101 Ways to Improve State Legal Systems

Seventh Edition

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

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Contents

How to Use This Guide

Chapter

01

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 as well as 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.

Tort 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.[2] 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.[3]

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 Seventh Edition of *101 Ways* are:

- How can states prevent private plaintiffs' attorneys and local governments from misusing public nuisance law to address complex public policy issues that are squarely in the purview of legislatures?
- How can legislatures address "nuclear verdicts" that often result from trial tactics that manipulate and inflame juries?
- How can states discourage plaintiffs' lawyers from naming businesses that have little or no connection to the litigation as defendants?

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. Recent enactments show how legislators can move the proposals described in this guide from theory into practice.

The inclusion of a legal reform in this report does not necessarily mean that the U.S. Chamber of Commerce 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 the context 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 as a useful resource to the reader.

Additional information on these and other legal reform issues can be found at [www.instituteforlegalreform.com.](http://www.instituteforlegalreform.com)

101 Ways to Improve State Legal Systems offers some of the many options available to foster a sound legal system that promotes states' economies.

Address Over-Regulation & Enforcement

Chapter

02

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 offense. There is a troubling dynamic, 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," deviation from non-binding guidance documents, 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. In addition, 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 their 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 four core areas.

State legislators can:

1. Adopt a transparent process with close government oversight when state officials hire private lawyers on a contingency fee basis to bring enforcement actions.

2. Enact safeguards authorizing the state to oversee litigation brought by local government entities when those actions duplicate state enforcement efforts.

3. Reject calls to deputize private citizens and contingency fee lawyers to enforce state law or sue businesses as a means to advance political goals or seek a payday.

4. Ensure that unfair and deceptive trade practices laws help consumers rather than enable private lawyers to circumvent the evidence needed to recover in a tort suit or obtain lucrative fees when consumers were not misled.

States can enact reforms to protect the fundamental principles of fairness and impartiality that are the hallmark of our legal system.

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."[4]

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 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 and financial support of the officeholder, 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 the 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.

Options

1. Adopt aspects of the Transparency in Private Attorney Contracting (TIPAC) law, which 17 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 the 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 the use of contingency fee contracts in the preceding year and the status of pending contingency fee litigation.

2. Legislators should also consider including the following additional elements:

    - Government control: Retention agreements must include safeguards requiring government attorneys to retain complete control over the litigation and recognizing that government attorneys have exclusive settlement authority (enacted in several states).

    - Eliminate financial motive to punish: A contingency fee may not be based on 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 statutory safeguards that require them to obtain express authority before hiring outside counsel.

Recent Enactments

- *Oklahoma S.B. 984 (2022) (amending Okla. Stat. tit. 74, § 20i)*: Requires state agencies and officials to use an open request for proposal process when seeking outside counsel in a matter where fees may exceed $1 million. Mandates inclusion of due process safeguards in contingency fee contracts between the state and outside counsel, such as ensuring that government attorneys have complete control over the litigation and settlement. Requires agencies and officials to disclose to the attorney general any past or present relationship between the attorney or firm and state agency, the reason a contingency fee arrangement is believed to be in the state's interest, and the justification for hiring the private attorney or firm before entering a contract. Requires submission of a copy of contracts in which fees may be $1 million or more, along with supporting information, to the Legislative Oversight Committee. Establishes a maximum sliding scale for contingency fees ranging from 25% to 5% with the percentage declining as the amount of recovery increases. Prohibits a total fee in excess of $50 million. Makes contingency fee contracts available to the public on the attorney general's website and requires firms to maintain records of their time and expenses. Requires the attorney general to submit an annual report to the governor and legislative leaders describing the use of contracts with private law firms and attorneys over the prior year. Prohibits provisions in settlement agreements that direct money to any place other than the state or state agency that is a party to litigation, and requires recoveries to be paid into the state treasury. Exempts from these requirements agencies that are not subject to notice and comment requirements and securities litigation conducted on behalf of state entities.

Other states that have enacted similar 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)

Another recently enacted law addressing the potential for conflicts of interest in government enforcement is:

- *Virginia H.B. 1700 (2019) (uncodified budget bill)*: Requires legal services provided by the Office of the Attorney General to be performed exclusively by an employee of the Office, an employee of another Virginia governmental entity, or an employee of a federal governmental entity pursuant to an agreement between the Office of the Attorney General and the federal entity. Employees of the Office of the Attorney General may only be compensated for providing legal services through public appropriations.

Mitigate Municipality Litigation

Purpose

There is a growing phenomenon in which cities, counties, and other local entities, along with local officials, sue corporate entities to address large-scale policy issues.[5] While local governments have occasionally brought lawsuits to pursue genuine local concerns, municipalities have 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 municipalities of severe, persistent 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 five years, local governments have pursued over 3,000 lawsuits against manufacturers, distributors, pharmacies, and retailers seeking costs attributed to opioid addiction.[6] These local claims are in addition to similar lawsuits filed by most state attorneys general and other entities.

The local litigation has faced challenges in court. For example, early in the litigation, 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]

More recently, a California judge dismissed claims seeking $50 billion in damages filed by several counties against opioid manufacturers, finding they offered no evidence that the companies' promotional activities caused doctors to inappropriately prescribe the medications and that the epidemic could not be considered a "public nuisance" when the federal government approved the drugs, finding their benefits outweighed their risks.[8] That decision contrasts with a November 2021 verdict in a federal court in Cleveland, where a jury found three pharmacy chains liable for contributing to the opioid abuse epidemic in a suit brought by a group of personal injury law firms hired on a contingency fee basis by two Ohio counties.[9]

The rise of municipality litigation adversely affects the civil justice system. The pile-on of lawsuits is counterproductive to resolving these disputes[10]—whether it is a statewide settlement or a national one.[11] 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.

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 of any recovery. 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 equally concerning.

Options

1. Change laws relating to municipalities' power to sue.

    - 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 a 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 discussed above.

    - 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.

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 narrowly 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 Enactments

- *Illinois S.B. 215 (2021) (codified as 735 ILCS 5/13-226)*: Prohibits additional state or local government entities from becoming a party to opioid litigation unless approved by the attorney general. Establishes the attorney general's authority to appear, intervene, and release any claims brought by a local government as part of a nationwide settlement.

- *Texas H.B. 2826 (2019) (primarily codified at Tex. Gov't Code §§ 2254.1032, .1034, .1036, .1037, and .1038)*:
    - Requires a political subdivision that retains outside counsel on a contingency fee basis to 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.

Reject Proposals to Deputize Private Citizens and Attorneys as Bounty Hunters

Purpose

Some states have deputized their private citizens and lawyers to bring actions on behalf of the general public or the government in certain types of cases. These laws often are proposed as a means to supplement or fill gaps in government enforcement. These laws effectively turn private citizens and attorneys into bounty hunters, giving them an incentive to file lawsuits in return for a share of the public's recovery, statutory damages, or civil penalties. They outsource the police power of the state and may spur litigation over slight, technical deviations from regulations or other minor issues, with the goal of receiving a massive payday.

For example, spurred by a 2005 federal law that provided a financial incentive to states,[12] many states have enacted laws modeled off the federal False Claims Act (FCA). The 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. False claims litigation brought by private individuals (known as *qui tam* claims) under federal law has exploded.[13] States that adopt similar laws or expand their FCAs risk a similar experience.

Another example is California's Private Attorney General Act (PAGA), which has become known as the "sue your boss" law. Enacted in 2004 and expanded through court rulings, PAGA gives private attorneys the power to enforce the state's labor laws through filing boilerplate complaints over even the most minor infractions, such as not including a full address on a pay stub or when an employee takes his or her lunch break. Under PAGA, 25% of the civil penalties imposed go to the plaintiff and his or her lawyer, while 75% goes to the state.[14] Meanwhile, the state performs little to no review of the claims, effectively acquiescing to private parties that sue with the authority of the state.

Small businesses and nonprofits that may lack the human resources staff to carefully comply with the minutiae of state labor laws can find themselves facing settlement demands for hundreds of thousands of dollars under the law. A wide range of California businesses, including farmers, restaurants, and truckers, say PAGA has cost them $5 billion in settlements and penalties in the past five years alone.[15] Furthermore, a recent study found that California workers receive far more benefit from government enforcement of the statute than from private lawsuits, which largely enrich attorneys.[16]

Other problematic laws include California's "Prop. 65," which authorizes private lawsuits against any business that sells a product with a trace of any of nearly 1,000 substances that a state agency has designated as possible carcinogens without a warning, even when unsupported by science,[17] and state laws permitting lawsuits alleging minor deviations from disability access standards.[18] Some state laws permit class action-type litigation without the need for plaintiffs to meet due process safeguards, such as California's PAGA and the District of Columbia's Consumer Protection Procedures Act.[19] Each of these statutes has become a cash cow for a small cadre of plaintiffs' lawyers and serial plaintiffs to demand that businesses pay extortionate settlements in exchange for dropping the claim.

Finally, in some instances, state legislatures have passed laws regulating business practices and charged government agencies with enforcing the law, only to find courts, at the invitation of plaintiffs' lawyers, creating a new private right of action under the statute. Such action invites profit-motivated attorneys to sue or threaten to sue for minor or technical issues with business practices or product labels that would not concern regulators. The lack of clarity over whether legislation authorizes a private right of action can also result in wasteful litigation and has implications for government policymaking.

Options

1. Reject legislation proposing new private rights of action or authorizing individuals to sue on behalf of the government that would encourage litigation by offering those who sue statutory damages, civil penalties, and attorneys' fees.

2. Provide businesses with an opportunity to cure technical compliance issues before a plaintiff may file a lawsuit.

3. Provide that any legislation that would create a private right of action or affirmative duty of care must 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 create an affirmative duty in the absence of such express language.[20]

4. States that have enacted False Claims Acts, or are contemplating doing so, should consider reforms detailed in two ILR publications, *Fixing the False Claims Act: The Case for Compliance-Focused Reforms* and *Fixing the FCA Health Care Problem*,[21] such as:
   - Provide liability protections to companies with certified compliance programs.
   - Adopt reforms applicable to all companies, such as a reasonable sliding-scale for the relator's share of the government's recovery that would incentivize bringing fraud to light while preserving more of the recoupment of taxpayer money.
   - In cases in which the government has sustained less than $5,000 in actual damages, limit the amount of per-violation civil penalties to no more than the amount of damages resulting from the violation.
   - Codify the unconditional authority of a state attorney general to dismiss meritless *qui tam* actions brought in the name of the state.

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, 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 providing for state 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 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.[22]

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 and 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.[23]

Options to Address Private Lawsuits

1. Codify the requirement that the practice that the complaint alleges is deceptive would mislead an objectively reasonable consumer, which may be decided by the court as a matter of law.

2. Require a plaintiff to show: (1) objectively reasonable reliance on an allegedly 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.

3. Require proof that the defendant willfully deceived the public for an award of treble damages where they are available or required.

4. 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.

5. 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.

6. Provide that the UDTPA does not create a private right of action under other state laws that are enforced by government agencies.

7. Clarify that a UDTPA action is to recover for economic losses stemming from the purchase of a product or service and is not a basis to recover for personal injury or death.

8. 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.

9. Do not permit statutory or treble damages in class actions.

    - 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.

10. Require a person, prior to bringing a lawsuit, to provide the prospective defendant with a certain number of days' notice of the intended action and, if the businesses cures the alleged violation, there is no action.

11. Authorize awards of attorneys' fees and costs to prevailing plaintiffs only when the defendant's conduct was willful.

Recent Enactments

- *Missouri S.B. 591 (2020) (amending Mo. Rev. Stat. § 407.025)*: Establishes that a court may dismiss a claim under the Missouri Merchandising Practices Act (MMPA) if a plaintiff fails to show a likelihood that the alleged unlawful act would mislead a reasonable consumer. Requires a plaintiff in individual and class actions to show damages with sufficiently definitive and objective evidence to allow the loss to be calculated with a reasonable degree of certainty. Prohibits MMPA claims in medical liability actions. Requires any award of attorneys' fees to have a reasonable relationship to the amount of the judgment and, when the judgment grants equitable relief, that the court base an award of attorneys' fees on the amount of time reasonably expended.

- *Arkansas H.B. 1742 (2017) (amending Ark. Code Ann. §§ 4-88-102, 4-88-113)*: Amends the Arkansas Deceptive Trade Practices Act (DTPA) to require proof of an actual financial loss caused by a person's reliance on an unlawful practice. Defines "actual financial loss" as "an ascertainable amount of money that is equal to the difference between the amount paid by a person for goods or services and the actual market value of the goods or services provided to a person." Generally precludes class actions under the DTPA and clarifies that an award of attorneys' fees to a prevailing plaintiff is discretionary, not mandatory.

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

- *Oklahoma S.B. 984 (2022) (amending Okla. Stat. tit. 74, § 20i)*: Prohibits provisions in settlement agreements that direct money to any place other than the state or state agency that is a party in the litigation, which must be paid into the state treasury.

- *Texas S.B. 2140 (2019) (amending Tex. Bus. & Com. Code § 17.47(c))*: Lessens 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.

Safeguard the Integrity of the Litigation Process

Chapter

03

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 has curbed this practice by ruling that a plaintiff cannot sue a business outside its home state unless the lawsuit involves conduct or harm that occurred in the forum state.[24] The Supreme Court's constitutional limitations on what is known as personal jurisdiction, however, do not address the particular court in which plaintiffs' lawyers can file a claim within a state. That is a matter of state venue laws. Loose state venue laws may allow plaintiffs' lawyers to pick and choose the court where they believe they will receive the most favorable judge or jury, even if that area has no connection to the lawsuit.

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

"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."

Plaintiffs' lawyers may also 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, the plaintiffs' lawyers do not disclose that they believe their clients' exposure to asbestos stemmed from the products of other 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 have to pay 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 may be significantly higher than inflation. These types of laws place undue pressure on defendants to settle even dubious claims 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 backed by the FDA—leading some people to discontinue their prescriptions or not seek treatment at all. 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 that is more appropriately heard elsewhere (though it should be acknowledged that this does not always happen).

Notes

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.[25] 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.
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.

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 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.

Ensure That Juries Represent the Entire Community

Purpose

Representative juries that include people from all walks of life are more likely to 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 requiring 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.[26] 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."[27]

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.[28] 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 fund may be financed by a nominal fee on the filing of civil complaints without having to use 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 additional 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. Offer a tax credit to small businesses that voluntarily pay employees during the first week of jury service. This concept has received the endorsement of jury task forces in states such as California,[29] Ohio,[30] Pennsylvania,[31] and, most recently, New Jersey.[32]

5. 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 Legislation and Enactments

- *Virginia S.B. 730 (2022)* (unanimously passed Senate; tabled in the House Appropriations Committee): Increases juror compensation from $30 per day to $50 per day.

- *West Virginia H.B. 4280 (2022)* (reported favorably from the House Judiciary Committee; interim hearing held in Sept. 2022): Increases juror compensation from $40 per day to $80 per day.

- *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 minimum juror compensation from $25 to $30 for the first day of jury service and from $40 to $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 that is 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 the 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 a "defendant-pays" system, 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 against plaintiffs 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 without doing much to deter frivolous litigation. Even if a judge imposed fees on a losing plaintiff, in many cases, such individuals are "judgment proof," and a defendant that pursues trying to recover their fees would spend more money chasing after unattainable reimbursement.

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 authorizes individuals to bring a statutory cause of action for "wrongful use of civil proceedings." The law, known as the Dragonetti Act,[33] 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."[34]

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 that is not frivolous, 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. Colorado, Tennessee, and Texas have variations of this approach.[35] The Tennessee law limits fees to $10,000. The Texas law applies to claims that a court dismisses as having no basis in law or fact.

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.

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

- *Colorado H.B. 1272 (2022) (amending Colo. Rev. Stat. § 13-17-201)*: Preserves an existing law requiring courts to award a defendant its attorneys' fees and costs in personal injury cases when a complaint does not survive a motion to dismiss. Adds an exception for good faith claims for the express purpose of modifying existing precedent or interpreting the meaning or constitutionality of a law that had not been determined by the Colorado Supreme Court.

- *Texas H.B. 1774 (2017) (amending Tex. Ins. Code § 541.156 and adding § 542A.001 et seq.)*: Addresses a surge of abusive lawsuits alleging an insurer did not properly cover damages from hailstorms or 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 attorneys' 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.

Address Shotgun Pleading

Purpose

Shotgun pleading is a practice by which a plaintiff's attorney files a complaint that is vague in its allegations and does not provide sufficient notice to the person sued as to how he or she is responsible for the injury alleged. One form of shotgun pleading asserts multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants is subject to a particular claim.[36] In other words, rather than conduct an adequate investigation before filing a complaint, plaintiffs' lawyers simply take an indiscriminate "sue everyone" approach.

These types of claims violate the rules of civil procedure and courts sometimes dismiss them, usually providing an opportunity for the plaintiff's attorney to amend the complaint to add information connecting the claims to a specific defendant's conduct. In some cases, however, courts have overlooked this requirement and allowed shotgun pleading.

Shotgun pleading has become commonplace, for example, in asbestos litigation. Following a bankruptcy wave in the early 2000s that removed virtually the entire asbestos industry from the tort system, asbestos litigation became an "endless search for a solvent bystander."[37] Personal injury lawyers now name over 60 defendants in an average asbestos complaint and as many as 300 defendants in some cases.[38]

Litigation costs begin on day one for defendants and may continue for years, costing thousands of dollars, until dismissal is obtained. For example, in Madison County, Illinois, "one company has been sued by the same law firm over 400 times"—incurring more than $720,000 in defense costs—even though there were actual allegations against the company in only four cases.[39] As this type of litigation proceeds, those who are pulled into the case may feel compelled to settle to avoid mounting defense costs, even if they are not responsible for the plaintiffs' injury. Improper naming of defendants has also contributed to recent bankruptcies.[40]

In response to this abusive litigation practice, state laws seeking to limit "over-naming" are gaining traction.

Notes

Iowa passed a first-of-its-kind law in 2020 to help ensure that there is an evidentiary basis for each claim against each defendant named in an asbestos action. Arizona, North Dakota, Tennessee, and West Virginia have enacted similar laws.

Options

1. In litigation where there is a practice of naming many individuals or entities as defendants, require plaintiffs to file an information form shortly after filing the complaint that specifies the basis for each claim against each defendant, along with supporting documentation.

Recent Enactments

- *Arizona S.B. 1157 (2022) (to be codified at Ariz. Rev. Stat. § 12-783)*: Within 45 days of filing an asbestos action, a plaintiff must file a sworn statement specifying the basis for each claim against each defendant. Requires a court, on motion by a defendant, to dismiss a plaintiff's asbestos action without prejudice as to any defendant whose product or premises is not identified in the required disclosures.
- *North Dakota H.B. 1207 (2021) (codified at N.D. Cent. Code § 32-46.2-02)*: Within 45 days of filing an asbestos action, a plaintiff must file a sworn information form specifying the evidence that provides the basis for each claim against each defendant and includes supporting documentation. In addition, absent consent of all parties, asbestos cases may be joined for trial only if the cases relate to the exposed person and members of the person's household.
- *Tennessee H.B. 1199 (2021) (codified at Tenn. Code Ann. § 29-34-703)*: Within 30 days of filing an asbestos complaint, a plaintiff must file an information form stating the evidence that provides the basis for each claim against each defendant and include supporting documentation. Requires a court, on motion by a defendant, to dismiss a plaintiff's asbestos action without prejudice as to any defendant whose product or premises is not identified in the required disclosures. In addition, absent consent of all parties, asbestos cases may be joined for trial only if the cases relate to the exposed person and members of the person's household.
- *West Virginia H.B. 2495 (2021) (amending W. Va. Code § 55-7G-4)*: Within 60 days of filing an asbestos or silica action, a plaintiff must file a sworn information form that specifies the evidence that provides the basis for each claim against each defendant and includes supporting documentation. The court, on motion by a defendant, must dismiss a plaintiff's action without prejudice as to any defendant whose product or premises is not identified in the required disclosures.
- *Iowa S.F. 2337 (2020) (codified at Iowa Code § 686B.3)*: Requires asbestos plaintiffs to provide a sworn information form with the complaint that includes detailed

information and supporting documentation as to the plaintiff’s exposures and their connection to each defendant. The court must dismiss the action without prejudice as to any defendant whose product or premises is not identified in the required disclosures.

Provide Proportionality in Discovery

Purpose

The standard of "broad and liberal discovery," which has been applied for decades, has become an "invitation to abuse."[41] The costs associated with civil discovery have grown exponentially, frustrating the goal of obtaining a just, speedy, and inexpensive determination of every action and imposing significant burdens on both litigants and the judiciary. It is estimated that discovery costs comprise between 50% and 90% of the total litigation costs in a given case.[42] 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 a 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

"The standard of 'broad and liberal discovery,' which has been applied for decades, has become an 'invitation to abuse.' The costs associated with civil discovery have grown exponentially, frustrating the goal of obtaining a just, speedy, and inexpensive determination of every action and imposing significant burdens on both litigants and the judiciary."

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.

Recent State Judicial Action

- The Ohio Supreme Court amended the Ohio Rules of Civil Procedure in 2020 to incorporate a number of discovery rule changes based on the 2015 amendments to the Federal Rules of Civil Procedure. The changes in Ohio include redefining the scope of discovery to be "proportional to the needs of the case"; limiting the frequency or extent of discovery that is cumulative or duplicative or can be obtained from another source that is more convenient, less burdensome, or less expensive; allowing for the allocation of expenses to the requesting party; and placing specific limits on the production of ESI. Ohio's civil rule reforms also include changes regarding required initial party disclosures, expert witness disclosure requirements, and pre-trial discovery conferences.[43]
- Wyoming adopted a proportionality requirement similar to the federal rule by amending Rule 26(b) of its Rules of Civil Procedure, effective 2017.

Recent Legislative Enactments

- *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.

- *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."

Prevent Harassment of High-Level Executives Through Discovery Abuse

Purpose

It is a common tactic for plaintiffs' lawyers to target high-ranking corporate executives during the discovery process by attempting to subject them to time-consuming and intrusive depositions even when the official has no firsthand knowledge of the events involved in the lawsuit. These "apex depositions" are misused as a tactical weapon to harass corporate defendants or extract settlements unrelated to the merits of a claim.[44]

As one court explained, "The job of a president is to manage the company, not to fly around the United States participating in depositions about ... disputes of which the president has no personal knowledge."[45]

As another court recognized, "high ranking and important executives can be easily subjected to unwarranted harassment and abuse."[46]

In addition, these tactics can stifle the involvement of high-level executives in setting company policy, speaking for the company on important safety or other public issues, and advancing corporate culture. Such general actions by a company executive may be inappropriately used by plaintiffs' lawyers as a means to pull the official into the litigation.

In response, courts have adopted the "Apex Doctrine," which promotes sound public policy by curbing abusive discovery. This doctrine reduces the potential for abuse by limiting depositions of a company executive to situations in which the high-level corporate officer has unique or superior personal knowledge of discoverable information. Courts also often require that the information cannot be obtained by less intrusive means, such as by deposing lower-level employees.

Many state and federal courts have expressly adopted the Apex Doctrine, while others apply the principles of the doctrine[47] when determining whether high-level officers can be deposed.[48]

In August 2021, Florida became the first state to codify the Apex Doctrine when the state's high court amended the Florida Rules of Civil Procedure.[49] In doing so, the Florida Supreme Court recognized that "[p]reventing harassment and unduly burdensome discovery has always been at the heart" of the Apex Doctrine, and there is "no good reason to withhold from private officers the same protection Florida courts have long afforded to government officers."[50] Other states, through statute or court rule, can take similar action.

Note

While the Apex Doctrine may be enacted by legislatures in some states, in other states, adopting the doctrine may require amending court rules.

Options

1. Prevent misuse of discovery to subject corporate executives to time-consuming and intrusive depositions when the officer has no unique or superior knowledge of the events involved in the lawsuit by adopting the Apex Doctrine.

Recent State Judicial Action

- In 2022, the state high courts of Indiana and Georgia each issued decisions that declined to expressly adopt the Apex Doctrine, yet incorporated the doctrine's basic principles.[51] The Indiana Supreme Court characterized its decision as establishing "a legal framework that harmonizes [the Apex Doctrine's] underlying principles with [Indiana's] existing discovery rules."[52] The Georgia Supreme Court similarly held that trial judges need to apply "factors commonly associated with the apex doctrine."[53]
- In 2021, the Florida Supreme Court amended Florida Rule of Civil Procedure 1.280(h) to codify the Apex Doctrine. The change was effective immediately and applies to pending cases.

Ensure Class Actions Benefit Claimants, 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 a record-breaking $3.37 billion on defending themselves against class action lawsuits in 2021 (a 16% jump over the prior year), and the cost is expected to continue to grow.[54]

Many class action lawsuits provide little or no value to consumers. Often, these cases are privately settled for their nuisance value, making the attorney who filed the case and the individual who agreed to serve as the representative plaintiff the sole beneficiaries. When a case is settled on a class-wide basis, it is common for the lawyers to receive hundreds of thousands or millions of dollars in 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.[55] 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. It is not uncommon for consumers to receive less money from a class action settlement than the money that goes to paying attorneys' fees, litigation expenses, and the costs of administering the claims process.

Few class members actually seek compensation, often about 1% or 2% of the class.[56] The low claims rate suggests that many people do not view class actions as compensating them for real losses. As a result, courts routinely distribute unclaimed settlement money to nonparty organizations through a practice known as *cy pres*.

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. Prohibit class certification when there is no reliable and feasible way of identifying and distributing money to class members. Require class counsel to affirmatively demonstrate early in the litigation that they have a plan not only to identify absent class members but also to deliver to them any award the attorneys secure.

2. Prohibit the use of *cy pres* arrangements in class action settlements except where absolutely necessary—i.e., where multiple attempts at direct distribution of money to class members have been made, and where such efforts result in an actual residue of class money.

3. Prohibit class certification when a proposed class representative is a relative, or is a current or former employee, of class counsel. Require class counsel to disclose the circumstances under which each class representative agreed to be included in the complaint.

4. Establish a rule in all class actions that discovery may not proceed until threshold motions challenging the validity of the claims are resolved.

5. 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.

6. Preclude attorneys' fees that dwarf the benefits provided to class members. Options include:

   - Basing attorneys' 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 attorneys' fee awards that exceed the amount of money distributed to the class members.

7. Instruct courts to provide greater scrutiny to proposed noncash relief, such as settlements involving the distribution of coupons, vouchers, or products, or requiring minor labeling changes.

8. 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

- *Missouri S.B. 591 (2020) (amending Mo. Rev. Stat. § 407.025)*: Provides that in class actions brought under the Missouri Merchandising Practices Act (MMPA), a class representative must have acted as a reasonable consumer. The amount of attorneys' fees awarded must bear a reasonable relationship to the amount of the judgment. When a judgment grants equitable relief, the attorneys' fees must be based on the amount of time reasonably expended.

- *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 as a class action 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 the 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 140 employers into Chapter 11 bankruptcy.[57] Scores of trusts have been created to pay claims related to those companies' asbestos products. Asbestos trusts hold an estimated $30 billion to pay claimants.

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. 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."[58] 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 ...."[59] 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)."[60]

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) (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.)*

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 the 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.*[61] Its ruling emphasized the obligation of trial court judges to serve as "gatekeepers," guarding the courthouse against untrustworthy expert testimony.

When courts evaluate expert testimony under this approach, which is reflected in Rule 702 of the Federal Rules of Evidence, they consider such factors as whether the proposed scientific 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.[62]

Federal Rule 702 and the *Daubert* decision, however, are binding only in federal courts. While many states have adopted the core requirements applied in federal courts, 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

- In 2022, the Federal Committee on Rules of Practice and Procedure approved amendments to strengthen Rule 702 by addressing ways in which the rule has been misapplied by courts.[63] The amended rule clarifies that: (1) the proponent of expert testimony must establish its admissibility to the court by a preponderance of the evidence before it can be presented to a jury; and (2) an expert must not assert a degree of confidence in an opinion that is not derived from sufficient facts and reliable methods.[64] The rule amendment is slated to take effect at the end of 2023.

- About three-quarters of states follow a gatekeeping approach similar to that applied in federal courts.[65] The five most recent jurisdictions to adopt the federal approach are Maryland, Florida, New Jersey, Missouri, and the District of Columbia.

- Just six states continue to apply the less rigorous *Frye* standard for admission of expert testimony: California, Illinois, Minnesota, New York, Pennsylvania, and Washington. Several other states apply either their own unique approach to evaluating expert testimony or a hybrid of the most common approaches.

Options

1. Amend state rules for admission of expert testimony to be consistent with Federal Rule of Evidence 702. 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 Rule 702, 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 Judicial Action

- In 2020, Maryland's highest court replaced its longstanding rule governing the admission of expert scientific evidence with the more rigorous standard applied in federal courts and most other states. The decision completed what the court described as a "jurisprudential drift" over the past half-century toward greater scrutiny of expert evidence to prevent unreliable science from entering the state's courtrooms.[66]

- In 2019, the Florida Supreme Court exercised its rulemaking authority to strengthen the state's standard for admission of expert testimony.[67] This action followed the Florida

Legislature's attempt to adopt the same approach 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.[68]

- In a 2018 decision, the New Jersey Supreme Court found that "[p]roperly exercised, the gatekeeping function prevents the jury's exposure to unsound science through the compelling voice of an expert."[69] The state high court clarified that the key factors that federal courts use to evaluate the admissibility of expert testimony also guide New Jersey's state courts.

Recent Legislative Enactments

- *Missouri H.B. 153 (2017) (repealing and replacing Mo. Rev. Stat. § 490.065)*: Codifies an approach to evaluating the admissibility of expert testimony that is consistent with the standard applied in federal courts.

Safeguard the Right to Appeal

Purpose

The proper functioning of America's civil courts depends in part on 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), 10, 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. Intermediate appellate courts also promote consistency and predictability in the civil justice system by providing more case law that establishes binding precedent.

Until 2021, West Virginia lacked both an intermediate appellate court and full appellate review as a matter of right in the state's high court. After an effort spanning over a decade, West Virginia enacted legislation establishing an Intermediate Court of Appeals in April 2021. The new court began operating on July 1, 2022.

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 of orders granting or denying class certification.

Recent Enactments

- *West Virginia S.B. 275 (2021) (codified at W. Va. Code Ann. §§ 51-11-1 et seq.)*: Establishes a three-judge Intermediate Court of Appeals with jurisdiction to hear appeals of civil cases, decisions involving guardianship or conservatorship, and rulings of family courts, state agencies, administrative law judges, and the workers' compensation board.

2. Appeal bonds:

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

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. When judgment interest rates greatly exceed market rates, however, civil defendants are in effect punished for exercising their right to defend the claims against them or for exercising their right to appeal proceedings.

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. These awards are calculated based on a statutory interest rate. Some states set judgment interest rates decades ago and have not adjusted them.

Interest on a judgment can accumulate quickly and reach into the hundreds of thousands, or even millions, of dollars. The time to litigate and appeal a case is often based on factors beyond a defendant's control, such as the cooperativeness of plaintiff's counsel, the trial court's docket, the timing of the court in deciding an appeal, or delays that a defendant did not cause and cannot control (e.g., court closures due to the COVID-19 pandemic).

Some states retain fixed rates in the double digits to calculate judgment interest. Massachusetts, Rhode Island, and Vermont retain 12% pre- and post-judgment interest rates.[70] At least eight states retain a judgment interest rate of 10%.[71] Several other states apply a fixed interest rate of 8% or 9%.[72] These fixed rates are grossly disproportionate and arbitrary when compared to existing market rates.

Excessive judgment interest rates unfairly discourage civil defendants from mounting a fair defense, and, instead, increase pressure on defendants to settle claims quickly, regardless of the merits.

Notes

In 2021, Maine Governor Janet Mills vetoed legislation that would have dramatically increased pre- and post-judgment interest rates in civil cases other than those for small claims and on contracts and notes.[73]

Also in 2021, Illinois enacted a new law (S.B 72) imposing prejudgment interest in all actions brought to recover damages for personal injury or wrongful death, generally at a rate of 6%. In May 2022, a Cook County trial court invalidated this statute, finding that requiring an award in excess of the amount that the jury awarded violates the right to jury trial. The court also ruled that the law impermissibly applied to only certain civil litigants, running afoul of the state constitution's prohibition against "special legislation."[74] Other Illinois courts are not bound by the ruling and an appellate court is likely to eventually decide the issue.

Options

1. Set a sensible post-judgment interest rate that is tied to or reflects market rates.

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%.

Create Safeguards Around Third Party Litigation Funding

Purpose

There is a rapidly growing business of entities investing in litigation.[75] As Allison Chock, chief investment officer of a prominent funding company, observed, "[f]ive or ten years ago this industry barely existed in the USA. Now it's thriving …."[76] Third party litigation funding (TPLF) has quickly become a multi-billion dollar industry and a ubiquitous feature of civil litigation.[77]

This form of litigation funding involves hedge funds and others that invest in big-ticket litigation, such as mass tort claims and class actions, as well as commercial litigation. These investors front money to a law firm or party in exchange for an agreed-upon cut of any award or settlement. Funders invest in individual cases or, with increasing frequency, an entire portfolio of cases at a particular firm.

TPLF 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. For instance, one of the most notorious examples of litigation funding fueling abusive litigation is *Chevron Corp. v. Donziger*. In that case, TPLF played a significant role in a failed attempt to enforce an $8.6 billion judgment against Chevron in the United States after it was secured through fraud and corruption in an Ecuadorian court.[78]

TPLF is often used to provide the financial muscle behind questionable mass tort litigation. Lead generating companies and law firms borrow money to inundate the public with television, radio, and social media ads, use the sheer number of claimants to pressure a company into a global settlement, and take a lucrative contingency fee from clients they never met.[79] In one extreme example of this tactic, litigation funders pushed plaintiffs' law firms to encourage women to undergo unnecessary surgeries in order to drive up the value of their claims.[80]

In almost all cases, TPLF occurs under a veil of secrecy. As a result, the court and other parties do not know that, behind the scenes, others may be controlling the litigation. For example, after a court required disclosure of a funding agreement in a putative class action, it learned that the contract required the attorneys to obtain the lender's approval of expert witnesses, invite the lender to internal meetings, and seek the largest contingency fee possible.[81] "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."[82]

These undisclosed arrangements may also complicate the ability to resolve cases because a funder may pressure a borrower to reject a settlement offer that does not reimburse the lender's full investment. In addition, these arrangements may also violate ethical rules that prohibit arrangements in which attorneys or law firms share their fees with nonlawyers. A bankruptcy trustee, for example, recently alleged that while embattled plaintiffs' lawyer Tom Girardi's law firm misappropriated client settlement funds, litigation funders bankrolled the cash-strapped firm in exchange for half of the contingency fees collected in referred cases (which may have been improperly taken from the firm's clients).[83]

A simple step that can discourage improper practices and reveal conflicts is to provide transparency. State legislatures should require parties and their counsel to disclose to the court and other parties when a third party is funding litigation.[84] To ensure that claimants are aware of repayment obligations that could affect the advice offered by their lawyers, funded law firms should be required to disclose to current and prospective clients any agreement that would require that a portion of the client's recovery or the lawyer's fee be paid to a litigation funder. Policymakers should also protect defendants against the litigation risk-taking that funding may encourage by requiring litigation funders to pay fees, costs, sanctions, or other payments required by a court during or at the conclusion of litigation.

Notes

- To date, one federal district court requires disclosure of the presence and nature of TPLF in all cases pending before it. The U.S. District Court for the District of New Jersey adopted this requirement through amending its local rules in June 2021.[85] The Chief Judge of the U.S. District Court for the District of Delaware issued a standing order taking the same approach in April 2022, though it applies only to cases before the Chief Judge.[86] Litigants must disclose the name and address of the funders, provide a brief statement of the funders' financial interest in the litigation, and indicate whether the funders require any terms or conditions for settlement negotiation or approval. Parties may seek additional discovery upon a showing that the non-party has authority to make material litigation or settlement decisions, the interests of parties or the class are not being promoted or protected, or conflicts of interest exist.
- Since 2017, the U.S. District Court for the Northern

District of California has also required parties to automatically disclose third-party funding agreements in a proposed class, collective, or representative action.[87] In addition, the federal court overseeing opioid litigation ordered parties that obtained or were considering third party litigation funding to submit a description of the arrangement and other materials to the court.[88]

- States are considering eliminating or weakening Rule 5.4 of the Rules of Professional Conduct, which has long barred nonlawyers from sharing in legal fees or having an economic interest in a law firm. While proponents of these changes often claim that their motivation is to expand access to legal services for underserved populations by allowing new types of providers, such changes will open the door to more third party litigation funding.

- Arizona became the first and only state to eliminate Rule 5.4 in 2021.[89] The Arizona Supreme Court's action allows nonlawyers to inject capital into law firms and allows law firms to "recruit nonlawyer managers by giving them an equity interest in the firm's profits."[90] After this change, two leading litigation funders commented that it was now possible for them to co-own law firms in the state.[91]

- Utah took a different approach. Effective August 14, 2020, the Utah Supreme Court established a regulatory sandbox that will allow nontraditional legal service providers to operate, including entities owned or partially owned by nonlawyers. The court also created the Office of Legal Services Innovation to help the court oversee and regulate providers in the pilot program. The court did not alter the state's prohibition on fee sharing as applied to traditional law firms and individual attorneys.[92]

- In response to the California Bar's exploration of a regulatory sandbox approach, the state legislature enacted a bill in September 2022 requiring any such program to exclude corporate ownership of law firms and prohibit splitting fees with nonlawyers "due to grave concerns that it could undermine consumer protection by creating conflicts of interest" and "fundamentally infringe on the basic and paramount obligations of attorneys to their clients." The provision sunsets in 2025.[93]

- The Florida Supreme Court indicated in March 2022 that it "does not intend to adopt" a committee's recommendations to test nonlawyer ownership in law firms or fee splitting with nonlawyers.[94]

Options

1. Provide much-needed disclosure regarding litigation funding transactions by requiring any party and their counsel that are receiving financing for the litigation from a third party, which has the right to receive compensation that is contingent on, and sourced from, any proceeds of the lawsuit—whether by settlement, judgment, or otherwise—to disclose this relationship at the outset of the litigation and provide a copy of the funding agreement to the court and the parties.
2. Require litigation funders to pay fees, costs, sanctions, or other payments required by a court during or at the conclusion of litigation.

Recent Legislation & Enactments

- *Kansas S.B. 152 (2021-22) (Introduced Feb. 4, 2021)*: Requires automatic disclosure of third party funding agreements to other parties. Provides that a third party litigation funder is jointly liable for costs and monetary sanctions.
- *Louisiana S.B. 415 (2022) (introduced Apr. 4, 2022)*: Requires automatic disclosure of third party litigation financing agreements and provides that litigation financing is a permissible subject of discovery. Provides that a "litigation financer" is jointly liable for costs, payment of attorneys' fees, or monetary sanctions imposed by a court. Violations of the law render the litigation financing agreement unenforceable.
- *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.

Curb Predatory Consumer Lawsuit Lending Practices

Purpose

A quick internet search reveals numerous companies offering "cash for lawsuits." This form of lawsuit lending is the "legal equivalent of the payday loan."[95] These lenders offer immediate cash to individual plaintiffs, typically in personal injury lawsuits. The loans often come with sky-high interest rates that can leave borrowers with little to no recovery.

In some states, the consumer lawsuit lenders operate on dubious legal ground. Longstanding doctrines such as champerty have traditionally prohibited arrangements in which third parties take a financial interest in litigation. In addition, these arrangements typically charge interest rates and fees that would exceed levels permissible under state usury laws. Consumer lawsuit lenders claim they are not subject to safeguards applicable to other lenders, however, because they offer "non-recourse funding," meaning that in the event that an individual does not receive a settlement or judgment, that person is not obligated to repay the loan.

In addition to predatory lending concerns, consumer lawsuit lending makes it more difficult to resolve litigation and leads to unreasonable settlement demands. Injecting a lawsuit lender into a case incentivizes plaintiffs to reject reasonable offers because the plaintiff not only must consider how much of his or her recovery will go to a contingency fee lawyer, but also how much additional money is needed to pay off the lender.

Notes

- In 2019, the Sixth Circuit found that consumer lawsuit lending agreements are unenforceable due to Kentucky's statutory prohibition on champerty, which does not allow parties to have a financial interest in litigation aside from the parties and their lawyers.[96] This prohibition, the court observed, reflects Kentucky's "strong public policy against such assignments," which is "intended to prevent the injured party from being compelled to prosecute a claim that he may not wish to prosecute," "may interfere with or discourage settlement," and "encourages and multiplies litigation."[97] The court also ruled that the loan agreements "clearly violated" the express language of the state's usury law, which generally does not allow an APR above 8%.[98]

State legislatures should require a party to disclose to the court and other parties when a third party has a financial stake in the outcome of his or her case. State legislatures should also reject proposals to authorize or expand lawsuit lending practices and consider bills that subject lawsuit lenders to existing state consumer lending laws or similar requirements.

Options

1. Reject legislation that would expand the availability of consumer lawsuit lending.

2. Apply the same protections from existing fair-lending laws to consumer lawsuit lending 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. Require any party that is receiving financing from a third party where repayment is contingent upon the outcome of litigation to disclose this relationship and provide a copy of the funding agreement to the court and the parties.

Recent Enactments

- *Ohio S.B. 94 (2021-22) (introduced Feb. 24, 2021)*: Requires the consumer of a non-recourse civil litigation advance to file a copy of the contract with the court or other tribunal in which the underlying claim is being held and requires a copy to be served to each opposing party. Includes registration and bond requirements, caps on annual interest and fees, and consumer protections.

- *West Virginia S.B. 360 (2019) (codified at W. Va. Code Ann. § 46A-6N-1 et seq.)*: Regulates "litigation financers," 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 financers 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 financers may not pay referral fees to lawyers or medical professionals, attempt to direct the litigation or its resolution, or charge an annual fee of more than 18% of the original amount of money provided to the consumer for a period exceeding 42 months.

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 incident 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 that provide additional protections for legal consumers. An attorney who fails to comply shall be subject to court sanctions, disciplinary action by the state bar association or other such professional 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.

Prevent Misleading Lawsuit Advertising

Purpose

Traditionally, the legal profession frowned upon attorney advertising, but the public is now inundated with television commercials and internet ads soliciting them to “call right now” to file a lawsuit.[99] These ads often present themselves as public health alerts and warn viewers that use of a consumer product can cause an illness or disease, even if contrary to the scientific consensus. Other ads tell viewers 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 when it is approved by the FDA as safe and effective.

Research indicates that the hundreds of millions of dollars spent on lawsuit advertising each year are primarily driven by the perceived potential to pressure a business into a massive settlement that will result in a return on the investment in the advertising, rather than whether the claims have merit.[100]

“Lead generation” firms, also known as “aggregators,” often use demographic data and marketing tools to identify people most likely to have been exposed to a particular drug or medical treatment.[101] In some cases, it appears that unscrupulous firms use private health information to directly solicit individuals who have undergone medical procedures to file lawsuits.[102] 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 aggregators, call centers, and lawyers who are not business associates of a healthcare provider.[103]

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.”[104] In 2019, the AMA found that the misleading lawsuit advertising practices identified had become “even more pervasive” in recent years and called upon state legislatures to protect patient health.[105]

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.[106] In one survey, one in four respondents said they would stop taking a medication immediately after they viewed an actual lawsuit ad targeting that drug.[107] Another study found that many viewers of lawsuit ads mistakenly believed that a medical product had been recalled.[108]

According to data 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.[109] These reports included seven deaths and a range of other adverse events, with the most common being a stroke.[110]

More recently, misleading lawsuit ads sparked a public health crisis by discouraging individuals at-risk for HIV from taking preventative medications. A study of 1,500 at-risk youth and young adults who were candidates for such medication found half of this population had seen lawsuit ads asserting that use of the drug can lead to kidney or bone injuries and nearly one in five of those who were aware of the lawsuits attributed not initiating or stopping use of the drug to the advertisements.[111] An outcry of LGBTQ+ and HIV organizations led social media companies to remove the ads.[112] Some ads went so far as to falsely claim that the manufacturer did not warn of the risks at all, despite their inclusion on the label, and misleadingly implied that cash settlements were available. That conduct earned a rare imposition of sanctions from a federal court in March 2021.[113]

Lawsuit ads also mislead the public by flashing multimillion-dollar verdicts. This practice not only suggests there is validity to the allegations, but that viewers may be entitled to a similar award. What viewers are not told is that trial courts often immediately reduce such excessive amounts. These types of "nuclear verdicts" are often further reduced or completely thrown out on appeal as unsupported by the evidence or a result of improper rulings or trial tactics designed to inflame a jury.[114]

Despite these concerns, federal and state regulators have not acted in a meaningful way. 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.[115] 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."[116] While the agency sent warning letters to several attorneys and lead generators that ran potentially deceptive lawsuit ads[117] and issued informal guidance in 2019,[118] the FTC has historically 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 ethics 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.[119] In addition, state bars and disciplinary authorities rarely enforce rules on advertisements.[120] What enforcement does occur typically follows the filing of a bar complaint—usually by a competing attorney or law firm.[121] 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.[122]

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.[123]

Notes

In April 2022, the U.S. Court of Appeals for the Fourth Circuit rejected a First Amendment challenge brought by personal injury lawyers to West Virginia's lawsuit advertising law, finding "the requirements here are just the sort of health and safety warnings that have been long considered permissible." [124] The court concluded that "all West Virginia requires is that attorneys truthfully present themselves as attorneys" and the "Act's prohibitions and disclosures work together to accomplish this end."[125] Plaintiffs' lawyers have appealed to the U.S. Supreme Court.[126]

The Texas Supreme Court revised a comment to its disciplinary rule regulating attorney advertising in 2022. The amended comment on advertising past success and results now reads: "A lawyer who knows that an advertised verdict was later reduced or reversed, or never collected, or that the case was settled for a lesser amount, must disclose those facts and the amount actually received by the client with equal or greater prominence to avoid creating unjustified expectations on the part of potential clients."[127]

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. Require attorney advertisements that publicize the amount of a verdict to indicate that "past results are not a guarantee of future success" and prohibit an attorney from advertising a verdict that was later reduced, reversed, never collected, or settled for a lesser amount without disclosing the amount actually received.

6. 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

- *Louisiana S.B. 383 (2022) (amending La. Rev. Stat. § 37:223)*: Prohibits deceptive advertising of legal services. Requires any legal services advertisement containing a reference or testimonial to past successes or results to include a disclaimer that "results may vary" and "past results are not a guarantee of future success." Requires any legal services advertisement or any unsolicited written communication that includes portrayal of a client or depiction of an event or scene that is not actual or authentic to include a disclaimer. Prohibits any attorney advertisement that promises results or utilizes a nickname, motto, or trade name that states or implies an ability to obtain results in a matter.

- *Louisiana S.B. 378 (2022) (to be codified at La. Rev. Stat. § 51:3221)*: Prohibits presenting a legal services ad as a "medical alert," "health alert," "drug alert," or "public service announcement," use of government agency logos, or using the word "recall" when a targeted product has not been recalled. For ads targeting FDA-approved prescription drugs or medical devices, it requires informing viewers that the product is approved by the FDA unless it has been recalled. For ads targeting FDA-approved prescription drugs, it also requires the ad to caution viewers to "consult your physician before making decisions regarding prescribed medication or medical treatment." Provides that violations are a deceptive and unfair trade practice.

- *Kansas S.B. 150 (2022)*: Prohibits deceptive practices in legal advertisements sponsored by individuals or entities that are not attorneys or law firms, such as lead generating companies. Prohibits presenting a legal services ad as a "medical alert" or "health alert," use of government agency logos, or using the word "recall" when a targeted product has not been recalled. For ads targeting FDA-approved prescription drugs, it requires cautioning viewers to "not stop taking a prescribed medication without first consulting your doctor." Prohibits using, selling, or transferring a person's protected health information for the purpose of soliciting an individual for legal services.

- *Indiana H.B. 1125 (2021) (codified at Ind. Code §§ 24-5-26.5 et seq.)*: Prohibits "commercial communications" for legal services from opening with "sensationalized warnings or alerts" that lead consumers to believe they are watching a government-sanctioned medical alert, health alert, consumer alert, or public service announcement. Prohibits advertising that is likely to cause consumers to fail to use or to discontinue medications or remove a medical device without appropriate independent medical advice. Provides that it is a deceptive act to misrepresent the risks associated with a drug or medical device, leave consumers with the false impression that the risks of the device or drug exceed its benefits, or to leave consumers with the false impression that the FDA has recalled the product. Requires advertising claims to be substantiated by competent and reliable scientific or medical evidence or backed by a final adjudication on the merits, including appeals. Authorizes the state attorney general, a manufacturer or seller of the medical device or drug, or a consumer who views the advertisement to enforce the law. An action may be brought against any combination of persons that authorize, finance, sponsor, participate in, or otherwise benefit from a deceptive act, except attorneys licensed to practice in Indiana. Authorizes courts to impose an injunction, order a person engaged in deceptive lead generation practices to reimburse or provide other restitution to aggrieved consumers, and require a violator to pay court costs and reasonable litigation fees.

- *West Virginia S.B. 136 (2020) (codified at W. Va. Code Ann. §§ 47-28-1 et seq.)*: Requires ads to inform consumers "[t]his is a paid advertisement for legal services." Prohibits presenting ads as a "consumer medical alert," "health alert," or "public service announcement." Prohibits ads that display a government agency logo in a manner that suggests an affiliation with the agency or that use the term "recall" when a product has not been recalled. Requires ads for lawsuits against prescription drug manufacturers to warn consumers to "not stop taking a prescribed medication without first consulting with your doctor." Prohibits disclosing protected health information for the purpose of soliciting an individual for legal services regarding the use of medications without consent. A person who willfully and knowingly violates this prohibition is subject to a fine of up to $5,000 and one year in jail.

- *Tennessee S.B. 352 (2019) (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. 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. Requires disclosure that an ad is a paid advertisement for legal services and the identity of the ad's sponsor. Ads targeting prescription drugs must warn viewers not to stop taking a prescribed medication without their doctor's advice. 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.

- *Louisiana S.B. 115 (2020) (codified at La. Rev. Stat. § 37:223)*: Requires any advertisement for legal services that refers to a monetary settlement or jury verdict obtained by the advertising attorney to disclose all fees paid to the attorney that are associated with the settlement or award.

- *Texas S.B. 1189 (2019) (codified at Tex. Gov't Code § 81.151)*: Prohibits presenting a television advertisement for legal services as a medical alert, health alert, drug alert, or public service announcement. Prohibits displaying the logo of a federal or state agency in a manner that suggests approval or affiliation, or using the term "recall" to refer to a product that has not been recalled. Ads must warn viewers, verbally and visually, "Do not stop taking a prescribed medication without first consulting a physician." 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. Provides a safe harbor for ads reviewed and approved by the State Bar. 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

Chapter

04

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 determining a defendant's liability proportionally based on fault. In order to properly allocate fault, states are clarifying that juries should consider everyone who 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.

Liability laws are often all "stick" and no "carrot." For example, a business's technical violation of a statute or regulation for providing a product or service may establish liability. In most states, however, a company that complies with, and even substantially exceeds, such standards does not

"At the foundation of a fair civil justice system is the method by which responsibility for an injury is allocated among those involved."

receive a commensurate benefit. States can protect consumers by adopting a presumption that a business is not liable when providing a product or service if it has met or exceeded government requirements or, at least, preclude punitive damages in such instances.

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

Finally, this section considers reforms available to address unwarranted insurance litigation and how state legislatures can protect the personal data of state residents without spurring abusive no-injury class action lawsuits.

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.

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, the 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. Responsible parties may not be present at trial for many reasons. The plaintiff may have settled with a party or the tortfeasor may be insolvent, immune, or beyond the jurisdiction of the court. Many states allow juries to consider the full picture of the events surrounding an injury when allocating responsibility, including the responsibility of settling parties and those not named as defendants. These states include Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Michigan, Minnesota, Mississippi, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming.

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;[128]
    - the plaintiff bears a greater percentage of fault than the combined percentage of fault attributed to others;[129] or
    - the plaintiff is 50% or more responsible for the injury or damages claimed.[130]

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.[131]

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 the admission of such evidence.[132] 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.[133]

Recent Enactments

- *West Virginia S.B. 439 (2021) (codified at W. Va. Code Ann. § 17C-15-49a)*: Allows juries to consider the failure of an occupant of a vehicle to wear a seatbelt as evidence of the plaintiff's negligence in certain types of cases and circumstances.

- *Louisiana H.B. 57 (1st Extraordinary Sess. 2020) (repealing La. Rev. Stat. § 32:295.1(E))*: Repeals a statute that prohibited a jury from considering a person's failure to wear a safety belt in violation of state law as evidence of comparative negligence or for purposes of mitigation of damages.

- *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.

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. When 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, when 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 including Alaska, Arizona, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Michigan, Mississippi, Oklahoma, Tennessee, Utah, and Wyoming.
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 the 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 Enactments

- *Georgia H.B. 961 (2022) (amending Ga. Code Ann. § 51-12-33)*: Provides that in cases involving one or more defendants, damages are apportioned among all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was named as a party to the suit, according to the percentage fault of each person or entity. Adopted in response to the Georgia Supreme Court's decision in *Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC*, 862 S.E.2d 295 (Ga. 2021), which interpreted the state's apportionment statute to apply only in cases involving multiple named defendants.

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 businesses with fairness; and protect the public interest.

Notes

During the COVID-19 pandemic, businesses struggled to operate amidst frequently shifting federal, state, and local requirements, changing best practices, and developing science. In response, many states enacted legislation providing that businesses and healthcare providers would not face liability if they followed public health guidance and executive orders that applied at the time of a person's alleged exposure to the virus.

Prior to the pandemic, several states enacted generally applicable laws providing 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 laws 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.[134] 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.[135] This 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. Earlier enactments in New Jersey, Ohio, Oregon, and Utah are limited to FDA-approved pharmaceuticals and medical devices. Laws later enacted in Arizona, Oklahoma, and Tennessee 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, service, or conduct 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 Enactments

Many states enacted legislation protecting businesses, schools, healthcare providers, and others from lawsuits if they followed applicable public health guidance or state and local orders during the COVID-19 pandemic. These laws vary from state to state, but generally consider an organization's compliance when deciding liability for a person's exposure to the virus. Some of these laws expire upon the conclusion of the declared public health emergency or a specific sunset date.

- *Alabama S.B. 30 (2021) (codified at Ala. Code §§ 6-5-790 et seq.).*
- *Alaska H.B. 76 (2021).*
- *Arizona S.B. 1377 (2021) (codified at Ariz. Rev. Stat. § 12-516).*
- *Arkansas H.B. 1487 (2021) (codified at Ark. Code § 16-120-1101 et seq.).*
- *Florida S.B. 72 (2021) (codified at Fla. Stat. Ann. § 768.38).*
- *Kansas S.B. 283 (2021) (codified at Kan. Stat. Ann. § 60-5504).*
- *Kentucky S.B. 5 (2021) (codified at Ky. Rev. Stat. 39A.275).*
- *Montana S.B. 65 (2021) (codified at Mont. Code Ann. § 27-1-1606).*
- *Nebraska LB 139 (2021) (codified at Neb. Stat. § 25-3603).*
- *North Dakota H.B. 1175 (2021) (codified at N.D. Cent. Code § 32-48-04).*
- *South Carolina S. 147 (2021) (to be codified in tit. 15, ch. 3 of the S.C. Code).*
- *Texas S.B. 6 (2021) (codified at Tex. Civ. Prac. & Rem. Code § 148.003).*
- *Iowa S.F. 2338 (2020) (codified at Iowa Code § 686D.6).*
- *Louisiana H.B. 826 and S.B. 435 (2020) (codified at La. Rev. Stat. §§ 9:2800.25, 29:773).*
- *Michigan H.B. 6030 and 6031 (2020) (codified at Mich. Comp. Laws §§ 408.1085, 609.1455).*
- *Mississippi S.B. 3049 (2020) (codified at Miss. Code Ann. §§ 11-71-3, 11-71-5).*
- *Nevada S.B. 4 (2020) (codified at Nev. Rev. Stat. § 41.835).*
- *Oklahoma S.B. 1946 (2020) (codified at Okla. Stat. tit. 76, § 111).*
- *Wyoming S.F. 1002 (2020) (amending Wyo. Stat. § 35-4-114).*

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 100-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 novel liability rules. Instead of educating judges and policymakers on existing legal norms, the ALI has pivoted in some projects to recommend adoption of unprecedented 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, 25 states have enacted laws to codify the longstanding rule that property owners generally owe no duty of care to trespassers, which preempts adoption of this Restatement provision.[136]

In 2019, the ALI published 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. Nine states have enacted laws or resolutions providing that this Restatement does not constitute the public policy of the state and should not be followed to the extent it sets forth rules inconsistent with state law.

In 2022, the ALI adopted another first-of-its-kind Restatement that proposes major changes in the common law with respect to contracts between businesses and consumers. The Restatement of the Law, Consumer Contracts recommends courts adopt a separate set of "consumer contract" rules that operate differently from the general law of contracts. Consequently, many of this project's recommended rules are innovations, not restatements, of common law. Instead of restating an established area of common law, this Restatement proposes rules to advance a particular policy agenda, namely to undermine what constitutes the adoption of contract terms and to subject agreements between businesses and consumers to heightened judicial scrutiny with respect to terms supplied by the business. This Restatement also obscures the lack of legal support for its novel proposed departures in the law, which creates a high potential to confuse (or worse, mislead) courts about the law.

Options

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 (Insurance Restatement)

- *Arizona H.B. 2272 (2022) (codified at Ariz. Rev. Stat. 20-110)*: Provides that a secondary source on insurance in any legal treatise, scholarly publication, textbook, or other explanatory text does not constitute the law or public policy of the state and is not authoritative if the secondary source purports to create, eliminate, expand or restrict a cause of action, right or remedy, or conflicts with other state law.

- *North Carolina H.B. 366 (2021) (codified at N.C. Stat. § 58-1-2)*: Provides that a secondary source on insurance in any legal treatise, scholarly publication, textbook, or other explanatory text does not constitute the law or public policy of the state and is not authoritative if the secondary source purports to create, eliminate, expand or restrict a cause of action, right or remedy, or conflicts with other state law.

- *Oklahoma S.B. 137 (2021) (codified at Okla. Stat. tit. 12, § 2411.1)*: Provides that a statement or restatement of the law of insurance in any legal treatise, scholarly publication, textbook, or other explanatory text shall not constitute the law or public policy of the state and shall not be authoritative if the statement purports to create, eliminate, expand or restrict a cause of action, right or remedy, or conflicts with other state law.

- *Utah H.B. 37 (2020) (codified at Utah Stat. § 31A-22-205)*: Provides that "a restatement of the law of liability insurance is not the law or public policy of this state" where inconsistent with a state statute, case law, or the state or federal constitution.

- *Arkansas S.B. 565 (2019) (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) (codified at N.D. Cent. Code § 26.1-02-34)*: 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 the interpretation of state law, rules, and principles of insurance law.

- *Indiana H. Concurrent Res. 62 (2019)*: States that the Restatement of the Law, Liability Insurance "does not reflect the determination of the State of Indiana's public policy, is not a faithful statement of existing law of the State of Indiana, is not an appropriate subject of notice, and should not be afforded recognition by courts as an authoritative reference regarding established rules and principles of insurance law."

- *Louisiana Sen. Res. 149 (2019)*: Declares that "any statement of the law contained in the Restatement of the Law, Liability Insurance does not constitute the public policy of Louisiana if the statement of law is inconsistent with or in conflict with Louisiana 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.

Recent Enactments (Trespasser Rule)

Many states have enacted laws codifying the established principle that a land possessor owes no duty of care to a trespasser except to refrain from causing willful and wanton injury, along with the "attractive nuisance" doctrine for injury to child trespassers. The most recently enacted laws are:

- *Montana S.B. 338 (2021) (codified at Mont. Code Ann. § 27-1-708)*.

- *Idaho H.B. 658 (2018) (codified at Idaho Code §§* 6-3101 *through 6-3103)*.

Other Recent Enactments

- *Texas H.B. 2757 (2019) (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, extra-contractual 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.[137]

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.[138]

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).[139]

- 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.[140]

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 available to third-party claimants.

5. Repeal statutes permitting third-party bad faith claims where applicable.

6. Clarify that enforcement of the state's unfair claims settlement statute is limited to a state insurance commission or department, and that any private statutory right of action must be established separately.

7. Establish limits on extra-contractual and/or punitive damages available in bad faith actions.

8. Oppose legislation that creates a private right of action for third-party claimants, reduces or eliminates the standard for finding bad faith, or increases penalties.

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) (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. Attorneys' fees may not be awarded if the insurer was entitled to but not provided with pre-suit notice.

Protect Privacy and Data Security

Purpose

As data breaches and the use of biometric information become more commonplace, states are considering how they can protect the security of their citizens' private information.[141] Over the past several years, state legislatures have also actively explored options to enact laws to protect privacy. As more states look to enact data privacy or breach laws, they often take cues from other states with existing laws, making the states a laboratory for experimentation.

Unfortunately, some states have adopted provisions, such as new private rights of action, that encourage unnecessary litigation. 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 is pushing 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.[142]

Perhaps no state law exemplifies the harms of private enforcement more than the Illinois Biometric Information Privacy Act (BIPA), enacted in 2008. BIPA regulates the collection and storage of personal information, such as fingerprint or retina scans, and provides statutory damages ranging from $1,000 to $5,000 per violation. Unlike other state laws, BIPA's enforcement mechanism allows an individual to bring a private claim for a violation of any provision of the law, not just in response to a data breach. The private right of action under BIPA is so broad that it has enticed plaintiffs' lawyers to file class actions on behalf of individuals who have experienced no injury at all. The range of available damages allows plaintiffs' lawyers to seek thousands of dollars for mere technical violations.[143]

Not surprisingly, 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.[144] 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 workplace 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 requirements to file a class action.[145] 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.[146]

The Illinois Supreme Court is considering other issues that could encourage more BIPA litigation in the future. The court is poised to decide, for example, whether plaintiffs' lawyers can seek up to $5,000 for each employee whose fingerprint is scanned without a required BIPA notice or pile on those penalties even more, imposing this penalty for each scan of an employee's fingerprint when clocking in and out of work over months or years.[147]

This highly litigious environment discourages companies from adopting innovative technology (like biometric authentication) that actually improves the security of sensitive information. While several state legislatures have considered bills modeled on BIPA, Illinois' law illustrates a problematic approach that states should ultimately avoid.[148]

Another approach that poses problems comes from California. In 2018, California enacted the first comprehensive data privacy bill in the country, the California Consumer Privacy Act (CCPA). The law establishes a private right of action following a data breach[149] and provides for statutory damages ranging from $100 to $750 "per consumer per incident," which can easily turn into an astronomical sum. Since the enactment of the CCPA, California passed another significant piece of privacy legislation, the California Privacy Rights Act (CPRA), which amends the CCPA. These amendments are effective January 1, 2023.

Instead of following Illinois and California, states should pursue alternative approaches that protect privacy without unnecessary litigation. For example, in March 2021, Virginia enacted a comprehensive data privacy bill similar to the CCPA, but, unlike the California law, the Virginia Consumer Data Protection Act does not contain a problematic private right of action.[150] Similarly, Colorado's 2021 comprehensive data privacy law, the Colorado Privacy Act,[151] does not provide a private right of action. Connecticut and Utah have also taken this approach. These laws go into effect in 2023.

Some states have advanced comprehensive privacy bills that have not gained the support needed for enactment. For example, the Florida House recently passed the highly-problematic Florida Privacy Protection Act (FPPA), but the bill died in the Senate.[152] Notably, the Florida Senate significantly limited the availability of a private right of action contained in the House bill and eliminated a private right of action for data breaches. Likewise, state legislators rejected the Washington Privacy Act (WPA), which was essentially a "copy-cat" bill of the CCPA.[153]

Ohio's commonsense cybersecurity law encourages businesses and others to adopt a program to protect personal information that "reasonably conforms to an industry recognized cybersecurity framework."[154] Organizations that meet the Ohio law's requirements receive safe harbor from tort liability in the event of a data breach.[155] The Ohio statute also instructs that it does not provide a private right of action with respect to any act or practice it regulates.[156] Along with Ohio, Utah and Connecticut have adopted cybersecurity safe harbor statutes.[157]

In sum, legislation addressing data security and collection of biometric information should provide clear guidance to businesses about their responsibilities, encourage the adoption of reasonable security safeguards of personal information, and empower government agencies or officials—not profit-motivated contingency fee lawyers—to enforce the law's provisions.

Options

1. Expressly preclude a private right of action in data security and privacy legislation. Oppose legislation that authorizes a private right of action, or allows lawsuits for technical violations of the statute when consumers experienced no financial injury.

2. Grant a safe harbor against liability to organizations that 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. 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.
- Require awards of attorneys' fees to be proportional to the benefit to consumers.

4. 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.

5. Provide for enforcement of data security, biometric, and privacy laws exclusively by state 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.[158]

Recent Enactments

- *Connecticut S.B. 6 (2022)*: Provides a comprehensive data privacy law that is exclusively enforced by the attorney general.
- *Virginia H.B. 2307 (2021) (codified at Va. Code Ann. §§ 59.1-575 et seq.)*: Provides a comprehensive data privacy law that is exclusively enforced by the attorney general.
- *Colorado S.B. 21-190 (2021) (codified at Colo. Rev. Stat. §§ 6-1-1301 et seq.)*: Provides a comprehensive data privacy law that is exclusively enforced by the attorney general and district attorneys.
- *Utah H.B. 80 (2021) (codified at Utah Code Ann. §§ 78B-4-701 et seq.)*: Enacts a comprehensive data privacy law that is exclusively enforced by the attorney general upon referral from the Utah Division of Consumer Protection. Provides businesses with an affirmative defense to tort claims stemming from a data breach if they have a cybersecurity program in place meeting certain requirements.
- *Connecticut H.B. 6607 (2021) (codified at Conn. Stat. Ann. §§ 42-901 et seq.)*: Provides that in a tort action stemming from a data breach, an entity is not subject to punitive damages if it had a cybersecurity program in place meeting certain criteria.
- *Ohio S.B. 220 (2018) (codified at Ohio Rev. Code §§ 1354.01 et seq.)*: Establishes a "legal safe harbor" that provides an entity with an affirmative defense to tort claims stemming from a data breach if it had a cybersecurity program in place meeting certain criteria.

[L]egislation addressing data security and collection of biometric information should provide clear guidance to businesses about their responsibilities, encourage the adoption of reasonable security safeguards of personal information, and empower government agencies or officials—not profit-motivated contingency fee lawyers—to enforce the law's provisions.

Improve Product Liability Law

Chapter

05

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 risks. But when courts impose liability on businesses viewed as "deep pockets" that are not responsible for injuries, prices needlessly rise and consumers may lose access to beneficial products.

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.

During the COVID-19 pandemic, many states took special steps to ensure that their residents had access to masks and other personal protective equipment, hand sanitizer and disinfectants, and innovative medical treatments.[159] They did so by offering liability protections to companies that shifted operations to make supplies outside of their ordinary line of business, significantly ramped up production, and quickly developed new products to meet critical public health needs.

As the pandemic subsides, 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

"These options would prevent plaintiffs' lawyers and courts from transforming consumer protection laws from a means of recovering the cost of a product or service to an alternative way of seeking damages for personal injuries stemming from alleged product defects where unsupported by product liability law."

and product that caused injury. They would not be able to take shortcuts to establish 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.

These options would prevent plaintiffs' lawyers and courts from transforming consumer protection laws from a means of recovering the cost of a product or service into an alternative way of seeking damages for personal injuries stemming from alleged product defects where unsupported by product liability law.

In addition, 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 illness 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.[160] These cases do not allege that the products themselves are defective, which is the linchpin for liability under product liability law. Lawsuits have also sought to impose liability on entire industries based on market share, civil conspiracy, or other theories rather than on the individual or business actually responsible for the plaintiff's harm.[161]

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.[162] 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.[163]

Plaintiffs' lawyers also 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 losses 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.[164]

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.

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 business as a 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 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.

Options

1. Limit the scope of product liability actions such that they may be permitted only against the manufacturer of the allegedly defective product and not 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

- *North Dakota H.B. 1207 (2021) (amending N.D. Cent. Code § 28-01.3-04)*: Amends the state's innocent seller law to require dismissal of a claim unless a plaintiff can show that the product seller exercised significant control over the product's design, manufacturing, instructions, or warnings, had actual knowledge of the defect, or created the defect.
- *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.

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 S.B. 635/S.B. 1243 (2022)*: These bills would preclude product liability lawsuits 15 years after the sale or lease of a product 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."[165] 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.[166] 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."[167] A former plaintiffs' attorney candidly described the litigation as an "endless search for a solvent bystander."[168]

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.

Options

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 have been enacted in Florida, Georgia, Iowa, Kansas, Ohio, North Dakota, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia.

Recent Enactments

- *North Dakota H.B. 1207 (2021) (codified at N.D. Cent. Code §§ 32-46.2-01 et seq.)*: Provides that an asbestos action related to an alleged nonmalignant asbestos-related condition may not be brought in the absence of evidence that the exposed individual has a physical impairment for which asbestos exposure was a substantial contributing factor. This showing must be made for each defendant and include a detailed narrative medical report signed by a qualified physician that includes certain information.

- *Iowa S.F. 376 (2017) (codified at Iowa Code §§ 686B.1 et seq.)*: 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.

[S]ick claimants with legitimate claims [must be] 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.

Address Damages “Run Wild”

Chapter

06

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 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 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."

damages, such as pain and suffering, are also causes 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. Plaintiffs' lawyers have learned that "the more you ask for, the more you get," a practice known as "anchoring." Many states have responded by enacting reasonable bounds for noneconomic damages in personal injury or medical malpractice claims and are considering other options.

Some 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's 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.

Address Tactics That Manipulate Juries Into Awarding Nuclear Verdicts

Purpose

Nuclear verdicts are often defined as verdicts of $10 million or more in tort cases that are comprised mainly of subjective awards of noneconomic damages such as pain and suffering or punitive damages. These outlier verdicts, which can reach hundreds of millions or even billions of dollars for a personal injury or wrongful death claimant, play an outsized role in the civil justice system. They drive up the costs of goods and services, adversely affect the cost and availability of insurance, and undermine fundamental fairness and predictability in the rule of law.

Recent ILR research indicates that nuclear verdicts are increasing in frequency and amount in personal injury and wrongful death cases.[169] These verdicts raise a basic question as to whether an award of, say, $30 million for pain and suffering truly serves a compensatory purpose, or instead is the product of improper plaintiffs' lawyer tactics that manipulate juror behavior and arbitrarily inflate damages.

Plaintiffs' lawyers engage in a variety of tactics designed to produce nuclear verdicts. For instance, they have increasingly embraced the so-called "reptile theory" to manipulate jurors. These tactics aim to instill a sense of danger in jurors' minds, divert their attention away from the evidence needed to evaluate liability and determine reasonable compensation, and inflame their sense of anger and outrage.[170] The goal is to make jurors feel that unless they protect the public from a large, uncaring corporation, their community will be at risk. As a result, a jury may return an extraordinarily high award to "send a message" even when a defendant was not at all responsible for a plaintiff's injury.

Jury anchoring arguments represent another pernicious tactic. In most states, plaintiffs' lawyers are permitted to suggest a specific damages amount or method of calculating damages to a jury.[171] These "anchors" are arbitrary, yet can have a profound impact on jurors struggling with assigning a monetary value to damages such as pain and suffering. The suggestion of a specific award or use of a scientific-sounding mathematical formula creates a psychologically powerful baseline that jurors often accept or "compromise" by negotiating the anchor upward or downward.

Other drivers of nuclear verdicts include persistent lawsuit advertising that misleads the public into believing that verdicts in the tens and hundreds of millions of dollars are the norm, and a rise in third parties funding litigation with the expectation that they will receive a substantial return on their investments.

States can employ a variety of approaches to avoid and respond to nuclear verdicts.

Options

1. Adopt pre-and post-nuclear verdict civil justice reforms, such as bifurcation of the compensatory and punitive damages phases of trials, venue reform, and statutory limits on noneconomic and punitive damages, as discussed in other sections of this paper.

2. Address misleading lawsuit advertising that touts nuclear verdicts without disclosing that they have been, or are nearly certain to be, reduced or overturned by the trial court or on appeal, as discussed in other sections of this paper.

3. Promote sound science in the courtroom, as discussed in other sections of this paper.

4. Require disclosure of third party litigation funding, as discussed in other sections of this paper.

5. Prohibit jury anchoring tactics by lawyers that seek to arbitrarily inflate damages by suggesting the jury award a specific amount of noneconomic damages or apply a mathematical formula designed to produce a nuclear verdict. In 2022, various state legislatures showed interest in this approach.[172]

Recent Enactments

- *Texas H.B. 19 (2021) (codified at Tex. Civ. Prac. & Rem. Code §§ 72.051 et seq.)*: Establishes bifurcated trials, on motion by a defendant, in negligence cases against commercial motor vehicle operators. In phase one, a claimant must prove that the driver of a commercial vehicle was negligent in operating the vehicle before the claimant may proceed against the driver's employer in phase two and seek exemplary damages. Prohibits introduction of a defendant's failure to comply with a regulation or standard that is unrelated to the case during the first phase of a trial determining liability for compensatory damages.

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 determining damages for medical expenses based on the amount paid for healthcare must explain why plaintiffs should recover amounts that vastly exceed actual costs.

Notes

About half of the 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, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, 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."[173] The Texas Supreme Court has applied this provision to preclude admission of billed amounts that do not reflect actual costs as evidence at trial.[174]

- In some states that limit phantom damages, 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. Two recent Texas Supreme Court decisions have significantly constrained the potential to abuse Letters of Protection by allowing defendants to seek discovery on the amounts typically paid for medical procedures and challenge the reasonableness of the amounts sought.[175]

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

In 2021, Colorado enacted legislation that went in the wrong direction by preventing defendants from learning whether a personal injury plaintiff used a medical lien to pay for medical treatment.[176] A Colorado-based national medical lien company lobbied for the law "after judges increasingly were allowing insurers and their defense teams to present evidence of the difference between what the lien company was trying to collect and what was paid to the patient's medical providers."[177]

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

Options

1. Provide that amounts billed that do not reflect amounts actually paid are inadmissible at trial. California, Iowa, Montana, 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.

Recent Enactments

- *Montana S.B. 251 (2021) (codified at Mont. Code Ann. § 27-1-308)*: Provides that medical expenses may not exceed amounts "paid by or on behalf of the plaintiff to health care providers that rendered reasonable and necessary medical services or treatment to the plaintiff," "necessary to satisfy charges that have been incurred and at the time of trial are still owing and payable to health care providers for reasonable and necessary medical services or treatment rendered to the plaintiff," and "necessary to provide for any future reasonable and necessary medical services or treatment for the plaintiff."

- *Iowa S.F. 2338 (2020) (codified at Iowa Code §§ 662.4, 668.14A)*: Limits evidence offered to prove past medical expenses to the amounts actually paid to satisfy the bills that have been satisfied and the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied. Evidence of the amounts actually necessary to satisfy bills that have been incurred may not exceed the amount by which the bill could be satisfied by the claimant's health insurance, regardless of whether insurance is or will be used to satisfy the bills. In a personal injury action, except certain medical liability actions, recoverable damages for medical care cannot exceed amounts actually paid to health care providers and any amount necessary to satisfy charges incurred but not yet satisfied.

- *Louisiana H.B. 57 (1st Extraordinary Sess. 2020) (codified at La. Rev. Stat. § 2800.27)*: Provides that when a health insurer or Medicare paid a claimant's medical expenses, a claimant may recover the amount actually paid to the medical provider by the insurer or Medicare and any copay or deductible, not the amount billed.

A court must award 40% of the difference between the amount billed and the amount actually paid to the contracted medical provider by an insurer or Medicare in consideration of the plaintiff's cost of procurement so long as this amount does not make the award unreasonable. When a claimant's medical expenses have been paid by Medicaid, the claimant's recovery of medical expenses is limited to the amount actually paid to the medical provider by Medicaid. Limits recovery of any other past medical expenses to amounts paid to a medical provider by or on behalf of the claimant, and amounts remaining owed to a medical provider, including medical expenses secured by a contractual or statutory privilege, lien, or guarantee. When a claimant's medical expenses are paid under the state's Workers' Compensation Law, recovery of medical expenses is limited to the amount paid under the medical payments fee schedule. The jury is informed only of the amount billed by a medical provider for medical treatment. Whether any person, health insurance issuer, or Medicare has paid or has agreed to pay any of a claimant's medical expenses is not disclosed to the jury. After the jury's verdict, the court considers evidence of recoverable past medical expenses paid by a health insurance issuer. This law does not apply to medical liability claims or claims brought pursuant to the Governmental Claims Act.

- *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.

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 a defendant.

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.

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 liability 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 liability 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.[178]

Juries may reach verdicts with large noneconomic damage awards due to sympathy for the plaintiff, bias against a deep-pocketed 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, 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.

- The Ohio Supreme Court is currently considering the constitutionality of the state's limit on noneconomic damages in personal injury cases.[179] The court has twice before rejected such challenges.[180]

- In 2021, the New Mexico Supreme Court upheld a $600,000 aggregate limit on nonmedical and punitive damages awards in medical liability actions.[181] In reaching its decision, the court considered the "great weight of persuasive authority" in other states finding that caps on tort damages do not violate the right to jury trial.[182] The legislature subsequently set a new statutory limit of $750,000 for individual healthcare providers and $4 million for hospitals, which will increase annually to account for inflation.[183]

- In 2021, the Missouri Supreme Court upheld a statute limiting noneconomic damages in medical liability cases to $400,000 for non-catastrophic and $700,000 for catastrophic personal injuries.[184] The 2015 statute was a response to a 2012 Missouri Supreme Court decision that overruled 20 years of precedent and held that a cap on noneconomic damages in common law medical liability cases violated the Missouri Constitution's right to jury trial.[185]

- In 2020, the Tennessee Supreme Court held that the state's $750,000 limit on noneconomic damages in personal injury cases ($1 million for certain types of "catastrophic loss or injury") satisfies the Tennessee Constitution's right to jury trial, separation of powers, and equal protection provisions.[186] That year, a Maryland appellate court also reaffirmed the constitutionality of the state's statutory limit on noneconomic damages in personal injury cases.[187]

- 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 fully compensated for any amount of medical care or lost wages," but only prevents them from receiving "more abstract damages" above the cap.[188]

- In 2018, the Wisconsin Supreme Court upheld the state's $750,000 limit on noneconomic damages in medical malpractice actions, overruling a prior decision.[189]

- State supreme courts that have invalidated statutory limits on noneconomic damages in recent years include Oregon (2020),[190] Kansas (2019),[191] Oklahoma (2019),[192] and Florida (2014/2017).[193]

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

4. Authorize higher noneconomic 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 $250,000 limit on noneconomic damages in personal injury cases set in 2004 based on the state's average annual wage adjustments, making the limit about $430,000 after July 2022).

Recent Enactments

- *California A.B. 35 (2022) (amending Cal. Civ. Code § 3333.2(b))*: Increases California's $250,000 limit on noneconomic damages in medical liability cases, set in 1975, to reflect inflation. Effective January 2023, the cap rises to $350,000 and will then increase $40,000 annually over 10 years. Sets a $500,000 limit on noneconomic damages in wrongful death cases, which will increase by $50,000 annually over 10 years. After the 10-year period, the levels will rise 2% annually.

- *New Mexico H.B. 75 (2021) (amending N.M. Stat. Ann. § 41-5-6)*: Sets a statutory limit of $750,000 in claims against individual healthcare providers, which will increase annually for inflation beginning in 2023. Sets a $4 million statutory limit per occurrence for claims against hospitals. This amount will increase by $500,000 annually to $6 million in 2026, then adjust annually for inflation. These damage limits do not apply to damages for past and future medical care or punitive damages.

- *Maine L.D. 841 (2019) (amending 18-C Maine Rev. Stat. Ann. § 2-807)*: Adjusts the statutory limit on noneconomic damages in wrongful death actions set in 1997 at $500,000 to $750,000.

- *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.

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."[194] 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.[195]

Recent Enactments

- *Texas H.B. 19 (2021) (codified at Tex. Civ. Prac. & Rem. Code §§ 72.051 et seq.)*: Establishes bifurcated trials, on motion by a defendant, in negligence cases against commercial motor vehicle operators. In phase one, a claimant must prove that the driver of a commercial vehicle was negligent in operating the vehicle before the claimant may proceed against the driver's employer in phase two and seek exemplary damages. Prohibits introduction of a defendant's failure to comply with a regulation or standard that is unrelated to the case during the first phase of a trial determining liability for compensatory damages.

- *Missouri S.B. 591 (2020) (amending Mo. Rev. Stat. §§ 510.261, 538.205, 538.210)*: Provides that punitive damages may be imposed when a plaintiff proves by clear and convincing evidence that the defendant intentionally harmed the plaintiff without just cause or acted with a deliberate and flagrant disregard for the safety of others. Similarly, in medical liability actions, a jury must find by clear and convincing evidence that the health care provider engaged in malicious misconduct or intentionally harmed the plaintiff before awarding punitive damages. Punitive damages may be awarded against an employer or other principal for an agent's acts only if a managerial agent authorized, participated in, or ratified the outrageous conduct, or the agent was "unfit" for the job, making it "reckless" for the principal to employ the person. A claim for punitive damages may not be included in an initial complaint. Rather, a plaintiff seeking punitive damages must file a motion with the court no later than 120 days before the final pretrial conference or trial date. The motion must be supported by evidence and show that a trier of fact could reasonably conclude that the standard for punitive damages can be met. The new law requires more than nominal damages to support punitive damages and prohibits awarding punitive damages based on harm to nonparties.

Prevent Excessive Punitive Damages Awards

Purpose

The U.S. Supreme Court has observed that punitive damages have "run wild."[196] 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.

Note

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

State high courts have upheld statutory limits on punitive damage with few exceptions.[197] For example, in 2020, the Tennessee Supreme Court repudiated an outlier federal appellate decision that predicted that the state's highest court would find a statutory limit on punitive damages unconstitutional.[198]

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. Preclude punitive damages in cases in which the product or service at issue was approved by a government agency or complied with government regulations, to ensure that businesses that follow the law are not punished.

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.[199] Data also indicates that about two-thirds of these claims are dropped or dismissed.[200] The cost of defending such lawsuits is high—on average it costs over $30,000 to defend against a dropped claim.[201] When a lawsuit goes to trial, the litigation expenses alone can be about five to 10 times that amount.[202] As a result of lawsuits, some physicians in certain states face liability premiums that exceed $100,000 or even $200,000 per year.[203]

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.[204]

During the COVID-19 pandemic, states were especially concerned that healthcare workers struggling to treat surges of patients would face lawsuits as a result of staff and equipment shortages and postponed procedures. More than two-thirds of states, through executive order, legislation, or both, responded by adopting liability protections. Many of these laws limited liability for COVID-19 related claims to situations in which a healthcare provider was grossly negligent when treating a patient or committed reckless, willful, or intentional misconduct. Some of the laws include additional safeguards, such as a certificate of merit requirement or an expedited statute of limitations.

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. Raise the standard for liability of healthcare providers when they provide care during a declared public health emergency.

6. Allow healthcare providers to express statements of apology or regret without fear that such statements can be used against them in litigation.

7. Eliminate phantom damages.

8. 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.

9. 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.

10. 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.

COVID-19 Enactments

State legislation protecting healthcare providers from excessive liability during the COVID-19 pandemic includes:

- *Alabama S.B. 30 (2021) (codified at Ala. Code § 6-5-794).*

- *Florida S.B. 72 (2021), amended by S.B. 7014 (2022) (codified at Fla. Code. Ann. § 768.381).*

- *Indiana H.B. 1002 (2021) (codified at Ind. Code §§ 25-1-20, 34-6-2-10.4, 34-6-2-10.5).*

- *Kentucky S.B. 5 (2021) (codified at Ky. Rev. Stat. § 39A.275).*

- *Missouri S.B. 51 (2021) (codified at Mo. Rev. Stat. § 537.1010).*
- *North Dakota H.B. 1175 (2021) (codified in at N.D. Cent. Code § 32-48-05).*
- *Montana S.B. 65 (2021) (codified at Mont. Code Ann. § 27-1-1604).*
- *South Carolina S. 147 (2021) (Act No. 99).*
- *South Dakota H.B. 1046 (2021) (codified at S.D. Codified Laws § 21-68-4).*
- *Tennessee S.B. 14 (3d Extra. Sess. 2021) (codified at Tenn. Code Ann. §* 14-5-101).
- *Texas S.B. 6 (2021) (codified at Tex. Civ. Prac. & Rem. Code § 74.155).*
- *Washington S.S.B. 5271 (2021) (codified at Wash. Rev. Code § 7.70.040).*
- *West Virginia, S.B. 277 (2021) (codified at W. Va. Code Ann. §§ 55-19-3, 55-19-4).*
- *Georgia S.B. 359 (2020) (codified at Ga. Code Ann. § 51-16-2).*
- *Iowa S.F. 2338 (2020) (codified at Iowa Code § 686D.6).*
- *Kansas H.B. 2016 (2020), amended by S.B. 283 (2021) (codified at Kan. Stat. Ann. §§ 60-5503, 60-5506).*
- *Massachusetts S. 2640 (2020).*
- *Michigan H.B. 6159 (2020) (codified at Mich. Comp. Laws § 691.1475).*
- *Mississippi S.B. 3049 (2020) (codified at Miss. Code. Ann. § 11-71-7).*
- *New Jersey S.B. 2333 (2020) (P.L.2020, c.18).*
- *North Carolina, S.B. 704 (2020) (codified at N.C. Code Ann. § 90-21.133).*
- *Ohio H.B. 606 (2020) (codified at Ohio Rev. Code Ann. § 2305.2311).*
- *Oklahoma S.B. 300 (2020) (codified at Okla. Stat. tit. 63, § 6406).*
- *Utah S.B. 3002 (2020) (codified at Utah Code §§ 58-13-2.7, 58-85-106).*
- *Virginia S.B. 5082 (2020) (codified at Va. Code Ann. § 8.01-225.03).*
- *Wisconsin A.B. 1038 (2020) (codified at Wis. Stat. § 895.4801).*

Other 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 an 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.

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

Endnotes

1 *See* David L. McKnight & Paul J. Hinton, *International Comparisons of Litigation Costs* 2 (U.S. Chamber of Commerce Institute for Legal Reform, June 2013).

2 As the report has grown over seven 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.

3 *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.

4 *See* Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue,* N.Y. Times, Dec. 18, 2014.

5 *See* Rob McKenna, Elbert Lin & Drew Ketterer, *Mitigating Municipality Litigation: Scope and Solutions* (U.S. Chamber of Commerce Institute for Legal Reform, Mar. 2019).

6 *See* Geoff Mulvihill, Explainer: *Where Do US Opioid Trials, Settlements Stand?*, Assoc. Press, Apr. 11, 2022.

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 *See* Craig Clough, *Opioid Makers Cement Calif. Win as Judge Spurns Objections*, Law360, Dec. 14, 2021 (reporting on *People of the State of California v. Purdue Pharma L.P. v. Purdue Pharma L.P.*, No. 30-2014-00725287-CU-BT-CXC).

9 *See* Jeff Overley & Cara Salvatore, *Pharmacy Giants Fueled Opioid Crisis, Ohio Jury Finds*, Law360, Nov. 23, 2021.

10 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 counterproductive. "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).

11 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.

12 42 U.S.C. § 1396h(b).

13 *Qui tam* claims under the False Claims Act increased over the two decades from 314 in 2001 to 598 in 2021 and peaked at 757 claims in 2013. Plaintiffs' lawyers have filed an average of 650 *qui tam* claims annually over the last five years. *See* U.S. Dep't of Justice, Fraud Statistics – Overview, October 1, 1986 – September 30, 2021.

14 Cal. Lab. Code § 2699(i).

15 Will Shuck, *The Battle Between Companies and Their Workers' Right to Sue*, Capitol Weekly, Apr. 21, 2022.

16 *See* CABIA Found., California Private Attorneys General Act of 2004: Outcomes and Recommendations (Oct. 2021).

17 *See, e.g.*, Bao Vu & Kelly Beskin, *9th Circuit Ruling Halts Prop 65 Acrylamide Lawsuits, Again*, The Recorder, Mar. 31, 2022 (discussing *California Chamber of Commerce v. Council for Education & Research on Toxics*, No. 21-15745 (9th Cir. Mar. 17, 2022)).

18 Amy Yee, *U.S. Businesses Get Hit With Record Numbers of Disability Lawsuits*, Wash. Post, Apr. 14, 2022.

19 *See* Cary Silverman, James Muehlberger & Adriana Paris, *The Food Court: Developments in Litigation Targeting Food and Beverage Marketing* 12-14 (U.S. Chamber of Commerce Institute for Legal Reform, Aug. 2021).

20 Georgia, Kansas, and Tennessee have enacted legislation taking this sound approach. Ga. Code Ann. § 9-2-8 (enacted 2010); Kan. Stat. Ann. § 60-5201 (enacted 2012); Tenn. Code Ann. § 1-3-119 (enacted 2012).

21 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* (U.S. Chamber of Commerce Institute for Legal Reform, Oct. 2013) and Robert Salcido and Emily Gerry, *ILR Briefly: Fixing the FCA Health Care Problem* (Inst. for Legal Reform, Aug. 2022).

22 *See* Cary Silverman, James Muehlberger & Adriana Paris*, The Food Court: Developments in Litigation Targeting Food and Beverage Marketing* (U.S. Chamber of Commerce Institute for Legal Reform, Aug. 2021).

23 *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).

24 *See Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773 (2017); *Daimler AG v. Bauman*, 134 U.S. 746 (2014).

[25] *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).

[26] G. Thomas Munsterman & Cary Silverman, *Jury Reforms in Arizona: The First Year*, Judges Journal (Winter 2006).

[27] Editorial, *For Long Trials, Raise the Pay for Jurors*, Denver Post, Jan. 20, 2015.

[28] *See* Nat'l Ctr. for State Courts Jury Trial Innovations (2nd ed. 2006); Am. Bar Ass'n, Principles for Juries and Jury Trials (2005).

[29] Report of the Blue Ribbon Commission on Jury System Improvement, Recommendation 3.27 at 45-47 (May 17, 1996); Final Report: Task Force on Jury System Improvements, Recommendation 3.27 at 38-40 (rev. April 2004).

[30] Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service, at 29 (Feb. 2004).

[31] First Judicial District of Pennsylvania, Juror Participation Initiative, at 33 (2018).

[32] Jury Reform—Recommendations of The Committee of the Judicial Conference on Jury Selection 7-8 (2022); *see also* Administrative Determinations by the Supreme Court on the Report and Recommendations of the Committee of the Judicial Conference on Jury Selection (July 12, 2022) (accepting compensation recommendations).

[33] 42 Pa. C.S. §§ 8351 *et seq*.

[34] *Villani v. Seibert*, 159 A.3d 478 (Pa. 2017).

[35] *See* Colo. Rev. Stat. 13-16-107; Tenn. Code Ann. § 20-12-119(c)(1); Tex. Civ. Prac. & Rem. Code § 30.021; Tex. Gov't Code § 22.004(g).

[36] *Barmapov v. Amuial*, 986 F.3d 1321, 1324-25 (11th Cir. 2021) (citing *Weiland v. Palm Beach County Sheriff's Office*, 792 F.3d 1313, 1321-32 (11th Cir. 2015)).

[37] '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).

[38] Mark Behrens & Christopher Appel, *Over-Naming of Asbestos Defendants: A Pervasive Problem in Need of Reform,* 36 Mealey's Litig. Rep.: Asbestos, Mar. 24, 2021, at 1.

[39] James Lowery, *The Scourge of Over-Naming in Asbestos Litigation: The Costs to Litigants and the Impact on Justice,* 32 Mealey's Litig. Rep.: Asbestos, Jan. 24. 2018, at 22.

[40] Behrens & Appel, *Over-Naming of Asbestos Defendants*, *supra* note 38 at 4.

[41] Gordon W. Nertzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather Than the Exception*, 87 Denv. U. L. Rev. 513, 513 (2010).

[42] John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 550 (2010).

[43] *See* Amendment to the Ohio Rules of Practice and Procedure, effective July 1, 2020.

[44] *See Intelligent Verification Sys., LLC v. Microsoft Corp.*, No. 2:12-cv-525, 2014 WL 12544827, at *2 (E.D. Va. Jan. 9, 2014) (recognizing executives "require protection from litigation tactics [used] to create undue leverage by harassing the opposition or inflating its discovery costs").

[45] *Gen. Star Indem. Co. v. Atlanta Hosp. of Fla., LLC*, 57 So. 3d 238, 240 (Fla. Dist. Ct. App. 2011).

[46] *EchoStar Satellite, LLC v. Splash Media Partners, L.P.*, No. 07-cv-02611, 2009 WL 1328226, at *2 (D. Colo. May 11, 2009) (internal quotations omitted).

[47] *See, e.g., Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995).

[48] *See, e.g., State ex rel. Mass Mut. Life Ins. Co. v. Sanders*, 724 S.E.2d 353, 361 (W. Va. 2012).

[49] *In re Amendment to Florida Civil Rule of Procedure 1.280*, 324 So. 3d 459 (Fla. 2021).

[50] *Id*. at 460-61.

[51] *National Collegiate Athletic Ass'n v. Finnerty*, 191 N.E.3d 211 (Ind. 2022); *General Motors, LLC v. Buchanan*, 874 S.E.2d 52 (Ga. 2022).

[52] *Finnerty*, 191 N.E.3d at 217.

[53] *Buchanan*, 874 S.E.2d at 61.

[54] Carlton Fields, *2022 Carlton Fields Class Action Survey* 6-7 (2022).

[55] For examples of worthless and abusive class action settlements, *see* John H. Beisner et al., *Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform* 12-26 (U.S. Chamber of Commerce Institute for Legal Reform, Aug. 2022).

[56] *See id.* at 18; *see also* Mayer Brown LLP, *Do Class Actions Benefit Class Members?: An Empirical Analysis of Class Actions*, Appendix A (2013) (providing examples of cases involving distributions to less than one percent of the class).

[57] *See* Crowell Moring, List of Asbestos Bankruptcy Cases (last updated Apr. 29, 2022) (compiling all asbestos bankruptcies between 1982 and early 2022).

[58] *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 82 (W.D.N.C. Bankr. 2014).

59 *Id*. at 86.

60 *Id.* at 84.

61 *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993).

62 *See* Fed. R. Evid. 702, Committee Notes on Rules—2000 Amendment (citing cases).

63 Agenda Book, Committee on Rules of Prac. & Proc., June 7, 2022.

64 LCJ Applauds Unanimous Approval of Amendment to Rule 702 by the Committee on Rules of Practice and Procedure, Lawyers for Civil Justice, June 7, 2022.

65 Cary Silverman, *Fact or Fiction: Ensuring the Integrity of Expert Testimony* 18 (U.S. Chamber of Commerce Institute for Legal Reform, Feb. 2021).

66 *Rochkind v. Stevenson*, 236 A.3d 630 (Md. 2020); *see also* Victor E. Schwartz, *Maryland High Court Adopts Daubert Expert Evidence Standard*, (Wash. Legal Found., Opinion Letter, Sept. 24, 2020).

67 *In re: Amendments to the Fla. Evid. Code*, No. SC 19-107 (Fla. May 23, 2019).

68 *See DeLisle v. Crane Co.,* 258 So.3d 1219 (Fla. 2018); *see also In re Amendments to the Fla. Evid. Code*, 210 So.3d 1231, 1239 (Fla. 2017) (declining to adopt the *Daubert* statute "to the extent it is procedural").

69 *In re Accutane Litig*., 191 A.3d 560, 589 (N.J. 2018).

70 Mass. Gen. Laws Ann. ch. 231, §§ 6B, 6C; R.I. Gen. Laws § 9-21-8; Vt. Stat. Ann. tit. 12 § 2903.

71 States with 10% judgment interest rates include Arkansas, California, Connecticut, Hawaii, Maryland, Minnesota (for judgments over $50,000), South Dakota, and Wyoming. *See* Ark. Code § 16-65-114; Cal. Civ. Code § 3291; Cal. Code Civ. Proc. § 685.010; Conn. Gen. Stat. §§ 37-3b; Haw. Rev. Stat. §§ 478-3; Md. Code. Cts. & Jud. Proc. § 11-107; Minn. Stat. § 549.09(c)(2); S.D. Codified Laws §§ 21-1-13.1, 54-3-16; Wyo. Stat. § 1-16-102.

72 Colorado, Illinois, Oregon, New York have 8% or 9% judgment interest rates in some cases. Colo. Rev. Stat. § 5-12-101, 102; 735; Ill. Comp. Stat. § 5/2-1303; N.Y. C.P.L.R. § 5004; Or. Rev. Stat. § 82.010.

73 Me. L.D. 1160 (2021); Letter from Hon. Janet T. Mills to Members of the 130th Legislature re L.D. 1160 (June 25, 2021). The vetoed legislation would have provided for prejudgment interest rates of 12% per annum from the date of service of the notice of claim or service of the complaint, whichever is earlier. The bill also would have provided for post-judgment interest at 12% per annum from the date of judgment. Current pre- and post-judgment interest rates are tied to U.S. Treasury bill rates. In addition, the bill would have amended the law governing unfair claims settlement practices by allowing direct claims against third-party liability insurers and treble damages against insurers for violations.

74 *Hyland v. Advocate Health & Hosps. Corp*., No. 17 L 3541 (Ill. Cir. Ct., Cook County, May 27, 2022).

75 *See* John Beisner et al., *Selling More Lawsuits, Buying More Trouble* 6-11 (U.S. Chamber of Commerce Institute for Legal Reform, Jan. 2020).

76 IMF Bentham International Litigation Funding, Annual Report 2018 at 15.

77 *See* Swiss Re Institute, US Litigation Funding and Social Inflation (Dec. 2021).

78 *See Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 474-79 (S.D.N.Y. 2014).

79 *See* Orig. Pet. ¶ 76, *Shenaq v. Akin*, No. 2015-57942 (Tex. Dist. Ct. Harris Cty. filed Sept. 29, 2015) (describing the business model used by the AkinMears law firm in litigation involving allegedly defective mesh products).

80 Matthew Goldstein & Jessica Silver-Greenberg, *How Profiteers Lure Women Into Often-Unneeded Surgery*, N.Y. Times, Apr. 14, 2018.

81 Litigation Funding Agreement §§ 1.1, 10.1 (dated Mar. 29, 2016) (attached to Decl. of Caroline N. Mitchell in Supp. of Chevron Corp.'s Mem. in Opp'n to Mot. for Class Certification & Mots. to Exclude the Reports & Test. of Onyoma Research & Jasper Abowei as Ex. 13), *Gbarabe v. Chevron Corp*., No. 3:14-cv-00173-SI, ECF No. 186 (N.D. Cal. Sept. 16, 2016).

82 Amanda Bronstad, *Mass Tort Attorneys: Judges Want to Know About Your Outside Financing*, Law.com, May 2, 2019 (quoting U.S. District Court Judge Paul Grimm).

83 *See* Debra Cassens Weiss, *Litigation Lenders Bankrolled Tom Girardi Despite His Apparent 'Proclivities' for Stealing From Clients, Suit Says*, ABA J., Sept. 6, 2022; Brandon Lowrey, *Litigation Funders Helped Girardi 'Loot' Client Funds: Trustee*, Law360, Sept. 1, 2022; Amanda Bronstad, *Litigation Funder Had Illegal Fee-Sharing Deals With Girardi Keese, Lawsuit Alleges*, The Recorder, Sept. 1, 2022.

84 The federal rules similarly require a party to include among initial disclosures any insurance agreement under which an insurer may be liable to satisfy all or part of a judgment or reimburse payments made to satisfy the judgment. *See* Fed. R. Civ. Proc. 26(a)(iv).

85 D. N.J. Civ. R. 7.1.1, Disclosure of Third-Party Litigation Funding (adopted June 21, 2021).

86 Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022).

87 Standing Order for All Judges of the Northern District of California at 2 ¶ 19 (N.D. Cal., effective Jan. 17, 2017).

88 *In re: Nat'l Prescription Opioid Litig.*, No. 1:17-MD-02804 (N.D. Ohio May 7, 2018).

89 In the Matter of Restyle and Amend Rule 31; Adopt New Rule 33.1; Amend Rules 32, 41, 42 (Various ERs From 1.0 to 5.7), 46-51, 54-58, 60 and 75-76) (Ariz. Aug. 27, 2020) (effective Jan. 1, 2021).

90 William Marra, *Ariz. Law Firm Ownership Rule Change is a Win for Clients*, Law360, Sept. 3, 2020.

91 Sam Skolnik, *ABA Sides Against Opening Law Firms Up to New Competition*, Bloomberg Law, Aug. 9, 2022.

92 *See* Utah Sup. Ct. Standing Order No. 15 (Aug. 14, 2020).

93 A.B. 2958 (Cal. 2022) (to be codified at Cal. Bus. & Prof. Code 6034.1).

94 *See* Mark D. Killian, *Supreme Court Declines to Adopt Recommendations on Nonlawyer Ownership, Fee Splitting, and Expanded Paralegal Work*, Fla. Bar News, Mar. 8, 2022.

95 Ashby Jones, *Loan & Order: States Object to 'Payday' Lawsuit Lending*, Wall St. J., Apr. 28, 2013.

96 *Boling v. Prospect Funding Holdings, LLC*, 771 Fed. Appx. 562, 579 (6th Cir. 2019).

97 *Id*. at 579-80.

98 *Id*. at 582-84 (affirming district court's ruling and finding the interest rate provided in the lawsuit loan agreements "far exceeded the permissible statutory rate" set by the usury statute).

99 *See* Cary Silverman, *Bad for Your Health: Lawsuit Advertising and Solutions* (U.S. Chamber of Commerce Institute for Legal Reform, Oct. 2017) [hereinafter *Bad for Your Health*].

100 *See generally* Cary Silverman, *Gaming the System: How Lawsuit Advertising Drives the Litigation Lifecycle* (U.S. Chamber of Commerce Institute for Legal Reform, Apr. 2020).

101 *See* Doni Bloomfield & Shannon Pettypiece, *How Law Firms Use Facebook and Other Data to Track Down Medical Victims*, Bloomberg, May 27, 2015.

102 *See, e.g.*, Matthew Goldstein & Jessica Silver-Greenberg, *How Profiteers Lure Women Into Often-Unneeded Surgery*, N.Y. Times, Apr. 14, 2018.

103 HIPAA only requires "covered entities" and their "business associates" to maintain the confidentiality of personally identifiable health information. Covered entities include health plans (insurers), healthcare providers (doctors, hospitals, etc.), and healthcare clearinghouses. Business associates are contractors that provide services to covered entities such as legal, financial, or accounting services.

104 *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.

105 Am. Med. Ass'n, House of Delegates, Resolution 222 (A-19) (2019) (calling on state legislatures to prohibit attorney advertisements that misuse governmental logos or the term "recall," provide a clear warning on the dangers of stopping a course of treatment without consulting a physician, and require written consent before sharing personal health information).

106 *See, e.g.,* Jesse King & Elizabeth Tippett, *Drug Injury Advertising*, 18 Yale J. Health Pol'y, L. & Ethics 114 (2019); *see also* Elizabeth Tippett, *Medical Advice from Lawyers: A Content Analysis of Advertising for Drug Injury Lawsuits*, 41 Am. J.L. & Med. 7 (2015).

107 *See Bad for Your Health*, *supra*, at 21.

108 Christopher F. Tenggardjaja et al., *Evaluation of Patients' Perceptions of Mesh Usage in Female Pelvic Medicine and Reconstructive Surgery*, 85 Urology 326, 327 (2015) (finding that more than half of new patients (52%) that went to a specialty urology clinic to seek treatment for pelvic organ prolapse (POP) and stress urinary incontinence (SUI) mistakenly believed there was a recall due to TV ads recruiting individuals for lawsuits).

109 *See* Mohamed Mohamoud et al., *Discontinuing of Direct Oral Anticoagulants in Response to Attorney Advertisements: Data from the FDA Adverse Event Reporting System*, 53 Annals of Pharmacotherapy 962-63 (Sept. 2019) (reporting data through November 15, 2017).

110 *Id*. at 962.

111 Pedro A. Serrano et al., *Effect of Truvada Lawsuit Advertising on Preexposure Prophylaxis Attitudes and Decisions Among Sexual and Gender Minority Youth and Young Adults at Risk for HIV*, 35 AIDS 131-39 (2021).

112 *See, e.g.*, Alaric Dearment, *Misleading HIV Drug Lawsuit Ads Still Appear on Facebook Despite Efforts to Remove Them,* MedCityNews, Feb. 18, 2020; Erin Schumaker, *Facebook Removes Misleading HIV-Prevention Drug Ads*, ABC News, Dec. 31, 2019; Tony Romm, *Facebook Ads Push Misinformation About HIV Prevention Drugs, LGBT Activists Say, 'Harming Public Health'*, Wash. Post, Dec. 9, 2019.

113 Order Granting in Part Defendant's Motions for Sanctions Against Robert C. Hilliard and Hilliard Martinez Gonzales LLP, *Holley v. Gilead Sciences*, *Inc*., No. 18-cv-06972 (N.D. Cal. Mar. 12, 2021).

[114] *See* Cary Silverman & Christopher E. Appel, *Nuclear Verdicts: Trends, Causes, and Solutions* 9 (U.S. Chamber of Commerce Institute for Legal Reform, Sept. 2022).

[115] *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).

[116] *See* FTC, Letter Regarding Proposed Amendments to the Tennessee Rules of Professional Conduct Relating to Attorney Advertising (Jan. 24, 2013).

[117] Fed. Trade Comm'n, Press Release, *FTC Flags Potentially Unlawful TV Ads for Prescription Drug Lawsuits*, Sept, 29, 2019; *see also* Cary Silverman & Frank Cruz-Alvarez, *FTC Sends Warning to Mass Tort Lawyers and Lead Generators*, WLF Legal Pulse, Sept. 27, 2019.

[118] *See* Lesley Fair, *Fear Factor?*, Fed. Trade Commission Business Blog, Sept. 24, 2019.

[119] *See* Am. Bar Ass'n, Model Rules of Professional Conduct, Rule 7.1.

[120] A survey revealed that only 17% of responding jurisdictions actively monitor lawyer ads. Thirty-six of 51 jurisdictions responded to the survey. *See* Ass'n of Professional Responsibility Lawyers, 2015 Report of the Regulation of Lawyer Advertising Committee 28 (June 22, 2015).

[121] *Id*. ("People who complain about lawyer advertising are predominantly other lawyers and not consumers.").

[122] King & Tippett, *Drug Injury Advertising*, at 150.

[123] *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 the 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).

[124] *Recht v. Morrisey*, 32 F.4th 398, 417 (4th Cir. 2022) (internal quotations omitted).

[125] *Id*. at 419-20.

[126] *Recht v. Morrisey*, No. 22-175 (petition for certiorari filed Aug. 22, 2022).

[127] *See* Order Amending Comment 10 to Rule 7.01 of the Texas Disciplinary Rules of Professional Conduct, Misc. Docket No. 22-9011 (Tex. Jan. 31, 2022).

[128] *See, e.g.,* Colo. Rev. Stat. § 13-21-11; Idaho Code § 6-1404; Minn. Stat. Ann. § 604.01.

[129] *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.

[130] *See, e.g.*, Ga. Code Ann. § 51-12-33(g), Tex. Civ. Prac. & Rem. Code § 33.001; Wyo. Stat. § 1-1-109.

[131] *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).

[132] *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).

[133] *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).

[134] *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).

[135] *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.

[136] *See, e.g.,* Idaho Code §§ 6-3101 to 6-3103 (enacted 2018); Iowa Code § 462.1 (enacted 2017); Miss. Code Ann. § 95-5-31 (enacted 2016); S.C. Code Ann. § 15-82-10 (enacted 2015); Nev. Rev. Stat. § 41.515 (enacted 2015); Ind. Code §§ 34-31-11-1 to 34-31-11-5 (enacted 2015); Wyo. Stat. §§ 34-19-201 to 34-19-204 (enacted 2015); W. Va. Code § 55-7-27 (enacted 2015).

[137] *See, e.g., 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); *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").

[138] *See generally* Insurance Information Inst., *Florida's Assignment of Benefits Crisis* (Mar. 2019).

[139] *See* Victor E. Schwartz & Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 Am. U. L. Rev. 1477 (2009).

[140] *First Acceptance Ins. Co. of Ga. Inc. v. Hughes*, 826 S.E.2d 71 (Ga. 2019).

[141] *See generally* Divonne Smoyer & Kimberly Chow, *Engineered Liability: The Plaintiffs' Bar's Campaign to Expand Data Privacy and Security Litigation* (U.S. Chamber of Commerce Institute for Legal Reform, Apr. 2017).

[142] *See generally* Mark Brennan, *Ill-Suited: Private Rights of Action and Privacy Claims* (U.S. Chamber of Commerce Institute for Legal Reform, July 2019).

[143] *See* 740 ILCS §§ 14/20, *et seq*.

[144] 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.

[145] *Rosenbach v. Six Flag Entertainment Corp*., 129 N.E.3d 1197 (Ill. 2019).

[146] 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.

[147] *See* Jonathan Bilyk, *'Astronomical damages:' IL High Court Ponders How Many Fingerprints Should be Worth Up to $5K Each Under IL Biometrics Law*, Cook County Record, May 18, 2020; Lauraann Wood, *BIPA Claims Don't Mean Ruinous Damages, Ill. Justices Hear*, Law360, May 17, 2022 (discussing *Cothron v. White Castle System Inc*., No. 128004).

[148] *See, e.g*., H.B. 72 (Alaska 2017) (no action); S.B. 1270 (Fla. 2019) (died in committee); H.B. 5019 (Mich. 2017) (died in committee); H.B. 645 (Mont. 2019) (died in committee); S.B. 1203 (N.Y. 2019) (died in committee); *see also ILR Briefly, A Bad Match: Illinois and the Biometric Information Privacy Act* (U.S. Chamber of Commerce Institute for Legal Reform 2021).

[149] 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.

[150] Va. Code §§ 59.1-575 *et seq*.

[151] Colo. Rev. Stat. 6-1-1301 *et seq*.

[152] H.B. 9 (Fla. 2022); S.B. 1864 (Fla. 2022).

[153] S.B. 5376 (Wash. 2019-20).

[154] Ohio Rev. Code § 1354.02(A).

[155] Ohio Rev. Code § 1354.02(D).

[156] Ohio Rev. Code § 1354.04.

[157] H.B. 80 (Utah 2021); H.B. 6607 (Conn. 2021).

[158] *See* Rob McKenna, Elbert Lin & Drew Ketterer, *Mitigating Municipality Litigation: Scope and Solutions* 12-13 (U.S. Chamber of Commerce Institute for Legal Reform, Mar. 2019).

[159] States enacting COVID-19 product liability protections, which vary significantly from state to state, include Alabama, Alaska, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin.

[160] *See generally* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541 (2006).

[161] *See generally* Mark A. Behrens & Christopher E. Appel, *The Need for Rational Boundaries in Civil Conspiracy Claims*, 31 N. Ill. Univ. L. Rev. 37, 39 (2010).

[162] *See generally* Victor E. Schwartz, Phil Goldberg & Cary Silverman, *Warning: Shifting Liability to Manufacturers of Brand-Name Medicines When the Harm was Allegedly Caused by Generic Drugs Has Severe Side Effects*, 80 Fordham L. Rev. 1835 (2013).

[163] *See, e.g., O'Neil v. Crane Co*., 266 P. 3d 987 (Cal. 2012).

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

[165] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

[166] 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).

[167] Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14.

[168] "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).

[169] Cary Silverman & Christopher E. Appel, *Nuclear Verdicts: Trends, Causes, and Solutions*, 7 (U.S. Chamber of Commerce Institute for Legal Reform, Sept. 2022) (finding a 27.5% rise in nuclear verdicts in personal injury and wrongful death cases between 2010 and 2019, far outpacing inflation).

[170] Max Mitchell, *With New Tactics Fueling 'Nuclear' Verdicts, Can Defense Catch Up?*, Legal Intelligencer, Oct. 23, 2019.

[171] Mark A. Behrens, Cary Silverman & Christopher E. Appel, *Summation Anchoring: Is it Time to Cast Away Inflated Requests for Noneconomic Damages?*, 44 Am. J. Trial Adv. 321 (2021).

[172] *See, e.g.*, S.B. 1751 (Okla. 2022) (prohibiting any party or counsel from referring to a specific dollar amount, stating a range, or suggesting a mathematical formula for the jury to consider with respect to an award for noneconomic damages); H.B. 2017 (Mo. 2022) (prohibiting reference to specific dollar amount or range); H.B. 4550 (W. Va. 2022) (prohibiting reference to specific dollar amount or range).

[173] Tex. Civ. Prac. & Rem. Code § 41.0105.

[174] *Haygood v. De Escabedo*, 356 S.W.3d 390 (Tex. 2011).

[175] *See In re K & L Auto Crushers*, LLC, 627 S.W.3d 239 (Tex. 2021); *In re Allstate Indemnity Co*., 622 S.W.3d 870 (Tex. 2021); *see also* Lee Mickus, *Texas High Court Rulings on Medical-Expense Damages Reel in Plaintiffs' Windfall-Profit Tactics*, Legal Backgrounder (Wash. Legal Found. June 24, 2021).

[176] H.B. 1300 (Colo. 2021).

[177] Diana Novak Jones, *Personal Injury Financiers Get Boost With New Colorado Law,* Reuters, Oct. 22, 2021.

[178] *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).

[179] *Brandt v. Pompa*, 169 N.E.3d 285 (Ohio Ct. App. 2021) (affirming constitutional application of statutory limit), *on appeal*, No. 2021-0497 (Ohio 2022) (oral argument held Mar. 30, 2022).

[180] *Simpkins v. Grace Brethren Church of Del*., 75 N.E.3d 122 (Ohio 2016); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007).

[181] *Siebert v. Okun*, 485 P.3d 1265 (N.M. 2021).

[182] *Id*. at 1277.

[183] H.B. 75 (N.M. 2021).

[184] *Ordinola v. Univ. Physician Assocs*., 625 S.W.3d 445 (Mo. banc 2021).

[185] *Watts v. Lester E. Cox Med. Ctrs*., 376 S.W.3d 633 (Mo. banc 2012).

[186] *McClay v. Airport Mgmt. Servs., LLC*, 596 S.W.3d 686 (Tenn. 2020).

[187] *See Crouell v. Turner*, 2020 WL 1303621 (Md. Ct. Spec. App. Mar. 18, 2020), *cert. denied*, 232 A.3d 260 (Md. 2020) (rejecting equal protection, right to jury trial, and separation of powers challenges to the cap).

[188] *Condon v. St. Alexius Med. Ctr.*, 926 N.W.2d 136, 142-43 (N.D. 2019).

[189] *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).

[190] *Busch v. McInnis Waste Sys., Inc*., 468 P.3d 419 (Or. 2020).

[191] *Hilburn v. Enerpipe Ltd*., 442 P.3d 509 (Kan. 2019).

[192] *Beason v. I.E. Miller Services, Inc*., 441 P.3d 1107 (Okla. 2019).

[193] *North Broward Hosp. Dist. v. Kalitan*, 219 So.3d 49 (Fla. 2017); *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014).

[194] *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994).

[195] *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).

[196] *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

[197] The Arkansas Supreme Court and Missouri Supreme Court struck down their states' statutory limits on punitive damages in 2011 and 2014, respectively.

[198] *See McClay v. Airport Mgmt. Servs., LLC*, 596 S.W.3d 686, 693 n.6 (Tenn. 2020) (finding, in a case upholding Tennessee's statutory limit on noneconomic damages, the Sixth Circuit's reasoning in *Lindenberg v. Jackson Nat'l Life Ins. Co*., 912 F.3d 3487 (6th Cir. 2018) "unpersuasive" and criticizing the Sixth Circuit's failure to certify that question of state law).

[199] Am. Med. Ass'n, *Medical Liability Reform – NOW!*, at 1 (2021 ed.).

[200] *Id*.

[201] *Id*. at 4 (citing Medical Professional Liability Association. 2019. Data Sharing Project MPL Closed Claims 2016-2018 Snapshot).

[202] *Id*.

[203] *Id*. at 2.

[204] *See id*. at 18-21; *see also* Mark A. Behrens, *Medical Liability Reform: A Case Study of Mississippi*, 118:2 Obstetrics & Gynecology 335-39 (Aug. 2011).

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