements providing for third-party financing of litigation. Legislatures can provide greater clarity in the law by codifying these rulings.

RECENT ENACTMENTS

- *Nevada S.B. 432 (2019) (to be codified at Nev. Rev. Stat. ch. 52):* Regulates “consumer litigation funding transactions,” defined as those in which a company provides up to \$500,000 to a consumer with a pending legal claim. Consumer litigation funding companies must obtain a license issued by the Commissioner of Financial Institutions and file annual reports. Litigation funding contracts must include disclosures regarding fees. Litigation funders are prohibited from engaging in certain practices, such as paying referral fees to lawyers or medical professionals, making decisions about a consumer’s legal claim, or charging fees that exceed 40% annually.
- *West Virginia S.B. 360 (2019) (to be codified at W. Va. Code Ann. § 46A-6N-1 et seq.):* Regulates “litigation financiers,” defined as a person or entity that provides non-recourse financing to a consumer in return for a contingent right to receive an amount of the consumer’s judgment. The law requires litigation financiers to register and post a bond. Litigation financing contracts must include certain safeguards, such as a right to rescission within five days, and various disclosures, including all charges and fees. Litigation financiers may not pay referral fees to lawyers or medical professionals, charge an annual fee of more than 18% of the original amount of money provided to the consumer, or attempt to affect the litigation.
- *Wisconsin A.B. 773 (2018) (codified at Wis. Stat. § 804.01(2)(bg)):* Requires a party to automatically disclose to other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action by settlement, judgment, or otherwise.
- *Indiana H.B. 1127 (2016) (codified at Ind. Code Ann. § 24-4.5-1-201.1):* Requires businesses that provide “civil proceeding advance payment contracts” to be licensed by, and post a \$50,000 bond or irrevocable letter of credit with, the Indiana Department of Financial Institutions. The law limits the annual interest rate consumer lawsuit lenders can charge to 36% and service fees to 7%. It also includes notice and disclosure requirements, a prohibition of attorney referral fees, and other safeguards.
- *Vermont H.B. 84 (2016) (codified at 8 Vt. Stat. Ann. §§ 2251-2260):* Requires businesses that provide consumer litigation funding to be licensed by the Vermont Department of Financial Regulation and post a surety bond or letter of credit that is either twice the amount of the largest fund they have provided in a three-year period or

\$50,000, whichever is greater. The law requires lawsuit lenders to file an annual report that includes the interest rates they charge. It also includes notice and disclosure requirements, a prohibition of attorney referral fees, and other safeguards.

- *Arkansas S.B. 882 (2015) (codified at Ark. Code Ann. § 4-57-109)*: Places the consumer lawsuit lending industry under the state's usury laws, providing for a maximum interest rate. It requires a written contract with prominent disclosure of its annual percentage rate. It also provides that a violation is a deceptive and unconscionable trade practice.
- *Tennessee S.B. 1360 (2014, as amended in 2017) (codified at Tenn. Code Ann. §§ 47-16-101 et seq.)*: Requires litigation financiers to register with the state and post a \$50,000 bond. Litigation financiers may not pay referral fees to, or accept referral fees from, lawyers or medical professionals. Litigation financiers may not offer legal advice to the consumer. Litigation financing contracts must disclose all fees, interest, and charges, among other disclosures, and inform consumers that they have five days to cancel the contract without penalty. Lenders may charge an annual administrative fee of up to 10% of the original amount provided to the consumer and a maximum yearly fee of 36% of the unpaid principal amount. Litigation financing arrangements are limited to three years.

Protect the Rights of Consumers of Legal Services

Purpose

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

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

Options

1. Forbid an attorney and any of his or her representatives from making unsolicited contact with a potential claimant for 45 days after an event resulting in personal injury or death that could give rise to a cause of action by that claimant.
2. Require 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.
3. 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.
4. 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.
5. 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.
6. Require that an attorney disclose any agreement or intent to have an outside

counsel provide any of the legal services, including the scope and anticipated costs associated with engaging outside counsel. If the decision to use outside counsel is made after the legal services agreement is entered, the attorney must receive the client's consent in writing.

7. 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.
8. 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.
9. 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.
10. Provide that failure to meet these disclosure obligations is considered an unfair or deceptive trade practice under state law.
11. 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 who 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 organizations through existing procedures, and civil liability in an action brought by a party alleging injury from failure to comply with legislation.
12. Provide that an attorney who intentionally fails to disclose to a claimant any information required shall additionally be liable for treble or exemplary damages.
13. Offer an exception to these provisions when the client is a "knowledgeable consumer of legal services," including a sole proprietorship or a business that has counsel to review such an agreement or has at least 30 employees.

RECENT ENACTMENTS

- *Arkansas S.J.R. 8 (2017)*: Endorsed a constitutional amendment that would have limited contingency fees to one-third (33⅓%) of the net amount of recovery, whether obtained by settlement, arbitration, or judgment. Because of an Arkansas Supreme Court ruling that found the measure unconstitutionally combined multiple proposals, however, the proposed measure did not appear on the November 2018 ballot.⁵⁹

Prevent Misleading Lawsuit Advertising

Purpose

Traditionally, the legal profession frowned upon lawyer advertising, but the public is now inundated with television commercials and internet ads soliciting them to “call right now” to file a lawsuit.⁶⁰

Annual spending on television ads for legal services is approaching \$1 billion, and ads to recruit clients for lawsuits against manufacturers of prescription drugs and medical devices make up a significant share of legal services advertising. These ads often present themselves as public health alerts and warn that use of a prescribed medication can have dire consequences such as heart attack, stroke, death, or birth defects, without indicating the rarity of such side effects or complications. This creates the impression that the product is

dangerous even though it is approved by the FDA as safe and effective. The solicitation of potential plaintiffs goes beyond advertising, with some firms directly contacting people through robocalls and cold calls, urging them to agree to file a claim.

“Lead generation” firms often use demographic data and marketing tools to identify people most likely to have been exposed to a particular drug or medical treatment.⁶¹ In some cases, it appears that unscrupulous firms have used private health information to directly solicit individuals to file lawsuits. While the Health Insurance Portability and Accountability Act (HIPAA) prohibits healthcare providers from disclosing a patient’s private health information without consent, these protections do not extend to mass tort lead generators, call centers, and lawyers who are not business associates of a healthcare provider.⁶²

Studies indicate that misleading information and exaggerated claims made in lawsuit ads scare people away from taking their prescribed medications and deter others from seeking treatment.⁶³ In one recent survey, one in four respondents said they would stop taking a medication immediately after they viewed an actual lawsuit ad targeting that drug.⁶⁴ According to data recently compiled by FDA researchers, the agency received 66

“ According to data recently compiled by FDA researchers, the agency received 66 reports of patients experiencing adverse events because they stopped their prescribed anticoagulant after viewing a lawsuit advertisement. ”

“A survey conducted by the Association of Professional Responsibility Lawyers revealed that only 17% of responding jurisdictions actively monitor lawyer ads.”

reports of patients experiencing adverse events because they stopped their prescribed anticoagulant after viewing a lawsuit advertisement.⁶⁵ These reports included seven deaths and a range of other adverse events, with the most common being a stroke.⁶⁶ The American Medical Association (AMA) has recognized that “[t]he onslaught of attorney ads has the potential to frighten patients and place fear between them and their doctor” and “jeopardize patient care.” The AMA has recommended that lawsuit ads warn patients to not discontinue medications without seeking the advice of their physician.⁶⁷

Despite these concerns, federal and state authorities have not acted. The FDA closely monitors prescription drug advisements by manufacturers, viewing it as important to ensure that these ads convey the benefits and risks of medications in a balanced fashion. The agency has indicated to Congress, however, that it views drug- and device-focused lawsuit ads as beyond the agency’s reach.⁶⁸

The Federal Trade Commission (FTC) is empowered to regulate misleading advertising, and it professes to have a “longstanding interest in the effect on consumers and competition of the regulation of attorney advertising and

solicitation.”⁶⁹ In practice, however, the FTC has generally taken a hands-off approach to lawyer advertising, deferring to state bars.

State bars are also unlikely to effectively address public health concerns stemming from lawyer advertising. State ethic rules focus on whether attorney ads are likely to mislead potential clients about the terms of a lawyer’s services, not whether the ads present a public health threat.⁷⁰ In addition, state bars and disciplinary authorities rarely enforce rules on advertisements. A survey conducted by the Association of Professional Responsibility Lawyers revealed that only 17% of responding jurisdictions actively monitor lawyer ads.⁷¹ What enforcement does occur typically follows the filing of a bar complaint—usually by a competing attorney or law firm.⁷² Injured patients, their families, and doctors may not realize the influence of the ad or its sponsor, or their ability to complain to a state bar.⁷³

Due to the public health threat created by lawsuit advertising that misleads the public about the risks of medications and medical devices, oversight is needed. The options presented below are consistent with the First Amendment, as they narrowly target specific misleading advertising practices.⁷⁴

Options

1. Specify that common misleading practices in lawsuit advertisements violate a state's existing unfair and deceptive trade practices law. Examples of such practices include:
 - Presenting a lawsuit ad as a "medical alert" or "health alert."
 - Displaying the logo of the FDA or any other government agency in a manner that suggests the affiliation or sponsorship of that agency.
 - Using the word "recall" when the product at issue has not been subject to a recall by a government agency.
 - Failing to clearly inform the viewer of the identity of the sponsor of the ad, whether that entity is a law firm, and whether it will handle the litigation.
2. Mandate certain disclosures in lawsuit ads to protect public health:
 - Warn viewers that they should not stop taking a prescribed medication without first consulting with a doctor.
 - Disclose that the drug or medical device targeted by the ad remains approved by the FDA, unless the product has been recalled or withdrawn.
3. Amend health privacy laws to broadly prohibit use of private health information to solicit individuals for lawsuits.
4. 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.
5. Prohibit attorney advertisements that are thinly disguised attempts to influence prospective jurors or tamper with jurors serving on a trial, rather than advertise legal services.

RECENT ENACTMENTS

- *Tennessee S.B. 352 (2019) (to be codified at Tenn. Code Ann. 47-18-5601 et seq.):* Prohibits presentation of legal advertisements as a medical alert, health alert, consumer alert, or public service announcement. The law prohibits ads from displaying a federal or state agency logo or using the term "recall" when referring to a product that has not been recalled. It requires disclosure that an ad is a paid advertisement for legal services and the identity of the ad's sponsor. It requires lawsuit ads targeting prescription drugs to warn viewers not to stop taking a prescribed medication without their doctor's advice and to disclose that a drug or medical device remains approved by the FDA. Failure to follow these requirements constitutes an unfair or deceptive act or practice subject to the penalties and remedies

provided by the Tennessee Consumer Protection Act. The law authorizes the attorney general to investigate potential violations and enforce the Act. It also provides that using, selling, transferring, or disclosing protected health information for the purpose of soliciting a person for legal services without written consent is a Class A misdemeanor if committed willfully and knowingly, and, if committed for the purpose of financial gain, is a Class C felony.

- *Texas S.B. 1189 (2019) (to be codified at Tex. Gov't Code § 81.151)*: Prohibits television advertisements for legal services from being presented as a medical alert, health alert, drug alert, or public service announcement. The law does not permit ads to display the logo of a federal or state agency in a manner that suggests approval or affiliation,

or to use the term “recall” to refer to a product that has not been recalled. An ad must disclose at the beginning that it is a paid advertisement for legal services, the identity of the sponsor, and the attorney or firm that will provide the legal services. Ads must warn viewers, verbally and visually, “Do not stop taking a prescribed medication without first consulting a physician.” The law authorizes the consumer protection division of the attorney general’s office, district attorney, and county attorney to enforce these provisions as a violation of the state’s deceptive acts or practices law. It provides a safe harbor for ads reviewed and approved by the State Bar. It also requires an enforcing agency to send a cease-and-desist notice and allow reasonable time for an attorney to end dissemination of a noncompliant ad.

Promote Rational Liability Rules

There are many ways that states can tailor liability rules to strike an appropriate balance that fairly compensates individuals for injuries and protects the public without imposing unwarranted liability. This section highlights four 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 by allowing plaintiffs who are largely responsible for their own injury (even 99% at fault) to “roll the dice” in court.

States are also moving away from joint and several liability, which unjustly requires a defendant that is as little as 1% at fault for an injury to pay the entire damage award if others responsible are immune, judgment proof, beyond the court’s jurisdiction, or not named as a defendant for some other reason. Such laws lead plaintiffs’ lawyers to target businesses with “deep pockets” rather than the parties responsible for injuries. Instead, more states are

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

determining a defendant's liability proportionally based on fault. In order to properly allocate fault, states are clarifying that juries should consider everyone that may have contributed to an injury, regardless of whether a person or business is named as a defendant. This approach ensures that defendants pay their fair share, not for an injury caused by someone else.

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

through 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.

Finally, this section shows how states are responding to the troubling trend in which Restatements of the Law, adopted by the respected American Law Institute, suggest expansions of liability rather than objectively presenting the law as it stands.

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

Purpose

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

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

NOTES

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

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

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

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

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

Options

1. Provide that a plaintiff who is at fault cannot recover if:
 - The plaintiff's negligence was greater than the negligence of the person against whom recovery is sought (*see, e.g.,* Colo. Rev. Stat. § 13-21-11; Idaho Code § 6-1404; Minn. Stat. Ann. § 604.01);
 - The plaintiff bears a greater percentage of fault than the combined percentage of fault attributed to others (*see, e.g.,* Ind. Code § 34-51-2-6; Iowa Code § 668.3; N.H. Rev. Stat. Ann. § 507:7-d; N.D. Cent. Code § 32-03.2-02; Ohio Rev. Code § 2315.33); or
 - The plaintiff is 50% or more responsible for the injury or damages claimed (*see, e.g.,* Ga. Code Ann. § 51-12-33(g), Tex. Civ. Prac. & Rem. Code § 33.001; Wyo. Stat. § 1-1-109).
2. Provide or clarify that the jury is permitted to consider all potentially responsible parties when allocating fault, including parties that settled before suit and those that are otherwise not before the court. Some state laws require defendants to provide notice to plaintiffs of responsible third parties before trial. *See, e.g.,* Ark. Code Ann. § 16-55-202(b)(1); Colo. Rev. Stat. § 13-21-111.5(2); Fla. Stat. Ann. § 768.81; Ga. Code Ann. § 51-12-33(c); Ohio Rev. Code § 2307.23(c); Tex. Civ. Prac. & Rem. Code Ann. § 33.003(a); Utah Code Ann. § 78-27-38(4)(A).
3. Provide that juries may consider whether individuals seeking to recover damages following an automobile accident were wearing their seatbelts for the purpose of apportioning responsibility. Many states have statutes or court decisions that prohibit admission of such evidence.⁷⁵ These antiquated laws came about before states required seatbelt use, before the public widely accepted the importance of wearing seatbelts, and before states moved from contributory negligence to comparative fault. States are now changing their laws to reflect that this highly pertinent information should not be hidden from jurors.⁷⁶

RECENT ENACTMENTS

- *Missouri S.B. 30 (2019) (amending Mo. Rev. Stat. § 307.178)*: In product liability actions, allows juries to consider the failure of an occupant of a vehicle to wear a seatbelt as evidence of comparative negligence or fault, causation, absence of a defect or hazard, and failure to mitigate damages.
- *West Virginia H.B. 2002 (2015) (codified at W. Va. Code §§ 55-17-13a, 55-7-13c(c))*: Codifies modified comparative fault. A plaintiff's fault does not bar recovery unless his or her fault is greater than the combined fault of all other persons responsible for the total amount of damages. When a plaintiff's fault is less than the combined fault of all other persons, recovery is reduced in proportion to the plaintiff's degree of fault.

Fairly and Proportionately Allocate Liability Based on Fault

Purpose

Joint and several liability reform is intended to allocate liability fairly and proportionately based on the percentage of fault attributed to each party's responsibility for an injury. Where multiple defendants are named, the fact finder (typically a jury) 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 fundamental unfairness can be corrected by requiring defendants to pay damages in proportion to their degree of responsibility and not for the conduct of others.

NOTES

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

Options

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

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

2. Implement modified joint and several liability. Several liability applies unless a defendant is 50% or 51% or more at fault.
 - Minnesota, Missouri, Montana, New Hampshire, New Jersey (60%), Pennsylvania (60%), South Carolina, Texas, and Wisconsin are among states that follow variants of this approach.
3. Bar joint liability for recovery of noneconomic damages, retaining joint or modified joint liability for economic damages only.
 - Currently law in California, Iowa (for defendants less than 50% at fault), Nebraska, New York (for defendants less than 50% at fault), and Ohio (for defendants less than 50% at fault).
4. Eliminate broad exceptions to several liability or modified joint liability laws that continue to allow disproportionate liability in many cases.
5. 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.

RECENT ENACTMENT

- *West Virginia H.B. 2002 (2015) (codified at W. Va. Code § 55-17-13c)*: Replaces law imposing joint liability on parties 30% or more at fault with pure several liability. After a good-faith effort to collect the judgment, the law permits the plaintiff to move for reallocation of uncollectable shares of liable defendants among other liable defendants in proportion to each party's percentage of fault. A defendant who is equally or less at fault than the plaintiff is not subject to reallocation. Joint liability continues to apply to defendants found to have engaged in conspiracy, driven under the influence, engaged in criminal conduct, or illegally disposed of hazardous waste.

Provide Transparency When Legislatures Create New Ways to Sue

Purpose

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

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

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

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

Option

1. Provide that any legislation that creates a private right of action or affirmative duty of care shall contain express language providing for such a right or duty. Instruct courts that they are not to interpret a statute to imply a private right of action or affirmative duty in the absence of such express language. Clarify that this law does not in any way
- impair courts’ ability to develop causes of action or duties under the common law in the absence of a legislative act, or use the violation of a statute to show negligent or unlawful conduct.
 - Georgia, Kansas, and Tennessee have enacted legislation taking this sound approach.⁷⁷

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

Prevent Adoption by Courts of Novel and Unsound Restatements of Law

Purpose

The American Law Institute (ALI) is one of the most influential private organizations in the development of American law. The ALI has developed this influence over its 96-year history by producing scholarly work across a wide range of subjects. Judges often rely on ALI Restatements of the Law when deciding issues of state common law because of the ALI's reputation for "restating" thoughtful and balanced legal rules.

Modern ALI Restatements, however, have increasingly departed from the organization's core mission to promote clarity and uniformity in the law into vehicles for advocating for particular liability rules. Instead of educating judges and policymakers on existing legal norms, the ALI has pivoted in some projects to recommend adoption of novel rules that would expand or enhance the liability of civil defendants.

For example, in the ALI's *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (2012), the organization recommended that courts expand landowners' duty of care to unwanted trespassers. State legislatures, concerned that the proposal would dramatically expand trespassers' rights to sue and impose costly burdens on property owners,

took action to prevent courts from adopting it. Since 2011, 24 states have enacted laws to preserve the longstanding rule that property owners generally owe no duty of care to trespassers, which preempts adoption of this Restatement provision.

In 2018, the ALI approved its first-ever *Restatement of the Law, Liability Insurance*, which includes several novel provisions that would, if adopted by courts, expand the liability of insurers. Insurers and legal experts do not believe this Restatement represents a faithful "restatement" of existing liability insurance law. Four states—Arkansas, Michigan, North Dakota, and Ohio—have enacted laws providing that this Restatement does not constitute the public policy of the state. Tennessee adopted legislation intended to preserve existing law regarding the interpretation of insurance contracts, which would preclude adoption of liability-expanding Restatement provisions. Texas responded to the Liability Insurance Restatement by instructing courts that ALI Restatements "are not controlling," meaning that courts may consider them but are not obligated to follow their provisions.

The ALI is developing a separate restatement that proposes major changes in the common law with respect to

contracts between businesses and consumers. The proposed *Restatement of the Law, Consumer Contracts* recommends a separate set of “consumer contract” rules that operate differently from the general law of contracts. Consequently, most of this project’s recommended rules

are innovations, not restatements, of common law. Many of the project’s provisions operate to impair the ability of businesses to enforce the terms of their contracts with consumers. If courts adopt these provisions, it could usher in a new contract law regime.

Option

1. Preempt courts from adopting novel and unsound Restatement provisions or entire Restatement projects by either codifying existing law on the specific issue or stating that a particular ALI Restatement does not constitute the public policy of the state and should not be relied upon.

RECENT ENACTMENTS AND LEGISLATION (Insurance Restatement)

- *Arkansas S.B. 565 (2019) (to be codified at Ark. Code § 23-60-112)*: Provides that the *Restatement of the Law, Liability Insurance* does not constitute the public policy of the state if inconsistent with existing state law.
- *North Dakota H.B. 1142 (2019) (to be codified at N.D. Cent. Code § 26.1-02)*: Provides that courts may not apply, give weight to, or afford recognition to the *Restatement of the Law, Liability Insurance* as an authoritative reference regarding interpretation of state law, rules, and principles of insurance law.
- *Michigan H.B. 6520 (2018) (codified at Mich. Comp. Laws § 500.3032)*: Provides that courts shall not apply a principle from the *Restatement of the Law, Liability Insurance* unless the principle is clearly established in a

statute, the common law, or case law precedent.

- *Ohio S.B. 239 (2018) (codified at Ohio Rev. Code § 3901.82)*: Provides that the *Restatement of the Law, Liability Insurance* does not constitute the public policy of the state.
- *Tennessee H.B. 1977/S.B. 1862 (2018) (codified at Tenn. Code Ann. 56-7-102)*: Provides that insurance policy interpretation should be the same as any other contract and that an insurer’s duty to defend depends solely on allegations contained in an underlying complaint describing acts or events covered by the policy.

RECENT ENACTMENTS (Trespasser Rule)

Laws providing that a land possessor owes no duty of care to a trespasser except to refrain from causing willful and wanton injury, and codifying the “attractive nuisance” doctrine for injury to child trespassers include:

- *Idaho H.B. 658 (2018) (codified at Idaho Code §§ 6-3101 through 6-3103)*
- *Iowa S.F. 376 (2017) (codified at Iowa Code § 462.1)*

- *Mississippi H.B. 767 (2016) (codified at Miss. Code Ann. § 95-5-31)*
- *South Carolina H.B. 3266 (2015) (codified at S.C. Code Ann. § 15-82-10)*
- *Nevada S.B. 160 (2015) (codified at Nev. Rev. Stat. § 41.515)*
- *Indiana S.B. 306 (2015) (codified at Ind. Code §§ 34-31-11-1 through 34-31-11-5)*
- *Wyoming H.B. 108 (2015) (codified at Wyo. Stat. §§ 34-19-201 through 34-19-204)*
- *West Virginia S.B. 3 (2015) (codified at W. Va. Code § 55-7-27)*

OTHER RECENT ENACTMENTS

- *Texas H.B. 2757 (2019) (to be codified at Tex. Civ. Prac. & Rem. Code § 5.001):* Provides that in any action concerning rights and obligations governed by Texas law, the ALI's Restatements of the Law are not controlling.

Reject Expansions of Liability in the Insurance Claims Settlement Process

Purpose

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

Traditionally, courts have interpreted "bad faith" as an intentional or reckless denial of a valid claim; however, some state courts have diluted this standard by holding that minor or unintended technical violations of an insurance statute may constitute bad faith for the purposes of a civil action. This may enable a claimant to recover a broad array of damages against an insurer, such as the full value of the underlying insurance policy, extracontractual damages, attorneys' fees, court costs, and punitive damages. Legislation may be needed to respond to liability-expanding court decisions to restore the intent of bad faith laws.⁷⁸

Plaintiffs' lawyers have pushed legislation to expand such lucrative lawsuits against insurers in four key ways: (1) creating new statutory private rights of action for bad faith; (2) diluting any intentional conduct standard for claiming bad faith; (3) enumerating strict criteria purporting to

show bad faith; and (4) increasing and expanding penalties for bad faith actions. By establishing new private rights of action for insureds and third parties, while lowering the standards for maintaining these 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.

In addition, contractors that repair property after a storm or other event sometimes abuse the availability of insurance by having the owner assign his or her benefits to the vendor and then submitting inflated claims. When an insurer denies payment or offers a lower amount, plaintiffs' lawyers file a bad faith lawsuit.⁷⁹

Ultimately, costs associated with these lawsuits are not borne by a "wealthy insurer," but rather by individuals, small businesses, and other policyholders onto whom higher premiums are passed. Higher premiums may price some consumers out of the insurance market altogether, increasing the number of uninsured and underinsured, and further increasing costs for those able to maintain insurance. Some insurers may also discontinue or substantially curtail their services given the risks associated with an overly expansive

bad faith law, which would additionally penalize consumers through less insurer competition and fewer coverage choices.

NOTES

States vary on whether a private right of action by a direct insured against his or her insurer (i.e., first-party claimant) is provided by statute or common law, although such an action is generally available. In

comparison, only a handful of states permit claims against an insurer by someone other than the insured individual (i.e., third-party claimant).⁸⁰

In 2019, the Georgia Supreme Court curbed “gotcha” bad faith lawsuits, ruling that an insurer cannot be sued for failing to settle a claim against its policyholder within policy limits unless the insurer received a valid settlement offer.⁸¹

Options

1. Provide a safe harbor from bad faith claims, during which the insurer can properly investigate the claim and decide whether to offer policy limits.
2. Provide or clarify bad faith standards for any private statutory right of action such 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 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.

“By establishing new private rights of action for insureds and third parties, while lowering the standards for maintaining these 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.”

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 be established separately.
7. Establish limits on extracontractual and/or punitive damages available in bad faith actions.
8. Oppose legislation that creates a private right of action for third-party claimants, reduces or eliminates the standard for finding bad faith, or increases penalties.
9. Adopt safeguards against fraud and abuse when a policyholder assigns his or her insurance benefits to third parties, such as contractors, who make repairs and then pursue payment from the insurer.

RECENT ENACTMENTS

- *Florida H.B. 301 (2019) (amending Fla. Stat. Ann. § 624.155)*: Provides that a plaintiff must wait 60 days before filing a notice indicating that he or she intends to file a bad faith action when any party requests an appraisal in a residential property insurance claim.
- *Florida H.B. 7065 (2019) (to be codified at Fla. Stat. Ann. §§ 627.7152 and 627.7153)*: Sets requirements for

assignments of benefits, including that the agreement contain an itemized estimate of the cost of the services to be performed. The law requires assignees to provide written notice at least 10 business days before filing a lawsuit. It requires an insurer to respond by making a pre-suit settlement offer, requesting an appraisal, or offering another method to resolve the dispute. It also encourages settlement by requiring parties that reject reasonable offers to pay attorneys' fees.

- *Missouri H.B. 339 & 714 (2017) (codified at Mo. Rev. Stat. §§ 537.058, 537.065)*: Requires a settlement demand for a personal injury, bodily injury, or wrongful death claim to be in writing and sent by certified mail to the tortfeasor's liability insurer. Settlement demands must include a minimal level of information about a claim and needed authorizations so that an insurer can evaluate it.
- *Texas H.B. 1774 (2017) (codified at Tex. Ins. Code §§ 542A.001 et seq.)*: Requires a policyholder to provide 60 days' notice to an insurer before filing a lawsuit alleging the insurer did not properly cover storm or other weather damage and including information needed for the insurer to address any outstanding claim issues. Attorney's fees may not be awarded if the insurer was entitled to but not provided with pre-suit notice.

DEFEATED LEGISLATION

- *Virginia S.B. 1117 (2019)*: Virginia rejected legislation that would have placed the state's affordable auto insurance rates at risk by vastly expanding first-party bad faith actions. The bill would have permitted an action against an insurer providing uninsured/underinsured motorist (UM/UIM) coverage where the insurer rejected a "reasonable" settlement demand within a policy's limits or where the insurer otherwise denied payment to its policyholder. The bill also would have allowed an action for denial of a UM/UIM payment where the insurer merely "should have known" of potential liability to the insured prior to a judgment being rendered against the uninsured motorist/ tortfeasor.⁸² The bill would have allowed plaintiffs to seek extracontractual damages in the full amount of the judgment.
- *New Jersey S. 2144 (2018)*: New Jersey rejected legislation that would have established a private right of action for first-party claimants for any unreasonable delay or denial of an insurance claim. The bill would have allowed claimants to recover a broad range of damages for a violation, including prejudgment interest, attorney fees, and treble damages.

Protect Data Security and Privacy

Purpose

As data breaches and use of biometric information become more commonplace, states are considering how they can protect the use and security of their citizens' private information.⁸³ State legislatures have a choice of two diametrically polar approaches: They can enact laws that proactively promote data privacy and security or they can entice plaintiffs' lawyers to bring massive class action lawsuits.

Ohio enacted legislation in 2018 that attempts to take the first approach.⁸⁴ The Ohio law encourages businesses and others to adopt a program to protect personal information that "reasonably conforms to an industry recognized cybersecurity framework."⁸⁵ Organizations that meet the Ohio law's requirements receive safe harbor from tort liability in the event of a data breach.⁸⁶ The Ohio statute also instructs that it does not provide a private right of action with respect to any act or practice it regulates.⁸⁷

Alternatively, states can provide the plaintiffs' bar with a lucrative new source of income by adopting laws with private rights of action. Privacy claims typically involve inchoate and intangible harms, rather than actual injuries with measurable financial losses. For this reason, private enforcement is ill suited to protecting privacy interests. Nevertheless, the plaintiffs' bar has pushed state legislatures to include private rights of action in privacy laws. This approach undermines government enforcement, results in inconsistent court rulings, and leads to settlements that benefit lawyers more than consumers.⁸⁸

The Illinois Biometric Information Privacy Act (BIPA), which regulates the collection and storage of information such as a fingerprint or retina scan, illustrates a problematic approach that states should avoid. While Texas and Washington have passed biometric privacy laws, Illinois was the first and only one to include a private right of action to enforce its provisions. The

“State legislatures have a choice of two diametrically polar approaches: They can enact laws that proactively promote data privacy and security or they can entice plaintiffs' lawyers to bring massive class action lawsuits.”

Illinois law allows plaintiffs' lawyers to seek thousands of dollars in statutory damages for technical violations. BIPA has led to hundreds of class action lawsuits, largely since 2018, against a wide range of companies that collect biometric information for legitimate reasons.⁸⁹ These "gotcha" class actions target companies that use technology that relies on fingerprint scans, retina scans, and facial recognition for time clocks and access to facilities.

The Illinois Supreme Court exacerbated this situation in January 2019 when it ruled that a plaintiff did not need to show actual harm to qualify as "aggrieved" and file a lawsuit. A person merely needs to assert that a company violated the notice, consent, disclosure, or other BIPA requirement to file a class action.⁹⁰ In the six months following that decision, plaintiffs' lawyers filed 153 no-injury class actions alleging BIPA violations—a number just shy of all BIPA lawsuits filed in the decade before the ruling.⁹¹ This litigious environment discourages companies from adopting innovative technology (like biometric authentication) that actually *improves* the security of sensitive information.

Not learning from this mistake, California passed a far-reaching new law that makes

the Golden State the first in the nation to create a private right of action following a data breach.⁹² Statutory damages will range from \$100 to \$750 "per consumer per incident," which can easily turn into an astronomical sum. That law, the California Consumer Privacy Act (CCPA), is expected to result in "an explosion of consumer litigation."⁹³ Even before the CCPA takes effect in 2020, plaintiffs' lawyers are pushing the California legislature to amend the law to invite more lawsuits, rather than promote compliance. They are pushing to expand the law's private right of action beyond data breaches to the Act's other data collection requirements, eliminate the law's "right to cure," and prevent companies from seeking guidance from the state's attorney general on how to comply with the law.⁹⁴

Meanwhile, several state legislatures considered, but have not enacted, bills modeled off of Illinois's BIPA.⁹⁵

Legislation addressing data security and collection of biometric information should provide clear guidance to businesses about their responsibilities, encourage adoption of reasonable security safeguards of personal information, and empower government agencies or officials to enforce the law's provisions.

Options

1. Provide for state government enforcement; no private right of action. Include a provision in data security and biometric privacy legislation expressly indicating that the law does not create a private right of action. Oppose legislation that authorizes a private right of action for technical violations of the statute when consumers experienced no actual injury.
2. Implement a safe harbor. Encourage organizations to adopt and comply with a written cybersecurity policy that safeguards the protection of personal information.

The program must, considering the size and complexity of the organization, its resources and activities, and the sensitivity of the information collected, require reasonable security standards that are designed to:

- Protect the security and confidentiality of information;
- Protect against any anticipated threats or hazards to the security or integrity of the information; and
- Protect against unauthorized access to and acquisition of information that is likely to result in a material risk of identity theft or other fraud.

An organization that meets the above requirements is entitled to an affirmative defense to tort claims following a data breach.

3. Require notification where there is a significant risk of financial harm or fraud. Require entities to promptly investigate any security breach and analyze whether an unauthorized person acquired personal information. Notification of a breach is required if, after a reasonable investigation, the entity finds a significant risk of financial harm to those affected.
4. Ensure that compensation in data breach and biometric privacy lawsuits is proportional to harm experienced by consumers and that lawyers do not

benefit at the expense of their clients:

- Do not impose statutory damages without proof of harm; and
 - Require awards of attorneys' fees to be proportional to the benefit to consumers.
5. Include a right to cure. Provide businesses with an opportunity to cure an alleged violation of a privacy law. For example, legislation may prohibit an individual or class action from seeking damages beyond actual financial losses unless the plaintiff has provided the business with written notice of the specific violation and the business has not cured that violation within 30 days.
 6. Avoid duplicative litigation by municipalities. Provide for enforcement of data security and biometric privacy laws exclusively by state or federal authorities, and indicate that the law does not empower local governments to bring similar actions. Litigation by cities and counties is likely to simply pile on enforcement actions and impose unnecessary costs on companies with no public benefit.⁹⁶

RECENT ENACTMENTS

- *Ohio S.B. 220 (2018) (codified at Ohio Rev. Code § 1354.01 et seq.)*: Includes a safe harbor approach.

Improve Product Liability Law

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

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

The proposals presented in this section help maintain balance. They codify core principles of product liability law and curb excesses allowed by some courts. For

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

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

“ 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. ”

personal injuries stemming from alleged product defects where unsupported by product liability law.

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

Product liability law can hurt both small businesses and larger retailers that simply sold a product in their stores without knowledge of a danger. Through “product seller reform,” states can provide that a seller that did not participate in developing a product’s design or warnings is not

subject to liability unless the plaintiff cannot recover from the actual manufacturer. This section’s suggested reforms also include limiting product liability exposure to a set number of years, recognizing that, after a decade or more of use, an injury stemming from a product is more likely a result of deterioration than a defect at the time it was manufactured.

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

Prevent Lawyers from Circumventing Core Product Liability Requirements

Purpose

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

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

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

they did not make, sell, or distribute extend beyond the pharmaceutical industry. Without reform, this trend will continue.

Similarly, some courts have imposed liability on companies that did not make or sell products containing asbestos when purchasers or others added asbestos-containing parts to the product after its sale. Other courts have resisted this expansion of liability, adhering to the traditional principle that manufacturers have a duty to ensure the safety of their own products, not those of others.⁹⁷

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 cellphone users claimed that radiation from cellphone 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 damages based on hypothetical future injuries predicted by statistical models and

designed by hired experts. These types of theories attempt to eliminate the need to show the product had an inadequate warning or caused actual harm, as required by product liability law.

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

Options

1. When a state has codified a product liability act, clarify that the act establishes the exclusive theories of liability for any civil action for harm caused by a product.
2. Clarify that a defendant may be held liable only if it manufactured or sold the actual product that was the cause of harm for which the claimant seeks to recover compensatory damages. Require plaintiffs to identify the specific product and manufacturer that allegedly caused the plaintiff's injury. Provide that a product seller may not be held liable in a product liability action based on market share, enterprise, or industry-wide liability.
3. Require plaintiffs who claim a product's design is defective to show that a technologically feasible and practical alternative design would have reduced or avoided a foreseeable risk of harm without significantly impairing the usefulness or desirability of the product to its intended users.
4. Require plaintiffs who allege that a product's warnings are inadequate to specify a reasonable alternative warning that would have prevented harm to the plaintiff.⁹⁸

RECENT ENACTMENTS

- *Iowa S.F. 376 (2017) (codified at Iowa Code § 686B.7)*: Provides that a defendant in an asbestos or silica action is not liable for exposures from products or component parts made or sold by a third party.
- *Tennessee S.B. 2062 (2016) (codified at Tenn. Code Ann. § 29-34-711(b))*: Provides that a defendant in an asbestos action is not liable for exposures from a product or component part made or sold by a third party, even if the third party is insolvent or otherwise not amenable to suit.
- *West Virginia S.B. 15 (2016) (codified at W. Va. Code Ann. § 55-7-30)*: Adopts the learned intermediary doctrine which recognizes that a manufacturer or seller of a prescription drug or medical device must provide adequate warnings or instructions to healthcare providers who are in the position of reducing the harm based on each patient's condition, rather than directly to consumers.
- *Alabama S.B. 80 (2015) (codified at Ala. Code Ann. § 6-5-530)*: Overturns *Wyeth, Inc. v. Weeks*, 159 So. 3d 649 (Ala. 2014), in which the Alabama Supreme Court became the first and

only state high court to recognize “innovator liability,” imposing liability on a brand-name drug maker for the injuries of a plaintiff who took only a generic version of the drug. The law 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.

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. Lawsuits may seek to 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 complied with federal or state regulations or a government agency approved the product or warnings at issue. These provisions typically establish a "rebuttable presumption" that a product or service that complies with government regulations is not defective unless a plaintiff provides sufficient proof to overcome that presumption.

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

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

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 is designed to meet 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 complied with government regulations. Such protection typically does not apply if the manufacturer knowingly, in violation of applicable regulations, withheld

from or misrepresented to the agency information known to be material and relevant to the harm that the plaintiff allegedly suffered. These laws recognize that a manufacturer whose product is evaluated and considered safe and effective by a government agency charged with protecting the public should not be punished through a private lawsuit seeking punitive damages.

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

Earlier enactments in New Jersey, Ohio, Oregon, and Utah are limited to 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 a product was approved by a government agency or complied with regulations absent evidence that the manufacturer wrongfully withheld or misrepresented information related to the risk of harm at issue in the litigation. Apply this prohibition to:
 - Any product where the design or warning at issue was approved by any state or federal agency or the aspect of the product at issue met or exceeded government safety standards.
 - Drugs and medical devices approved by the FDA.
 - Any service where the act or transaction forming the basis of the claim involves terms of service, contract provisions, representations or other practices authorized by, or in compliance with,

the rules, regulations, standards or orders of, or a statute administered by, a government agency.

RECENT ENACTMENT

- *Oklahoma H.B. 3365 (2014) (codified at Okla. Stat. tit. 76, § 57.2):*
 - Provides a rebuttable presumption that a manufacturer or seller is not liable for an injury caused by some aspect of the formulation, labeling, or design of a product if the formulation, labeling, or design complied with or exceeded mandatory federal safety standards or regulations that applied when the product was made and addressed the product risk that allegedly caused the harm. The law permits a plaintiff to rebut the presumption by showing that the federal standards were
- inadequate to protect the public or that the manufacturer withheld or misrepresented information relevant to the agency's determination of adequacy of the safety standards or regulation.
- Applies a similar rebuttable presumption that a product manufacturer or seller is not liable in a product liability action when the product was subject to premarket licensing or approval by a federal agency. It does not apply when a product is subject to a recall or is no longer marketed pursuant to an order, consent decree, or agreement between the manufacturer and a federal agency.

Protect Innocent Product Sellers

Purpose

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

NOTES

Most states have acted to protect innocent sellers, including Alabama, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana,

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

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

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

Option

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

- the court determines that the claimant would be unable to enforce a judgment against the manufacturer.

RECENT ENACTMENTS

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

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

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

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

NOTES

The following states have enacted a statute of repose for product liability actions: Alabama (common law), Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, North Carolina, Ohio, Oregon, Tennessee, Texas, Washington, and Wisconsin. Most courts have found statutes of repose constitutional, though a few courts have invalidated 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, which precludes a product liability claim after the statutory period has elapsed.
2. Apply this reform only to those products with a useful life under a specified period of time (e.g., 10 years) and not where the product is specifically warranted to have a useful life longer than the statute of repose period.

RECENT LEGISLATION

- *Missouri H.B. 186 (passed House 2019)*: Provides that a person who alleges injury from a defective or unsafe condition of a product due to negligence in the design, manufacture, sale, or distribution of a product must file the action within 15 years of the date on which the product is first sold or leased, with certain exceptions.

Prioritize Asbestos Claims to Benefit Legitimate Claimants With Credible Injuries

Purpose

For decades, courts have struggled with an avalanche of asbestos lawsuits. As far back as 1997, the U.S. Supreme Court described the litigation as a “crisis.”⁹⁹ Cardozo Law School Professor Lester Brickman, an expert on asbestos litigation, has said that “the ‘asbestos litigation crisis’ would never have arisen” if not for the claims filed by the non-sick.¹⁰⁰ 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-sized 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.”¹⁰¹ A former plaintiffs’ attorney candidly described the litigation as an “endless search for a solvent bystander.”¹⁰²

NOTES

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

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

Option

1. Require claimants to submit credible and objective evidence of physical impairment caused by asbestos or silica to bring or maintain a claim.
- Medical criteria procedures for asbestos and silica cases were enacted in Ohio in 2004, Florida and Texas in 2005, Kansas and South Carolina in 2006, Georgia in 2007, Oklahoma in 2013, West Virginia in 2015, and Iowa in 2017. Tennessee separately enacted medical criteria procedures for silica cases in 2006 and for asbestos cases in 2016.

RECENT ENACTMENTS

- *Iowa S.F. 376 (2017) (codified at Iowa Code 686B.1 et seq.)* (enacting the Asbestos and Silica Claims Priorities Act): Gives priority to the claims of individuals who can demonstrate actual physical impairment caused by exposure to asbestos or silica, establishes medical criteria for determining impairment, requires certain medical documentation to support a claim, and preserves the legal rights of people who have been exposed to asbestos or silica, but who have no present physical impairment.
- *Tennessee S.B. 2062 (2016) (codified at Tenn. Code Ann. §§ 29-34-701 et seq.)* (enacting an Asbestos Claims Priorities Act, as described above).
- *West Virginia S.B. 411 (2015) (codified at W. Va. Code Ann. §§ 55-7F-1 et seq.)* (enacting an Asbestos and Silica Claims Priorities Act, as described above).

Address Damages “Run Wild”

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

Damages for medical expenses in personal injury lawsuits are often inflated. In many states, a person can receive damages based on 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 Kelley Blue Book value, would be sorely disappointed. But in the civil justice system, plaintiffs’ lawyers seek—and receive—the list price printed on medical bills even when the amount actually paid by the patient or the patient’s insurer and accepted by the healthcare provider is far less. Legislatures can eliminate these “phantom damages,” which serve no compensatory purpose.

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

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

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

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

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

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

Ensure That Damages for Medical Expenses Reflect Actual Costs

Purpose

Plaintiffs’ lawyers argue in personal injury cases that their clients should receive damages for medical expenses for the amount billed by their healthcare providers, even when providers accepted a substantially lower amount as payment in full. Since it is common for amounts that appear on invoices to be three or four times the amounts paid by patients or their insurers (including private insurers, Medicare, or Medicaid) due to negotiated rates, discounts, and write-offs, defendants typically pay significantly inflated awards to reimburse a plaintiff for nonexistent medical expenses. These damages serve no compensatory purpose and they are passed on to consumers in the form of higher costs for goods and services and higher insurance rates. “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 vastly exceed the medical expenses actually paid.

NOTES

Over 20 states have limited recovery of “phantom damages” to some degree through court rulings or legislation. These states include Alabama, California, Connecticut, Delaware (when medical expenses are paid by Medicare or Medicaid), Florida, Idaho, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Texas, and West Virginia.

Texas was the first state to address phantom damages through legislation in 2003. The one-line statute provides: “In addition to any other limitation under law, recovery of medical or healthcare expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.”¹⁰³ The Texas Supreme Court has applied this provision to preclude admission of billed amounts that do not reflect actual costs as evidence at trial.¹⁰⁴

In some states that limit phantom damages, such as Florida, plaintiffs’ lawyers engage in tactics that continue to allow inflated recovery. They do so through “Letters of Protection,” where a patient, by not paying a healthcare provider for services during pending litigation, avoids evidence of the true value of a service that he or she would actually pay.

The following states permit recovery of phantom damages: Alaska, Arizona, Arkansas, Colorado, Delaware (when medical expenses are paid by private insurers), District of Columbia, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Oregon, South Carolina, South Dakota, Tennessee, Virginia, Washington, and Wisconsin.

In the remainder of states (and in some of those listed above), the ability to recover phantom damages is unclear or inconsistently applied.

Options

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

MIXED COURT RULINGS

- The Indiana Supreme Court ruled in 2016 that the amount accepted as full payment by a healthcare provider is admissible in court as evidence of the reasonable value of the medical services. The court emphasized that Indiana tort law “seeks to make injured parties whole,” not more than whole.¹⁰⁵ The ruling allows the jury to consider both the billed charges and the accepted amounts in determining damages.
- On the other hand, problematic state supreme court rulings in Tennessee in 2017 and Alaska in 2019 permit plaintiffs to introduce full, undiscounted medical bills to show the reasonable value of medical expenses. In addition, the courts ruled that defendants cannot rebut this evidence by showing that healthcare providers accepted a lesser amount.¹⁰⁶
- A 2016 Delaware Supreme Court ruling precludes phantom damages when Medicare or Medicaid paid an injured party’s expenses. The court reasoned that allowing a plaintiff “to recover amounts that are paid by no one” does not make an injured party whole.¹⁰⁷ This ruling, however, does not extend to cases in which private insurers pay medical expenses, allowing phantom damages in many cases.
- In 2016, the Oklahoma Supreme Court upheld a state statute precluding phantom damages.¹⁰⁸

RECENT ENACTMENTS

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

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

Purpose

Generally, the collateral source rule prohibits admission of evidence that all or some of a plaintiff’s damages will be or have been paid by a source other than a defendant, 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).

NOTES

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

The proposal to eliminate phantom damages provides a related, but limited way of addressing collateral source benefits. 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.

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

Options

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

Place Reasonable Bounds on Subjective Noneconomic Damage Awards

Purpose

Historically, pain and suffering damages were modest in amount and often had a close relationship to a plaintiff’s actual pecuniary loss, such as medical expenses. Over the years, a confluence of factors has led to a significant rise in the size of pain and suffering awards, creating the need for legislation to guard against excessive and unpredictable outlier awards. Noneconomic damage awards in personal injury litigation now constitute the largest single item of recovery, exceeding medical expenses and lost wages.¹⁰⁹

Juries may reach verdicts with large noneconomic damage awards due to sympathy for the plaintiff, bias against a deep-pocket defendant, or a desire to punish a 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 and increase insurance rates. Statutory limits are particularly critical for preserving access to affordable medical care.

NOTES

At least 20 states limit noneconomic damages specifically in healthcare liability lawsuits, including Alaska, California,

Colorado, Iowa, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nevada, North Carolina, North Dakota, Ohio, South Carolina, Texas, Utah, West Virginia, and Wisconsin.

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

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

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

- In 2019, the North Dakota Supreme Court rejected an equal protection challenge to the state’s limit on noneconomic damages in medical liability actions. The court recognized that this constraint “does not prevent seriously injured individuals from being

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

fully compensated for any amount of medical care or lost wages,” but only prevents them from receiving “more abstract damages” above the cap.¹¹⁰

- In 2018, the Wisconsin Supreme Court upheld the state’s \$750,000 limit on noneconomic damages in medical malpractice actions, overruling a prior decision.¹¹¹
- In 2016, the Oregon Supreme Court explicitly overruled a 1999 decision that invalidated a statutory limit on noneconomic damages.¹¹² Oregon courts continue to evaluate whether the state’s \$500,000 limit on pain and suffering damages in personal injury cases constitutionally applies.
- The Nevada Supreme Court unanimously upheld a \$350,000 limit on noneconomic damages in actions against healthcare providers in 2015.¹¹³
- State supreme courts that have invalidated statutory limits on noneconomic damages in recent years include Kansas (2019),¹¹⁴ Oklahoma (2019),¹¹⁵ and Florida (2014/2017).¹¹⁶
- After the Missouri Supreme Court in 2012 invalidated a limit on noneconomic damages as unconstitutionally limiting damages available under common law, 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 to a specific amount. *See, e.g., Nev. Rev. Stat. Ann. § 41A.035* (limiting noneconomic damages to \$350,000 in any action for injury against a healthcare provider based on professional negligence).
2. Limit noneconomic damages to the greater of a specific amount or a multiplier of the compensatory damage award. *See, e.g., Ohio Rev. Code Ann. § 2315.18* (greater of \$250,000 or three times economic loss up to a maximum of \$350,000).
3. Limit noneconomic damages to a certain amount per year of the plaintiff’s life expectancy. *See, e.g., Alaska Stat. § 09.17.010* (limiting noneconomic damages to the greater of \$400,000 or injured person’s life expectancy in years).

multiplied by \$8,000 and, in cases involving severe permanent injuries, to the greater of \$1 million or injured person’s life expectancy in years multiplied by \$25,000).

4. Authorize higher noneconomic damage awards in cases involving defined catastrophic injuries. *See, e.g.,* W. Va. Code Ann. § 55-7B-8(b) (\$250,000 limit rises to \$500,000 in cases involving wrongful death and certain permanent and substantial injuries in professional liability actions against a healthcare provider).
5. Provide for periodic adjustment of the noneconomic damage limit to account for inflation. *See, e.g.,* Idaho Code § 6-1603 (adjusts a \$250,000 limit set in 2004 based on the state’s average annual wage adjustments, making the limit \$372,865, effective July 1, 2019).

RECENT ENACTMENTS

- *Iowa S.F. 465 (2017) (codified at Iowa Code § 147.136A)*: Limits the total amount recoverable for noneconomic damages in actions against healthcare providers to \$250,000 regardless of the number of plaintiffs, derivative claims, theories of liability, or defendants in the action. The limit does not apply, however, if the jury finds there is a substantial or permanent loss of a bodily function, substantial disfigurement, or death, which warrants a finding that the limit would deprive the plaintiff of just

compensation for the injuries sustained. The limit also does not apply if the defendant acted with actual malice.

- *Nevada S.B. 292 (2015) (amending Nev. Rev. Stat. § 41A.035)*: Clarifies that the state’s existing \$350,000 statutory limit on noneconomic damages in any action for injury against a healthcare provider based on professional negligence applies “regardless of the number of plaintiffs, defendants or theories upon which liability may be based.”
- *Missouri S.B. 239 (2015) (codified at Mo. Rev. Stat. §§ 1.010, 538.205, 538.210)*: Provides a statutory cause of action for medical malpractice subject to a \$400,000 limit on noneconomic damages, which rises to \$700,000 in defined cases of catastrophic injury or wrongful death.

OTHER RECENT ACTION

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

Protect Due Process in Punitive Damages Determinations

Purpose

The U.S. Supreme Court 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 the case of punitive damages, the Court considers whether a lower court’s method of determining them departs from traditional procedures. The adequacy of procedural protections is particularly important because punitive

damage 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.”¹¹⁷ Many state legislatures and courts have adopted practices that protect due process in cases in which plaintiffs seek punitive damages.

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. This reform helps ensure that juries decide whether a defendant is liable for a plaintiff’s injury based on its conduct, rather than the defendant’s financial worth or other prejudicial, irrelevant evidence.
2. Prevent duplicative punishment for the same conduct. Punitive damages may not be awarded if the defendant establishes before trial that punitive damages have previously been awarded against it for the same action or course of conduct. If the court determines by clear and convincing evidence that the punitive damages award was insufficient, then the court may permit the jury to consider a subsequent award.
3. Require “clear and convincing” evidence to support an award of punitive damages. Most states follow this approach, but it is still needed in Connecticut, Delaware, Illinois, New Mexico, Pennsylvania, Rhode Island, Vermont, Virginia, and Wyoming. Clear and convincing evidence is a standard in

between “beyond a reasonable doubt” of criminal law and “preponderance of the evidence” of civil liability.

4. Eliminate prejudgment interest on punitive or exemplary damages.
5. Defer or prohibit punitive damages in asbestos litigation to help ensure timely and adequate compensation for sick claimants and because imposing such damages no longer serves a corrective purpose.¹¹⁸

RECENT ENACTMENTS

- *Tennessee S.B. 2062 (2016) (codified at Tenn. Code Ann. § 29-34-711(c))*: Provides that punitive damages shall not be awarded in an asbestos action.
- *West Virginia S.B. 421 (2015) (codified at W. Va. Code Ann. § 55-7-29)*: Requires 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. The law also provides for bifurcation at the defendant’s request.

Prevent Excessive Punitive Damages Awards

Purpose

The U.S. Supreme Court has observed that punitive damages have “run wild.”¹¹⁹ 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 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, Virginia, West Virginia, and Wisconsin.

Six states generally do not permit punitive damages awards: Louisiana, Massachusetts, Michigan, Nebraska, New Hampshire, and Washington.

The following states have no statutory limit: Arizona, California, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Kentucky, Maryland, Minnesota, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, and Wyoming.

The Arkansas Supreme Court and Missouri Supreme Court struck down their states’ statutory limits on punitive damages in 2011 and 2014, respectively.¹²⁰ Other state high courts have upheld such measures.

Options

1. Limit punitive damages awards to the greater of three times compensatory damages or a specific cap (possibly adjusting periodically for inflation).
2. In cases where the fact finder finds a specific intent to harm or malice, limit punitive damages awards to the greater of four times compensatory damages or a specific cap.
3. For individuals or small businesses, limit punitive damages awards to the lesser of three times compensatory damages or a certain percentage of net worth.

4. Provide that the limit shall not be disclosed to the trier of fact but applied by the court to any punitive damages 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) (codified at W. Va. Code § 55-7-29)*: Punitive damages may not exceed \$500,000 or four times the amount of compensatory damages, whichever is greater.

Protect Access to Healthcare Through Medical Liability Reform

Purpose

The societal impact of excessive civil liability is nowhere more evident than in medical liability.

According to a survey conducted by the American Medical Association, almost half of physicians and 75% of surgeons and obstetricians/gynecologists age 55 or older have been sued, and data shows that 99% of doctors in high-risk specialties are subject to a lawsuit during their career.¹²¹ Data also indicates that about two-thirds of these claims are dropped or dismissed.¹²² The cost of defending such lawsuits is high—on average it costs over \$30,000 to defend against a dropped claim. When a lawsuit goes to trial, the litigation expenses can be about 10 times that amount.¹²³ As a result of lawsuits, some physicians in certain states face liability premiums that exceed \$100,000 or even \$200,000 per year.¹²⁴

Widely disparate awards 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. Concerns about unwarranted liability also encourage physicians to practice defensive medicine, which is a major contributor to skyrocketing healthcare costs.

Medical liability reforms have dramatically improved the healthcare environment in such states as Mississippi, Pennsylvania, Texas, and West Virginia.¹²⁵

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

Options

1. Establish a limit on noneconomic damages in medical liability cases.
2. Allow admission of evidence of payments to the plaintiff from sources other than the defendant, or a set off for collateral source recovery.
3. Require plaintiffs’ lawyers to file medical liability lawsuits where the action arose, preventing such claims from flowing to the county viewed as the most plaintiff friendly in the state.
4. Limit the liability of physicians and other medical professionals who provide voluntary or emergency care.
5. Allow healthcare providers to express statements of apology or regret without fear that such statements can be used against them in litigation.
6. Eliminate phantom damages.
7. Provide a sliding scale for contingency fees in medical liability cases (e.g., up to 40% of the first \$150,000 recovered, 33% of the next \$150,000, 25% of the next \$200,000, and 20% of any amount recovered over \$500,000).
 - States with similar provisions include California, Connecticut, Delaware, Florida, Illinois, Massachusetts, Nevada, New Hampshire, New Jersey, New York, and Wisconsin.
8. Require the plaintiff to obtain from a qualified physician a certificate of merit finding a breach of the duty of care before filing a lawsuit.
9. Set qualifications for expert witnesses that require them to be licensed and trained in the same specialty as the defendant doctor and actively practicing in that specialty at the date of the injury. Prohibit testimony from expert witnesses whose compensation depends upon the outcome of the lawsuit.

RECENT ENACTMENTS

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

- *West Virginia S.B. 6 (2015) (codified at W. Va. Code § 55-7B-7)*: Adds a requirement to criteria for an expert to qualify to testify on the standard of care that the opinion is grounded on scientifically valid peer-reviewed studies if available.
 - *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.
 - *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.
- Statements made by a healthcare provider indicating it would attempt to remediate an unanticipated outcome, compromise or settle a medical malpractice claim, or pay or write off medical expenses are also inadmissible.

Endnotes

- 1 See David L. McKnight & Paul J. Hinton, *International Comparisons of Litigation Costs* 2 (Inst. for Legal Reform, June 2013).
- 2 Paul Hinton et al., *Costs and Compensation of the U.S. Tort System* 26 (Inst. for Legal Reform, Oct. 2018).
- 3 As the report has grown over six editions, it presents “101 Ways” in a figurative sense. A count of the reform options and recently enacted legislation presented in this report will likely exceed that number.
- 4 *The Economist* has observed that America’s enforcement system is “the world’s most lucrative shakedown operation.” Tom Easton, *The Criminalisation of American Business*, *The Economist*, Aug. 24, 2014.
- 5 See Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. Times, Dec. 18, 2014.
- 6 See Rob McKenna, Elbert Lin & Drew Ketterer, *Mitigating Municipality Litigation: Scope and Solutions* (Inst. for Legal Reform, Mar. 2019).
- 7 *City of New Haven v. Purdue Pharma, L.P.*, No. X07 HHD CV 17 6086134 S, 2019 WL 423990 (Conn. Super. Ct., Jud. Dist. of Hartford, Jan. 8, 2019).
- 8 James Tierney, Maine’s attorney general from 1980 to 1990 and a veteran of litigation against tobacco companies, has recognized that the surge of city and county governments jumping into the opioid cases is counter-productive. “Their presence in these suits drastically reduces the opportunity to settle the opioid cases, and that means delay and more people dying,” said Tierney. “All of these guys are going to show up and they’re all going to want their share.” Peter Hayes & Steven M. Sellers, *From Opioids to Guns: Cities, Counties Step Up Civil Suits*, Bloomberg BNA, Mar. 15, 2018 (quoting James Tierney).
- 9 For example, Nebraska Attorney General Doug Peterson cautioned that in the opioid litigation “[i]t is unnecessary for cities and counties to file a separate legal action, and such lawsuits may actually delay the states’ efforts to expedite recovery on behalf of our citizens.” Letter from Douglas J. Peterson, Nebraska Attorney General, to Lynn Rex, Executive Director, League of Nebraska Municipalities and Larry Dix, Executive Director, Nebraska Association of County Officials, Apr. 30, 2018. In the federal opioid multidistrict litigation, this phenomenon has led plaintiffs’ lawyers to propose a novel “negotiation class” to try to resolve the morass. See Jeff Overly & Emily Field, *3 Takeaways as ‘Negotiation Class’ Idea Jolt Opioid MDL*, Law360, June 14, 2019 (“Friday’s motion depicted the negotiation class as an invention born of necessity, arguing that ‘it is difficult to imagine any other feasible mechanism that could coordinate the needs of a class of more than 20,000 city and county entities.’”).
- 10 For example, the attorneys general of 27 states have expressed concern that certifying a “negotiation class” of city and county plaintiffs in the federal opioid multidistrict litigation would intrude on their duty to protect state interests, and could harm government entities from their own states, violate the due process rights of absent class members, and run afoul of federal rules governing class certification. See Letter from Texas Attorney General Ken Paxton & California Attorney General Xavier Becerra to Hon. Dan Aaron Polster, U.S. District Court Judge for the Northern District of Ohio, June 24, 2019.
- 11 See Cary Silverman & James Muehlberger, *The Food Court: Trends in Food and Beverage Class Action Litigation* (Inst. for Legal Reform, Feb. 2017).

- 12 See Cary Silverman & Jonathan Wilson, *State Attorney General Enforcement of Unfair or Deceptive Acts and Practices Laws: Emerging Concerns and Solutions*, 65 Kan. L. Rev. 209 (2016).
- 13 Qui tam claims under the False Claims Act increased over the past decade from 379 in 2008 to 645 in 2018, and peaked at 757 claims in 2013. See U.S. Dep't of Justice, *Fraud Statistics – Overview*, October 1, 1986 – September 30, 2018.
- 14 42 U.S.C. § 1396h(b).
- 15 See Jonathan L. Diesenhaus, *The Great Myths of State False Claims Acts: Alternatives to Qui Tam Statutes* 10 (Inst. for Legal Reform, Oct. 2013).
- 16 See Memorandum from Michael Granston, Director United States Department of Justice, Commercial Litigation, Civil Fraud Section, to Commercial Litigation Branch, Fraud Section, Jan. 10, 2018 (known as the “Granston Memo”) (discussing DOJ authority under 31 U.S.C. § 3739(c)(2)(A)).
- 17 See Jeff Overly, *DOJ to Snuff Out FCA Suit Targeting United Health Unit*, Law360, Feb. 25, 2019.
- 18 See P. David Yates, *DOJ: A Company Created to File Lawsuits Has Wasted 1,500 Hours of the Government’s Time*, Forbes, Dec. 19, 2018; Jeff Overly, *DOJ Aims Torpedo at 11 FCA Kickback Suits*, Law360, Dec. 18, 2018.
- 19 For more information on these proposed reforms, see Peter B. Hutt II, Anna Dolinsky, David W. Ogden & Jonathan G. Cedarbaum, *Fixing the False Claims Act: The Case for Compliance-Focused Reforms* (Inst. for Legal Reform, Oct. 2013).
- 20 See *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2002 (2016).
- 21 See *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773 (2017); *Daimler AG v. Bauman*, 134 U.S. 746 (2014).
- 22 See *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773 (2017); *BNSF R. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *TC Heartland LLC v. Kraft Food Group Brands LLC*, 137 S. Ct. 1514 (2017); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).
- 23 G. Thomas Munsterman & Cary Silverman, *Jury Reforms in Arizona: The First Year*, Judges Journal (Winter 2006).
- 24 Editorial, *For Long Trials, Raise the Pay for Jurors*, Denver Post, Jan. 20, 2015.
- 25 *The Verdict: Better Pay for Juries*, Chi. Trib., Sept. 24, 2004.
- 26 See Nat’l Ctr. for State Courts Jury Trial Innovations (2nd ed. 2006); Am. Bar Ass’n, *Principles for Juries and Jury Trials* (2005).
- 27 *Hoffer v. Shappard*, 380 P.3d 681, 695-96 (Idaho 2016).
- 28 Idaho Code § 12-121.
- 29 See Barbara Hoberock, *Unsuccessful Civil Cases Could Cost Thousands More as New Law Would Make Loser Pay All Attorney Fees*, Tulsa World, May, 15, 2017 (discussing H.B. 1470 (Okla. 2017)).
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- 32 *Villani v. Seibert*, 159 A.3d 478 (Pa. 2017).
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- 34 John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 550 (2010).
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- 37 Mark D. Plevin et al., *Where Are They Now: Part Eight: An Update on Developments in Asbestos-Related Bankruptcy Cases*, Mealey’s Asbestos Bankr. Rep., vol. 6, no. 2, Sept. 2016, at 13-17.

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- 39 *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 82 (W.D.N.C. Bankr. 2014).
- 40 *Id.* at 86.
- 41 *Id.* at 84.
- 42 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
- 43 See Fed. R. Evid. 702, Committee Notes on Rules—2000 Amendment (citing cases).
- 44 *In re: Amendments to the Fla. Evid. Code*, No. SC 19-107 (Fla. May 23, 2019).
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- 56 *In re: Nat’l Prescription Opioid Litig.*, No. 1:17-MD-02804 (N.D. Ohio May 7, 2018).
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- 67 See Am. Med. Ass’n, Press Release, *AMA Adopts New Policies on Final Day of Annual*

- Meeting*, June 15, 2016; *see also* Jessica Karmasek, *AMA: Lawyer Ads Are Alarming Prescription Drug Users, Jeopardizing Health Care*, *Forbes*, July 21, 2016.
- 68 See Letter from Anna K. Abram, Deputy Commissioner for Policy, Planning, Legislation, and Analysis, U.S. Food and Drug Admin. to The Hon. Andy Harris, M.D., U.S. House of Representatives (undated 2017).
- 69 See FTC, Letter Regarding Proposed Amendments to the Tennessee Rules of Professional Conduct Relating to Attorney Advertising (Jan. 24, 2013).
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- 71 See Ass’n of Professional Responsibility Lawyers, 2015 Report of the Regulation of Lawyer Advertising Committee 28 (June 22, 2015). Thirty-six of 51 jurisdictions responded to the survey.
- 72 *Id.* (“People who complain about lawyer advertising are predominantly other lawyers and not consumers.”)
- 73 King & Tippet, *Drug Injury Advertising*, at 39.
- 74 See *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 650 (1985) (permitting lawyer discipline in medical device litigation where contingency-fee advertisement did not disclose client liable for costs); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 464-65 (1978) (upholding ban on in-person or phone solicitation of injured people); *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977) (invalidating blanket rule on truthful attorney advertising, while reaffirming that “[a]dvertising that is false, deceptive, or misleading of course is subject to restraint”); *see also* *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980) (establishing balancing test for restrictions on commercial speech that considers whether government interest is substantial and regulation is not more extensive than necessary).
- 75 See Steven B. Hantler et al., *Moving Toward the Fully Informed Jury*, 3 *Geo. J. of L. & Pub. Pol’y* 21, 32-33 (2005) (providing compilation of state statutes and court decisions on seatbelt use admissibility).
- 76 See, e.g., *Nabor Well Services, Ltd v. Romero*, 456 S.W.3d 553 (Tex. 2015) (overturning prior cases prohibiting admissibility of seatbelt usage evidence).
- 77 Ga. Code Ann. § 9-2-8 (enacted 2010); Kan. Stat. Ann. § 60-5201 (enacted 2012); Tenn. Code Ann. § 1-3-119 (enacted 2012).
- 78 For example, the supreme courts of Pennsylvania and Nevada recently issued liability-expanding bad faith decisions. See *Rancosky v. Washington Nat’l Ins. Co.*, 170 A.3d 364 (Pa. 2017) (diluting the standard for awarding punitive damages in a statutory bad faith action by allowing punitive awards even if there is no showing that the insurer was motivated to deny a claim due to “self-interest or ill will”); *Century Surety Co. v. Andrew*, 432 P.3d 180 (Nev. 2018) (ruling that an insurer that breaches its contractual duty to defend its policyholder is subject to liability for any consequential damages, including a judgment in excess of the policy’s limits, caused by the breach even if the insurer did not act in bad faith).
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- 82 S.B. 1117, Reg. Sess. (Va. 2019).
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- 84 S.B. 220 (Ohio 2018) (codified at Ohio Rev. Code §§ 1354.01 et seq. and amending 1306.03 and 3772.01).
- 85 Ohio Rev. Code § 1354.02(A).
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- 87 Ohio Rev. Code § 1354.04.

- 88 See generally Mark Brennan, *Ill-Suited: Private Rights of Action and Privacy Claims* (Inst. for Legal Reform, July 2019).
- 89 Cary Clark et al., *Anticipating Potential Updates to Ill. Biometric Privacy Law*, Law360, June 5, 2019; see also Jeffrey N. Rosenthal & Thomas F. Brier Jr., *Biometrics and the New Wave of Class Action Lawsuits*, Legal Intelligencer, Mar. 1, 2019.
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- 91 Thomas Ahlering et al., *Copy-Cat Class Actions Meet Copy-Cat Legislation: Illinois’ BIPA Spurs New Biometric Privacy Legislation Across the Nation*, JD Supra, July 12, 2019.
- 92 Cal Civ. Code § 1798.150(a)(1) (authorizing a civil action when any consumer’s nonencrypted or nonredacted personal information is subject to “unauthorized access and exfiltration, theft, or disclosure”); see generally Al Saikali, Steve Vieux & Colman McCarthy, *The California Consumer Privacy Act: What Every In-House Lawyer Should Know*, Shook Hardy & Bacon, Apr. 2019.
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- 94 See Karen Kidd, *Push to Expand State Consumer Privacy Law Likely Is Not Over, California Manufacturers & Technology Association Says*, N. Cal. Record, July 26, 2019 (discussing S.B. 561, which did not meet legislative deadlines in the 2019 session, but is expected to reemerge in 2020); see also Cheryl Miller, *Senate Scraps Bill Giving Consumers Power to Sue for Data-Privacy Violations*, The Recorder, May 16, 2019.
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- 97 See, e.g., *O’Neil v. Crane Co.*, 266 P.3d 987 (Cal. 2012).
- 98 See Aaron D. Twerski & James A. Henderson, Jr., *Fixing Failure to Warn*, 90 Ind. L.J. 237 (2015).
- 99 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).
- 100 Lester Brickman, *Lawyers’ Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 Wm. & Mary Envtl. L. & Pol’y Rev. 243, 273 (2001).
- 101 Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14.
- 102 “Medical Monitoring and Asbestos Litigation”—A Discussion with Richard Scruggs and Victor Schwartz, 17:3 Mealey’s Litig. Rep.: Asbestos 19 (Mar. 2002) (quoting Richard Scruggs).
- 103 Tex. Civ. Prac. & Rem. Code § 41.0105.
- 104 *Haygood v. De Escabedo*, 356 S.W.3d 390 (Tex. 2011).
- 105 *Patchett v. Lee*, 60 N.E.3d 1025 (Ind. 2016).
- 106 *Weston v. AKHappytime, LLC*, 2019 WL 3519685 (Alaska Aug. 2, 2019); *Dedmon v. Steelman*, 535 S.W.3d 431 (Tenn. 2017).
- 107 *Smith v. Mahoney*, 150 A.3d 1200 (Del. 2016); see also *Stayton v. Delaware Health Corp.*, 117 A.3d 521 (Del. 2015).
- 108 See *Lee v. Bueno*, 381 P.3d 736 (Okla. 2016).
- 109 See Victor E. Schwartz & Cary Silverman, *The Case in Favor of Civil Justice Reform*, 65 Emory L.J. Online 2065, 2066-67 (2016) (documenting the rise of pain and suffering damages and the factors underlying this expansion).
- 110 *Condon v. St. Alexius Med. Ctr.*, 2019 ND 113, ¶ 16 (2019).

- 111 *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 914 N.W.2d 678 (Wis. 2018), overruling *Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005).
- 112 See *Horton v. Oregon Health & Sci. Univ.*, 376 P.3d 998 (Or. 2016) (overruling *Lakin v. Senco Products, Inc.*, 987 P.2d 463, modified, 987 P.2d 476 (Or. 1999)); see also *Rains v. Stayton Builders Mart*, 375 P.3d 490 (Or. 2016) (applying *Horton* to reverse trial court decision that did not apply limit).
- 113 See *Tam v. Eighth Judicial Dist. Ct.*, 358 P.3d 234 (Nev. 2015).
- 114 *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509 (Kan. 2019).
- 115 *Beason v. I.E. Miller Services, Inc.*, 441 P.3d 1107 (Okla. 2019).
- 116 *North Broward Hosp. Dist. v. Kalitan*, 219 So.3d 49 (Fla. 2017); *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014).
- 117 *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994).
- 118 See generally Mark A. Behrens & Cary Silverman, *Punitive Damages in Asbestos Personal Injury Litigation: The Basis for Deferral Remains Sound*, 8 Rutgers J.L. & Pub. Pol’y 50 (2011).
- 119 *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).
- 120 The Sixth Circuit recently invalidated Tennessee’s punitive damage limit on state constitutional grounds. See *Lindenberg v. Jackson Nat’l Life Ins. Co.*, 912 F.3d 3487 (6th Cir. 2018). That decision, however, is not binding on state courts.
- 121 Am. Med. Ass’n, *Medical Liability Reform – NOW!*, at 1 (2019 ed.).
- 122 *Id.*
- 123 *Id.* at 4.
- 124 *Id.* at 2.
- 125 See, e.g., Mark A. Behrens, *Medical Liability Reform: A Case Study of Mississippi*, 118:2 Obstetrics & Gynecology 335-39 (Aug. 2011).

Notes



U.S. CHAMBER

Institute for Legal Reform

202.463.5724 main
202.463.5302 fax

1615 H Street, NW
Washington, DC 20062

instituteforlegalreform.com