101 Ways to Improve State Legal Systems

Eighth Edition

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

December 2024

U.S. Chamber of Commerce
Institute for Legal Reform

Cary Silverman and Christopher E. Appel,
Shook, Hardy & Bacon L.L.P.

© U.S. Chamber of Commerce Institute for
Legal Reform, December 2024.
All rights reserved.

This publication, or part thereof, may not
be reproduced in any form without the
written permission of the U.S. Chamber of
Commerce Institute for Legal Reform.

Contents

Chapter 01

1 How to Use This Guide

Chapter 02

3 Address Over-Regulation & Enforcement

5 Mitigate Municipality Litigation

8 Avoid Misuse of Public Nuisance Law

13 Reject Proposals to Deputize Private Citizens and Attorneys as Bounty Hunters

16 Restore Rationality to Unfair and Deceptive Trade Practices Litigation

Chapter 03

21 Safeguard the Integrity of the Litigation Process

24 Provide Transparency and Address Abuse in Third-Party Litigation Funding

30 Curb Predatory Consumer Lawsuit Lending Practices

33 Prevent Misleading Lawsuit Advertising

40 Reduce Forum Shopping

43 Ensure That Juries Represent the Entire Community

46 Stop Frivolous Lawsuits

49 Address Shotgun Pleading

52 Provide Proportionality in Discovery

Chapter

03
continued

21 Safeguard the Integrity of the Litigation Process (continued)

54 Prevent Harassment of High-Level Executives Through Discovery Abuse

56 Ensure Class Actions Benefit Claimants, Not Just Lawyers

59 Prevent Suppression of Evidence of Plaintiff Exposures in Asbestos Cases

61 Support Sound Science and Expert Evidence in the Courtroom

63 Safeguard the Right to Appeal

65 Promote Fairness in Judgment Interest Accrual

Chapter

04

67 Promote Rational Liability Rules

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

73 Fairly and Proportionately Allocate Liability Based on Fault

75 Treat Businesses Operating in Higher-Crime Areas Fairly

78 Encourage Compliance with Government Regulations

81 Prevent Adoption by Courts of Novel and Unsound Restatements of Law

84 Reject Expansions of Liability in the Insurance Claims Settlement Process

87 Protect Privacy and Data Security

Chapter

05 93 Improve Product Liability Law

96 Prevent Lawyers From Circumventing Core Product Liability Requirements

98 Protect Innocent Product Sellers

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

103 Prioritize Asbestos Claims to Benefit Legitimate Claimants With Credible Injuries

Chapter

06 105 Address Damages "Run Wild"

108 Ensure That Damages for Medical Expenses Reflect Actual Costs

113 Provide Juries With Full Information on a Plaintiff's Actual Losses

115 Place Reasonable Bounds on Subjective Noneconomic Damage Awards

119 Protect Due Process in Punitive Damages Determinations

122 Prevent Excessive Punitive Damages Awards

124 Protect Access to Healthcare Through Medical Liability Reform

127 Address Tactics That Manipulate Juries Into Awarding Nuclear Verdicts

Chapter

07 131 Endnotes

How to Use This Guide

Chapter

01

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

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 outside investors fund litigation or have a financial interest in the outcome, what disclosure requirements or conflict of interest safeguards are needed? How can legislators address improper trial tactics that lead to nuclear verdicts?

This Eighth Edition also raises important questions around emerging issues, such as how can legislators ensure that businesses operating in high-crime areas are treated fairly if a customer, guest, or resident is a victim of a crime on or near their property?

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.

Inclusion of a legal reform in this guide 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.

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.

Multiple state attorneys general, state regulators, and federal agencies sometimes work in concert with private lawyers to target a company or an entire industry. They may institute multiple overlapping investigations and lawsuits, alleging violations of law based on ambiguous claims such as "unfair practices," "false claims," "public nuisance," deviations from non-binding guidance documents, or other similarly vague theories. A company must then defend against duplicative investigations and legal actions that are pursued either simultaneously or in succession (forcing targets to litigate the same issues repeatedly), which can impose huge litigation costs long before any judge or jury evaluates the merits of the claims. The public drumbeat stemming from these accusations subjects the target to significant, ongoing reputational damage. A company may ultimately have little choice but to agree to whatever settlement government officials and private lawyers demand.

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

State legislators can:

1. Enact safeguards authorizing the state to oversee litigation brought by local government entities when those actions duplicate state enforcement efforts and providing transparency when government officials hire contingency-fee lawyers.
2. Prevent attempts to transform a tort intended to address unreasonable interference with property rights into a means to shift costs associated with societal problems onto manufacturers of lawful products.
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.

Mitigate Municipality Litigation

Purpose

> **"The rise of municipality litigation adversely affects the civil justice system. The piling-on of lawsuits is counterproductive to resolving disputes—whether it is a statewide settlement or a national one."**

There is a growing phenomenon in which cities, counties, and other local entities, along with local officials, sue corporate entities to address societal problems.[4] On the prompting of contingency-fee lawyers, municipalities are bringing lawsuits seeking compensation from businesses for costs they attribute to opioid addiction, climate change, litter, data privacy breaches, and other issues.

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

Unless this problem is addressed through legislation, the opioid litigation illustrates what may become the new normal. Local governments have pursued over 3,000 lawsuits against manufacturers, distributors, pharmacies, and retailers seeking costs attributed to opioid addiction.[5] These local claims are in addition to similar lawsuits filed by most state attorneys general and other entities.

If the outcome of the tobacco litigation is a guide, most of the money obtained through

settlements and judgments will likely go toward relieving 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. Indeed, early signs are that while some opioid litigation settlement money has gone to addiction treatment centers and overdose reversal drugs, law enforcement departments are also using it for new police cruisers, overtime pay, phone-hacking equipment, and restraint devices.[6] Some local governments have used opioid settlement money to pay off debts or for purchases unrelated to opioid addiction.[7] Very few recipients have been transparent about where the billions in settlement money have gone.[8]

Legislation is needed to avoid duplicative litigation, preserve the ability of the state to make decisions of statewide importance, settle claims, and protect the taxpayers' recovery.

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 or settle 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. Since 2010, 18 states have adopted similar laws applicable to state attorneys general or state agencies, which provide a model for local governments.

   - 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.
3. Provide the state attorney general with authority, if needed, to 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.
4. Reduce the potential for novel municipal litigation by modifying commonly misused causes of action.
5. Regulate conduct in a manner that does not permit municipalities to demand inconsistent obligations through a lawsuit.
6. Require municipalities to meet threshold evidentiary requirements before proceeding with a claim, such as by providing proof of damages.
7. 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 parties to the 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 municipalities to use an open process when retaining outside counsel on a contingency-fee basis. Provides state oversight by requiring attorney general approval of these legal service contracts, which can be denied if the local government did not comply with state law in entering the arrangement, the matter addresses an issue that the state has already addressed or is pursuing, or the local action will not promote the just and efficient resolution of the matter.

Avoid Misuse of Public Nuisance Law

Purpose

When state and local governments have turned to their state's courts to help them manage large-scale public policy questions—from prescription drug abuse to climate change to litter and other environmental clean ups—the tort of choice in recent years has tended to be public nuisance. These lawsuits typically target companies in industries that are politically appealing for government officials to blame, and financially appealing for plaintiffs' lawyers to pursue. These lawsuits ask courts to make the companies fund government programs or contribute to settlement funds that are in theory meant to address these issues.

The courts are not the place to establish broad public policies governing society—under public nuisance or any other liability theory. Those debates are best left to the political branches. But that has not stopped the proliferation of these lawsuits. Why?

Local and state governments have figured out that they can make companies give them money by creating unacceptably large litigation threats. Often, all they need is for a judge to not dismiss the case out of hand. Most companies, particularly those that sell products, are very sensitive to reputational harm and are loath to go to trial and be publicly accused of causing a major societal issue. Given the rise of nuclear verdicts, they are also often reluctant to take on the outsized exposure that going to trial would entail.

It is telling that when governments have secured settlements in these cases, the courts have failed—often admittedly—to apply public nuisance law properly.[9] They have ignored time-honored elements of a public nuisance cause of action to facilitate the governments' leverage to coerce settlement.

For example, in a case in which the State of California required paint manufacturers to remove lead paint from homes around the state, the trial court altered every element of a public nuisance claim in allowing the case to go to trial, saying it did not

"The courts are not the place to establish broad public policies governing society—under public nuisance or any other liability theory. Those debates are best left to the political branches."

want to turn “a blind eye” to childhood lead poisoning.[10] And, when the science at the time of sale decades earlier did not support liability, the court stated, “[S]houldn’t we take advantage of this more contemporary knowledge to protect thousands of lives?”[11]

In federal opioid litigation, the MDL judge denied the defendants’ motion to dismiss, indicating his focus was not “figuring out the answer to interesting legal questions,” but to “do something” about prescription drug abuse.[12] After that, many companies agreed to settle rather than defend themselves against these groundless claims.

Public nuisance law is being misused and misunderstood. It is intended to stop someone from unlawfully interfering with the public’s right to use a communal resource, such as a public road or river.

Most courts that have considered traditional public nuisance law’s application to new types of claims involving the sale of lawful products rather than land use issues have broadly rejected them.[13] When defendants have not succumbed to settlement pressures and appealed adverse rulings to state high courts, they have generally won. Specifically, most courts have reaffirmed that public nuisance has distinct elements that are not met in these new cases:

1. Public Right: The litigation must be over a “public right,” which is the right to use a shared public resource—again, such as a road or river. The new cases often deal with private rights of people, health or safety issues, or things in the public interest, but that does not mean the case involves a public right that is protected by the tort of public nuisance.[14]

2. Unlawful Interference: The defendant must have engaged in unlawful conduct when interfering with this public right. Historically, an illegal blockade of a road, vagrancy in a town square, or illegally dumping pollutants into a river have qualified as such unlawful conduct. These acts have no redeeming qualities. In today’s cases, the companies made, sold, and promoted products or otherwise engaged in regular commerce. This is not public nuisance conduct.[15]

3. Causation: The illegal conduct must have proximately caused the public nuisance. At most, companies targeted in today’s cases made and sold products that others used or misused to cause harm. It is the person who dumps the chemicals into a river that proximately causes the nuisance, not the manufacturer that sold the person those chemicals.[16]

4. Control: Similarly, one must have controlled the product and nuisance when the nuisance was created to be liable for it. In today’s cases, a

manufacturer no longer has possession or control of a product after it sells or distributes it. So, it is not liable if the product is later used to cause a public nuisance harm.[17]

5. Remedy: Governments are not allowed to get money in public nuisance actions, which is what the new cases seek. They can only obtain an order requiring a person to stop the nuisance-causing activity (injunction) or clean up the nuisance (abatement). Once the nuisance is cleared, this duty is met.[18]

When these elements are not met, and courts allow claims against a company for selling a lawful product at the center of a public health or safety issue, public nuisance litigation no longer has any limiting principle. As courts have explained, governments could "convert almost every products liability action into a nuisance claim"[19] regardless of one's "culpability."[20] The New Jersey Supreme Court observed that "were we to permit these complaints to proceed, we would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance."[21] Its ruling echoed a New York appellate court finding that "[a]ll a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born."[22]

Product liability, not public nuisance, should govern claims involving product manufacturing and sale.[23]

Note

In Ohio, the legislature enacted legislation in 2005 and 2007 clarifying that public nuisance actions cannot supplant the Ohio Product Liability Act. Ohio law now specifies that "public nuisance" claims against product manufacturers and sellers are subsumed under the Ohio Product Liability Act, and this Act abrogates "all common law product liability claims or causes of action."[24] The Ohio statute further states that a product liability claim "includes any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling or sale of a product unreasonably interferes with a right common to the public."[25]

Options

1. Codify the traditional tort of public nuisance, which would not allow courts to ignore its time-honored elements.

   - Affirm that a public right involves the public's right to use a shared government resource. These rights are different from private rights (private driveways are not

public roads) and from matters in the public interest, including those involving public health and safety.

- Affirm that to be liable for a public nuisance, one must have engaged in unlawful conduct that caused the public nuisance; this includes being in control of the product used to create the nuisance when the nuisance was created.
- Clarify that remedies available to local and state governments for public nuisances are limited to injunctive relief and abatement, not money damages.

2. Ensure public nuisance law cannot supplant product liability law with respect to allegations that a product or class of products caused a particular harm.
   - In states that have product liability statutes, this type of amendment can ensure that when the subject matter of the lawsuit is harm caused by a product—as with the opioid litigation—then the claims must be heard under that statute. These statutes establish the rights and responsibilities for manufacturing and selling products.
   - Provide defendants with a right to immediately appeal a trial court ruling that allows certain types of public nuisance claims to proceed. Typically, a party must wait for a final judgment to appeal this type of order, which only occurs after substantial time and expense. This approach would help reduce the coercive effect of local court rulings that allow a specious public nuisance case to proceed.
3. Provide that conduct that is compliant with relevant state or federal regulations does not provide a basis for a nuisance claim.

Recent Legislation

- *Missouri S.B. 1031 (introduced in 2024)*: Establishes a statutory action for public nuisance, replacing common law causes of action. Provides that a public nuisance does not include any activity expressly authorized or encouraged by law, or the manufacturing, distributing, selling, advertising, or promoting of a lawful product. Establishes that remedies in such actions are injunctive relief sufficient to prevent the unlawful condition from violating an established public right and resources necessary to abate the public nuisance.
- *Texas H.B. 1372 (reported favorably from committee in 2023)*: Establishes that a public nuisance claim is not cognizable if the lawsuit seeks relief arising from: (1) an action or condition authorized, licensed, approved, or mandated by law or a government agency; (2) an action or condition that occurs

where a statutory cause of action or administrative enforcement mechanism already exists to address conduct that is injurious to the public; or (3) a product or the manufacturing, distributing, selling, labeling, or marketing of a product, regardless of whether the product is defective.

- *West Virginia S.B. 572 (passed Senate in 2023)*: Provides that the manufacturing, distribution, sale, labeling, promotion, hosting, or marketing of certain products or services does not constitute a public nuisance. Establishes requirements for public nuisance actions brought by government entities and private citizens and available remedies. Provides an affirmative defense to a defendant that does not have actual control over the source of the alleged public nuisance.

Most courts that have considered traditional public nuisance law's application to new types of claims involving the sale of lawful products rather than land use issues have broadly rejected them.

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. Legislators often propose these laws 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 or penalties imposed. 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.

"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 to do so,[26] 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 percent 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.[27] States that adopt similar laws or expand their FCAs risk a similar experience.

Another example is California's Private Attorneys General Act (PAGA). For years, private attorneys have used PAGA to enforce the state's labor laws, often through filing boilerplate complaints over even the most minor infractions, such as not including a full address on a pay stub or the timing of when an employee takes a lunch break. Small businesses and nonprofits that may lack the human resources staff to carefully comply with the minutiae of state labor laws found themselves facing settlement demands for hundreds of thousands of dollars under the law. A wide range of California businesses, including farmers, restaurants, and truckers, indicated that PAGA had cost them billions in settlements and penalties.[28] California workers received far more benefit from government enforcement of the statute than from the private lawsuits, which largely enriched attorneys, a study found.[29] Legislators enacted reforms in 2024 that are intended to curtail abusive PAGA litigation.

Other problematic laws include California's "Prop. 65," which authorizes private lawsuits against any business that sells without a warning label a product with a trace of any of nearly 1,000 substances that a state agency has designated as possible carcinogens, even when unsupported by science,[30] and state laws permitting claims alleging minor deviations from disability access standards.[31] 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.[32] 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, create a new private right of action under the statute. Such action invites profit-motivated attorneys to sue or threaten to sue for minor technical issues with business practices or product labels that would not concern regulators. The lack of clarity in 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 bring lawsuits 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 creating 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.[33]

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*,[34] 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.

Recent Enactments

- *California A.B. 2288 and S.B. 92 (2024) (amending Cal. Lab. Code §§ 2699 and 2699.3)*: As an alternative to a ballot initiative that would have repealed PAGA, California adopted a package of reforms to reduce abusive litigation. This package of reforms:

  - Permits only employees who have personally suffered the alleged violation to seek penalties.
  - Reduces potential penalties for employers that take "all reasonable steps" to comply with the Labor Code before receiving a notice of violation and for employers who take all reasonable steps to come into compliance within 60 days of receiving a notice.
  - Reduces or eliminates penalties when employers promptly cure alleged violations after notification by making each aggrieved employee whole.
  - Provides procedures to facilitate early resolution of claims.

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 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. For example, UDTPA claims may be tacked on or brought as an alternative to product liability claims. Plaintiffs' lawyers do so when they are unable to otherwise satisfy the well-reasoned elements of these claims, such as showing an actual injury, causation, or damages. In addition, plaintiffs' lawyers use UDTPA laws to bring lawsuits claiming violations of regulations that the legislature intended government agencies to monitor and enforce. UDTPA laws are often the basis of massive class actions brought on behalf of people whose purchase of consumer goods and services had nothing to do with the challenged advertising or labeling. For example, in recent years, certain lawyers and law firms have filed cut-and-paste lawsuits targeting food and beverage marketing.[35]

> **"Plaintiffs' lawyers often assert UDTPA claims where traditional tort claims fail."**

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. 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.[36]

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 a court can decide as a matter of law.

2. Require a plaintiff to show: (1) objectively reasonable reliance on an unfair or deceptive act or practice; (2) an ascertainable loss of money or property; and (3) proof that the conduct at issue caused the plaintiff's injury.

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 that prevent a finding of unfair or deceptive conduct, though their 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 injuries or death.

8. Provide that only the attorney general can pursue collective actions under the UDTPA law.

    - 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. 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.

10. 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.

11. 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 business cures the alleged violation, there is no action.

12. 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.

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).

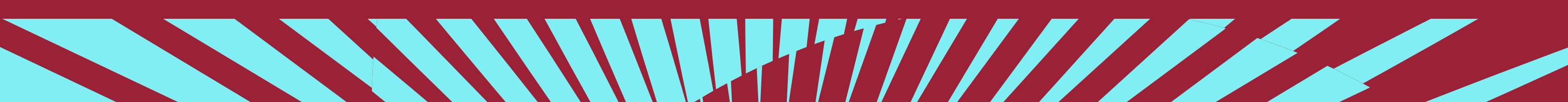
3. Establish predictability and proportionality in civil penalties by: (1) limiting civil penalties to cases in which there is evidence that a business willfully violated the law; (2) requiring evidence of actual consumer harm; (3) codifying factors to guide courts in determining an appropriate civil penalty level; and (4) placing an aggregate limit on civil penalties for any related series of violations.

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.

… [P]laintiffs' lawyers use UDTPA laws to bring lawsuits claiming violations of regulations that the legislature intended government agencies to monitor and enforce.



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 court procedures can matter just as much as the substantive law.

Over the past decade, there has been a transformative change in the civil justice system. Doctrines that prevented outside parties from funding or having a financial interest in litigation have fallen by the wayside in many places. Now, litigation finance firms, hedge funds, and other investors are funneling cash into big-ticket litigation, promoting speculative lawsuits and raising conflict of interest concerns. Other firms offer "cash for lawsuits" in which they lend money to vulnerable plaintiffs in personal injury cases, which drives up settlement demands to pay back the lenders.

Meanwhile, personal injury lawyers specializing in mass tort litigation and "lead generation" companies that find clients for them are inundating the public with ads for lawsuits on television and through social media. Fearmongering lawsuit ads mislead viewers to believe that U.S. Food and Drug Administration (FDA)-approved medications will harm them, 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.

To gain an advantage, personal injury lawyers file their claims in courts known for procedures that favor plaintiffs, judges that are receptive to liability-expanding rulings, and juries that return excessive awards. They know that corporate defendants have a distinct disadvantage in some jurisdictions.

Some state 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 often leads

businesses to quickly settle claims even when many of the class members have no concern with the product or its marketing.

Plaintiffs' lawyers 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, however, the plaintiffs' lawyers do not disclose that they believe their clients' exposure to asbestos stemmed from the products of companies that have already been driven into bankruptcy by lawsuits. After a settlement or judgment, the lawyers file claims with trusts established by the bankrupt companies and recover more. Since the trust claims are hidden during the litigation, juries are misled and solvent companies settle for inflated amounts.

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

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

Provide Transparency and Address Abuse in Third-Party Litigation Funding

Purpose

The litigation funding industry has exploded over the past decade with little oversight. Dedicated commercial litigation finance firms, hedge funds, institutional investors, foreign sovereign wealth funds, and wealthy individuals are investing billions of dollars each year into funding U.S. lawsuits in exchange for a portion of any recovery obtained by a law firm. These third-party litigation funding (TPLF) arrangements implicate wide-ranging concerns for which safeguards are needed.

Lawsuit funders "have long operated under a veil of secrecy," but their business model has become harder to hide as TPLF has transformed into a multi-billion-dollar industry.[37] Major litigation funders alone had more than $15 billion invested in U.S. litigation in 2023.[38] TPLF investments could reach $31 billion by 2028.[39]

Large commercial litigation funders invest primarily in "portfolio" litigation rather than individual cases.[40] Funders also back the personal injury law firms behind mass tort litigation[41] and support advertising intended to generate thousands of claims.[42] This allows funders to spread the cost of litigation across many cases and reduce the downside risks of any specific case. This large-scale type of investment can position funders as the driving force behind mass tort litigation and other mass litigation campaigns.[43] Further, by spreading litigation costs and risks, funders—like a gambler playing with house money—may work with plaintiffs' lawyers to pursue speculative lawsuits or assert more questionable claims for a chance at a financial windfall.

As experts on litigation finance have explained, TPLF is "reshaping every aspect of the litigation process—which cases get brought, how long they are pursued, when are

> "An outside funder's presence can turn what is traditionally a negotiation between two opposing parties into a multi-party affair with a 'behind the scenes' funder interested solely in maximizing a return on investment."

they settled."[44] An outside funder's presence can turn what is traditionally a negotiation between two opposing parties into a multi-party affair with a "behind the scenes" funder interested solely in maximizing a return on investment. Indeed, major funders recognize, and even tout, that their presence "make[s] it harder and more expensive to settle cases."[45]

These TPLF arrangements can also create serious ethical problems, as often-undisclosed funders may exert control over potential case settlements or other major litigation decisions in place of the law firm's client.[46] A growing list of examples shows the lengths some funders have gone to maximize their return on investment in others' lawsuits. For instance, in 2023, a dispute between food distributor Sysco Corp. and litigation funder Burford Capital exposed the funder actively working to block Sysco from settling antitrust claims so that the funder could get more money.[47] A federal magistrate judge in Minnesota observed that Burford's actions created an "enormous" litigation burden for Sysco and caused "serious practical problems" that proposed to "allow a financer with no interest in the litigation beyond maximizing profit on its investment to override decisions made by the party that actually brought suit."[48] The federal judge that affirmed that ruling also noted that an agreement allowing a funder to take over litigation "threatens the public policy favoring the settlement of lawsuits."[49]

More recently, Fortress Investment Group, which funds mass tort and IP litigation, as well as other litigation funders, was described by insiders as intricately involved in the litigation it funds. As the funder's managing partner indicated, "We see where funds go. If you do something you're not supposed to do, we're gonna be upset."[50]

The influence of a litigation funder is often hidden. For example, Delaware federal district court Chief Judge Colm Connolly raised concern that a patent monetization firm, IP Edge LLC, used "shell" companies to obscure its influence and financial interest in patent infringement cases.[51] Under this scheme, IP Edge recruited "relatively unsophisticated individuals" to serve as owners of the shell companies so it could pursue—and exercise total control over—dozens of patent infringement cases.[52] Judge Connolly exposed this scheme, explaining that IP Edge served as the lawyers' de facto client while the actual clients were treated as "mere inventory" to advance the funder's patent monetization objectives.[53]

Judge Connolly subsequently stressed the importance of requiring greater transparency in litigation financing so that courts do not become "casinos where people should just go to profit."[54]

The flood of TPLF investments into U.S. litigation also provides a means for foreign adversaries to "weaponize the courts for strategic goals."[55] Foreign interests may fund lawsuits in the U.S. to "weaken critical industries" or "obtain confidential materials through the discovery process."[56] In 2022, the U.S. Government Accountability Office found that TPLF investors include "foreign sovereign wealth funds, which are government-controlled funds that seek to invest in other countries…."[57]

For instance, Bloomberg reported that Burford Capital, one of two publicly traded litigation funders, has an $872 million funding arrangement with a sovereign wealth fund.[58] Bloomberg also reported that a Chinese firm, PurpleVine IP, is financing intellectual property lawsuits in the U.S. against Samsung Electronics Co. and a subsidiary, related to earbud, tablet, and smartphone technology, which were filed by an affiliate of a Florida-based private equity firm.[59] As a former acting director of the U.S. Patent and Trademark Office explained, the disclosure of a litigation funder tied to China "is our worst fears confirmed" given that "nothing over there is really independent" of the Chinese government.[60] Bloomberg Law has also reported that an investment firm founded by Russian oligarchs with ties to Vladimir Putin is financing lawsuits, allowing them to evade international sanctions.[61]

The full measure of how TPLF is impacting the U.S. legal system—whether by distorting litigation, creating ethical problems, threatening national security, or otherwise turning the "American justice system into a financial playground"[62]—is unclear. That is because these investments typically occur in secret and are not disclosed to courts or parties. Accordingly, a critical step to assess and respond to concerns is to provide basic transparency in TPLF arrangements.

State legislatures should require parties to disclose to the court and other parties when a third party is funding someone else's lawsuit. Such disclosure is consistent with existing required initial disclosure, pursuant to the Federal Rules of Civil Procedure and many analogous state rules, of any insurance agreements that might cover a judgment in a lawsuit.[63] In both instances, the parties and the court learn who has a financial stake in the lawsuit and may seek to influence the case's resolution.

Requiring transparency in TPLF agreements protects parties against funders who might secretly control or exert undue influence in a litigation or pursue claims for improper reasons such as to obtain confidential information or trade secrets. Disclosure also protects the integrity of the court system by alerting judges to potential financial conflicts that may require recusal, as well as conflicts of interest that violate attorney ethics rules. Understanding the scope of

problems generated by the influx of TPLF investments can lead to other reforms that respond to specific concerns, but transparency must come first.

Note

- 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.[64]

- Chief Judge Connolly of the U.S. District Court for the District of Delaware issued a standing order taking the same approach in 2022, though it applies only to cases before the Chief Judge.[65] Litigants must disclose the name and address of those 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 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 2018, the U.S. District Court for the Northern District of California has required parties to automatically disclose TPLF agreements in a proposed class, collective, or representative action.[66] In addition, federal courts that oversee certain litigations, including claims related to opioids, the prescription drug Zantac, and 3M earplugs, have ordered disclosure of TPLF agreements.[67]

- In 2024, the federal Advisory Committee on Civil Rules established a subcommittee to consider the need for a rule mandating TPLF disclosure in federal courts.[68]

Options

1. Require any party and their counsel receiving litigation financing from a third party that is contingent in any respect on the outcome of the civil action or a group of actions of which the civil action is a part to disclose this relationship at the outset of the litigation and provide a copy of the funding agreement to the court and the parties.[69]

2. Prohibit certain conduct by funders, such as influencing litigation or settlement decisions, providing or offering to provide legal services to funded parties, paying or accepting commissions or referral fees, or advertising false or misleading information.

3. Prohibit TPLF arrangements funded by foreign government entities and adopt reporting requirements for litigation funding provided by any other foreign entities.[70]

4. Limit the maximum amount litigation funders may receive to ensure the funded party collects most of any settlement or judgment.

Recent Enactments

- *Louisiana S.B. 355 (2024) (to be codified at La. Rev. Stat. §§ 9:3580.1 to 9:3580.7 and §§ 9:3580.10 to 9:3580.12)*: Requires a third-party litigation funder to make certain disclosures to the state attorney general, including identification of any foreign entity that has a right to receive payment that is contingent on the outcome of the litigation or has received or is entitled to receive proprietary information or information affecting national security interests as a result of the funding agreement, and provide the attorney general with a copy of the funding agreement. Charges the attorney general with providing an annual report to the legislature on foreign involvement in litigation financing. For all litigation funding agreements (excluding consumer lawsuit loans and with other exceptions), prohibits funders from influencing the litigation or its settlement. Subjects litigation financing agreements to discovery.

- *Indiana H.B. 1160 (2024) (to be codified at Ind. Code § 24-12-11)*: Subjects commercial litigation funding agreements to disclosure through discovery. Prohibits funders from making any decision, having any influence, or directing the plaintiff or the plaintiff's attorneys with respect to the conduct of the underlying civil proceeding or settlement or resolution of a civil proceeding. Prohibits a party from disclosing documents or information to a commercial litigation financier that are sealed or protected. Bars commercial litigation finance agreements that are directly or indirectly funded by a "foreign entity of concern."

- *West Virginia S.B. 850 (2024) (to be codified at W. Va. Code Ann. § 46A-6N-1 et seq.)*: Extends safeguards enacted for consumer lawsuit lending in 2019 to all TPLF. Requires a party to disclose any litigation funding agreement to other parties without awaiting a discovery request. Prohibits litigation financiers from attempting to influence the litigation or its resolution. Bars litigation financiers from paying commissions or referral fees to lawyers, law firms, or medical providers, advertising false or misleading information about their services, referring a claimant to a specific attorney, law firm, or medical provider, or failing to promptly provide copies of complete litigation financing contracts to claimants. Retains a maximum 18 percent annual fee for consumer lawsuit loans.

- *Montana S.B. 269 (2023) (codified at Mont. Code Ann. §§ 31-4-101 et seq.)*: Enacts the Litigation Financing Transparency and Consumer Protection Act. Requires litigation funders to register with the Secretary of State. Requires disclosure of litigation financing contracts in any civil action to the court and other parties. Prohibits referrals or commissions, or attempting to influence the litigation or its settlement. Establishes a 25 percent cap on the amount that a funder may recover from any award, settlement, or other monetary relief from the lawsuit. Provides that litigation funders are jointly liable for any award or order imposing costs.

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.”[71] Lenders offer immediate cash to individual plaintiffs, typically in personal injury lawsuits. Consumer lawsuit lending industry representatives say that the average lawsuit loan is about $2,000,[72] but the amounts can be far greater. The loans often come with sky-high interest rates that can leave borrowers with little to no recovery. At payback, a consumer may owe the lender three, five, or even 10 times the advanced amount.[73]

“The loans often come with sky-high interest rates that can leave borrowers with little to no recovery.”

Victims have included 9/11 first responders, who took advances while waiting for payment from the federal victim compensation fund,[74] and former professional football players, whose settlements from a class action lawsuit alleging concussion-related injuries were “cannibalized” by lenders.[75]

Florida federal district court Judge M. Casey Rodgers observed that, at least for the past decade, in mass tort litigation, funders “prey on litigants” by offering them money subject to “exorbitant fees and rates of interest” when a settlement is near. To protect against predatory lending practices, she ordered all plaintiffs’ counsel in multi-district litigation involving 3M earplugs to disclose the funding agreements and pledge to review them “with a high degree of scrutiny.”[76]

Judge Rodgers also observed that, in addition to predatory lending concerns, these agreements can create improper conflicts of interest and improperly deter the reasonable settlement of cases, as plaintiffs “may want to make up the amount they will be forced to repay the funder.”[77]

In some states, consumer lawsuit lenders operate on dubious legal ground. Longstanding doctrines such as champerty traditionally prohibited arrangements in which third parties take a financial interest in litigation. In addition, these arrangements typically charge interest rates and fees that 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.

As with other forms of litigation finance, state legislatures should require a party to disclose to the court and other parties when an outside party has a financial interest in the litigation. State legislatures should also reject proposals to simply authorize or expand lawsuit lending practices, and instead consider bills that subject lawsuit loans to reasonable transparency requirements and consumer protections.

Options

1. Require disclosure of any agreement in which a third party has a financial interest that is contingent on the outcome of the litigation to the court and other parties.
2. Cap the interest consumer lawsuit lenders can charge at the state's existing usury rate.
3. Prohibit referrals or commissions between lawyers, lenders, and medical providers.
4. Require consumer lawsuit lenders to register with the appropriate state authority.
5. Reject legislation that would simply authorize or expand the availability of consumer lawsuit lending.

Recent Enactments

- *West Virginia S.B. 850 (2024) (amending W. Va. Code Ann. §§ 46A-6N-1 et seq.)*: Maintains safeguards enacted for consumer lawsuit lending in 2019, including a prohibition on charging consumers an annual fee exceeding 18 percent of the original amount of money provided to the consumer, offering commissions or referrals, or influencing the litigation or settlement. Requires disclosure of litigation financing agreements to other parties. Extends safeguards and disclosure requirements to other forms of litigation finance.
- *Indiana H.B. 1124 (2023) (codified at Ind. Code Ann. § 24-12-4-2)*: In any civil action in which the plaintiff has entered into a civil proceeding advance payment (CPAP) transaction—i.e., a nonrecourse loan to a consumer where the consumer assigns to the lender a contingent right to receive a portion of the consumer's recovery in a civil action—the plaintiff or that person's attorney must provide to the other parties and each insurer that has a duty to defend a party in the action written notice that the plaintiff has entered into a CPAP contract with a CPAP provider. The existence and contents of the contract are subject to discovery. The written notice concerning a CPAP contract is inadmissible in a court proceeding.

- *Montana S.B. 269 (2023) (codified at Mont. Code Ann. §§ 31-4-101 et seq.)*: Enacts the Litigation Financing Transparency and Consumer Protection Act. Requires litigation funders to register with the Secretary of State. Requires disclosure of litigation financing contracts in any civil action to the court and other parties. Prohibits referrals or commissions, or any attempts to influence the litigation or its settlement. Prohibits charging an interest rate that exceeds the rate permitted by the state's usury law (15 percent or six points per year above the prime rate published by the federal reserve system). Establishes a 25 percent cap on the amount that a funder may recover from any award, settlement, or other monetary relief from the lawsuit. Provides that litigation funders are jointly liable for any award or order imposing costs.

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.[78] 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 the warning is 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 pervasive mass tort lawsuit advertising is primarily driven by the perceived potential to pressure a business into a massive settlement that will result in a return on the investment, rather than whether the claims have merit."

Research indicates that pervasive mass tort lawsuit advertising is primarily driven by the perceived potential to pressure a business into a massive settlement that will result in a return on the investment, rather than whether the claims have merit.[79] Law firms specializing in mass tort litigation spend hundreds of millions of dollars each year on advertising for plaintiffs, an estimated 12 percent to 50 percent of their budgets.[80] Outside investors finance these ads as a moneymaking opportunity,[81] without regard to the public health consequences.

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."[82] In 2019, the AMA found that the misleading lawsuit advertising practices identified had become "even more pervasive" and called upon state legislatures to protect patient health.[83]

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.[84] 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.[85] Another study found that many viewers of lawsuit ads mistakenly believed that a medical product had been recalled.[86]

According to data compiled by FDA researchers, the agency received 66 reports of patients experiencing adverse events because they stopped taking their prescribed anticoagulant after viewing a lawsuit advertisement.[87] These reports included seven deaths and a range of other adverse events, with the most common being a stroke.[88]

Misleading lawsuit ads also 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 lawsuit advertisements attributed not initiating or stopping use of the drug to the ads.[89]

There is also concern that lead generators have obtained and misused confidential patient medical records to solicit them for lawsuits, as a *New York Times* exposé revealed.[90] 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.[91]

In addition to raising public health and privacy concerns, lawsuit advertising practices also mislead the public by flashing multimillion-dollar verdicts in front of viewers. 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 courts often significantly reduce such excessive amounts and sometimes throw out the verdict entirely.[92]

Despite these concerns, federal and state regulators have not acted in a meaningful way. The FDA closely monitors prescription drug advertisements 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.[93] 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."[94] While the agency sent warning letters to several attorneys and lead generators that ran potentially deceptive lawsuit ads[95] and issued informal

guidance in 2019,[96] 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.[97] In addition, state bars and disciplinary authorities rarely enforce rules on advertisements.[98] What enforcement does occur typically follows the filing of a bar complaint—usually by a competing attorney or law firm.[99] 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.[100]

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 below are consistent with the First Amendment, as they narrowly target specific misleading advertising practices. Truthful attorney advertising is protected by the First Amendment and can serve a valuable purpose in linking people who are injured as a result of wrongful conduct with a lawyer.[101] The U.S. Supreme Court has made clear, however, that "[a]dvertising that is false, deceptive, or misleading of course is subject to restraint."[102] The Court has upheld rules requiring attorney ads to make disclosures that are needed to avoid misleading the public.[103] It has also upheld restrictions on soliciting people to bring lawsuits who are injured, sick, or vulnerable.[104] In fact, the U.S. Court of Appeals for the Fourth Circuit has 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."[105] 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."[106]

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 actually recalled or withdrawn.

3. Amend health privacy laws to 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

- *Florida H.B. 1205 (2023) (codified at Fla. Stat. Ann. § 501.139)*: Prohibits presenting a legal service 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 requires the ad to caution viewers to "consult your physician before making any decision regarding prescribed medication or medical treatment." Provides a safe harbor for any advertisement reviewed and approved by a committee of the Florida Bar. Prohibits using, selling, transferring, or disclosing a consumer's protected health information for the purpose of soliciting a consumer for legal services. Provides that a violation is a deceptive and unfair trade practice.

- *Georgia S. 74 (2023) (codified at Ga. Code Ann. §§ 10-1-424.1, 10-1-427, 51-1-57)*: Prohibits attorneys from making misleading statements in advertisements for legal services, such as by falsely portraying actors as clients or making statements likely to lead a person to have an unjustified expectation of future success based on past performance.
- *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) (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 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) (codified at Kan. Stat. Ann. §§ 50-6,144, 50-6,145)*: 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.
- *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.
- *West Virginia S.B. 136 (2020) (codified at W. Va. Code Ann. §§ 47-28-1 et seq.)*: Requires ads to inform consumers "This 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.

Recent Judicial Action

- *Texas Supreme Court* Amendment *Comment 10 to Rule 7.01 of the Texas Disciplinary Rules of Professional Conduct (2022)*: Revised a comment to its disciplinary rule regulating advertising past successes. Provides that "[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 the amount actually received by the client with equal or greater prominence to avoid creating unjustified expectations on the part of potential clients."[107]

- *New Jersey Supreme Court Committee on Attorney Advertising Opinion 46 (2020)*: An ethics opinion advises that while "geo-fencing" or "geo-targeting" techniques to deliver digital advertising for a law firm to persons in or from a certain geographical area are not "flatly prohibited," ads may not target areas in which people are likely to be in a compromised physical, emotional, or mental state. These areas include those in which there has been a mass-disaster event, emergency rooms, hospitals, urgent care centers, funeral homes, police stations, courthouses, and accident sites.

Reduce Forum Shopping

Purpose

Forum shopping, or "litigation tourism," describes the practice whereby attorneys file personal injury or wrongful death lawsuits seeking damages in a jurisdiction that has little or no relation to the injury upon which the lawsuit is based. This can occur within a state (intrastate forum shopping) or among states (interstate forum shopping). The motivation is often monetary, rooted in 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 private litigation and place an undue burden on the judicial system, jurors, and taxpayers of these jurisdictions who have little interest in the subject matter of the lawsuit.

The proper place to file a personal injury lawsuit is typically governed by state venue laws. Even where a venue statute allows a lawsuit to be filed in an area that has little or no connection to the claim, however, the doctrine of *forum non conveniens* provides a court with discretion to dismiss a case or transfer it to a more appropriate forum. This doctrine takes into account the availability of witnesses and evidence that may be compromised when private defendants are haled into court to litigate a personal-injury or wrongful-death claim far from the location of the injury or accident.

Note

Venue rules are typically set by statute, but sometimes established by court rules. In Pennsylvania, for example, a court rule adopted to curb the personal injury lawsuit forum shopping that had contributed to a medical liability insurance crisis required plaintiffs to sue in the county where their alleged injury occurred.[108] The Pennsylvania Supreme Court loosened this rule in 2023, allowing plaintiffs' lawyers to file medical liability lawsuits anywhere a healthcare provider named as a defendant regularly conducts business or has significant contacts.[109] As a result, lawyers are increasingly filing their cases in Philadelphia when their clients received medical care elsewhere. [110] Medical liability cases filed in Philadelphia hit a 15-year high in 2023.[111] Critics have expressed

"As a result, lawyers are increasingly filing their cases in Philadelphia when their clients received medical care elsewhere."

concern that "history will repeat itself" and that this new flood of cases in a plaintiff-friendly jurisdiction will lead to skyrocketing insurance rates.[112]

In Illinois, the plaintiffs' bar is urging the state supreme court to abandon the doctrine of intrastate *forum non conveniens*, which, in that state, is rooted in court rulings rather than a statute.[113] If successful, plaintiffs' lawyers will file many more cases in Cook County, which has gained a reputation as favorable to plaintiffs, rather than where the incident or injury at issue occurred.

In addition, a plurality decision by the U.S. Supreme Court in 2023 has increased the potential for forum shopping. In that case, the Court ruled that a unique Pennsylvania law requiring any out-of-state company to answer in state courts to any suit against it in exchange for status as a registered foreign corporation did not violate the Due Process Clause for at least that company.[114] This ruling has led to attempts by the plaintiffs' bar to enact similar legislation in other states[115] or to seek court rulings interpreting state laws to allow such expansive "general [personal] jurisdiction by consent."[116]

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. Tighten intrastate 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.

3. 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.

4. Reject legislation that would subject corporations to general personal jurisdiction in state courts on the basis that the company registered to do business in the state.

Recent Action

- In 2023, New York Governor Kathy Hochul vetoed a bill that would have construed an out-of-state company's registration to do business in New York as "consent to the jurisdiction of the courts of this state for all actions against such corporation." Governor Hochul observed that the proposal "represent[ed] a massive expansion"

"[A] plurality decision by the U.S. Supreme Court in 2023 has increased the potential for forum shopping."

of state laws governing jurisdiction, "likely deterring out-of-state companies from doing business in New York because it would require them to be subject to lawsuits in the State regardless of any connection to New York." Governor Hochul also observed that "[t]he bill would cause uncertainty for those businesses and burden the judicial system."[117]

In Illinois, the plaintiffs' bar is urging the state supreme court to abandon the doctrine of intrastate *forum non conveniens* ... if successful, plaintiffs' lawyers will file many more cases in Cook County ... rather than where the incident or injury at issue occurred.

Ensure That Juries Represent the Entire Community

Purpose

Representative juries that include people from all walks of life enhance the quality of deliberations and reduce the potential for outlier verdicts. The jury service laws of some states, however, exempt certain professionals or make it easy for citizens to simply avoid jury service. In addition, juror compensation levels in many courts have remained stagnant,[118] making it particularly difficult for working jurors to serve on long, high-stakes trials. In some states, jurors continue to receive amounts as little as $12.50 per day, an amount that does not fully cover their lunch and transportation costs.[119] States can facilitate representative juries by reducing the burdens of jury service and expecting all people to serve.

> "Representative juries that include people from all walks of life enhance the quality of deliberations and reduce the potential for outlier verdicts."

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. Filing fees collected by Arizona courts have fully financed supplemental payments to jurors and the administrative expenses of managing the fund. The fund has been hailed as a "success story" because it has allowed thousands of Arizonans to serve who otherwise would not have been able to do so because of financial hardship.[120]

In 2022, given the record of success of the lengthy trial fund, Arizona expanded the system to make supplemental compensation available to those who receive less than their ordinary compensation during jury service beginning on the first day of service.

By making it easier for individuals with a diverse range of experiences to serve, programs like these may reduce the potential for a "runaway" jury.

Note

Six states increased juror compensation in 2023, some of which had not raised the juror per diem in decades.[121]

In 2023, the Oklahoma Supreme Court rejected a constitutional challenge arguing that legislation establishing a $10 filing fee on civil complaints to fund the state's Lengthy Trial Fund, with exceptions for certain litigants and cases, was an impermissible "special law."[122]

Options

1. Consider updating 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. Adopt a lengthy trial fund providing supplemental compensation to jurors selected to serve on trials of more than five or 10 days who do not receive their full regular compensation during jury service from their employers or who are self-employed. This fee may be financed by a nominal fee on filing of civil complaints without the use of taxpayer dollars.

3. 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,[123] Ohio,[124] Pennsylvania,[125] and New Jersey.[126]

4. Promote predictability and consistency in jury determinations by preserving a 12-member jury in civil cases (other than for deciding small claims). Smaller juries have less diversity and deliberation and are less representative of the community. They have a greater chance of reaching outlier decisions. Resist efforts—pushed by plaintiffs' lawyers as a means to cut costs or increase juror pay—to reduce civil juries to six members.

Recent Enactments

- *Arizona H.B. 2859 (2022) (amending Ariz. Rev. Stat. § 21-222)*: Increased the juror per diem from $12 to $40 per day and extended

a fund that offers up to $300 per day to jurors who do not receive their usual income during jury service to begin on the first day of service, rather than after five days.

- *Indiana H.B. 1466 (2023) (amending Ind. Code § 33-37-10-1)*: Doubled juror compensation from $15 to $30 per day prior to a jury being impaneled and from $40 to $80 per day for subsequent days. After the sixth day, jurors will receive $90 per day.
- *Nevada S.B. 222 (2023) (amending Nev. Rev. Stat. § 6.150)*: Increased the juror per diem from $40 to $65.
- *North Dakota H.B. 1002, § 8 (2023) (amending N.D. Cent. Code § 27-09.1-14)*: Doubled the juror per diem from $25 to $50 for the first half-day and from $50 to $100 for each full day of jury service.
- *Oklahoma H.B. 1024 (2023) (amending 28 Okla. Stat. § 86)*: Raised juror compensation from $20 to $50 for each day of service.
- *Texas H.B. 3474 (2023) (amending Tex. Gov't Code § 61.001)*: Increased juror compensation from $6 to $20 for the first day of jury service and from $40 to $58 thereafter.
- *Virginia S.B. 789 (2023) (amending Va. Code Ann. § 17.1-618)*: Increased the juror per diem from $30 to $50.

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

State legislators periodically express interest in adopting "loser pays"—a system under which the losing party in a lawsuit must pay the opposing party's attorneys' fees and costs. Loser pays can have strong appeal, since under the current system it often takes little more than a small filing fee and generation of a form complaint to begin a lawsuit. It costs much more for a small business to defend itself. Even when an individual or business "wins" a lawsuit, the cost of defending against a meritless claim can easily rise into the tens or hundreds of thousands of dollars. These expenses, which typically are not recoverable, have regrettably become a part of doing business in America.

> **"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."**

Theoretically, a loser-pays law should deter lawyers from filing weak claims. Some respected scholars and advocacy groups strongly support a loser-pays system. There are questions, however, about whether the pure form of a loser-pays law, known as the "English Rule," achieves this result in practice. Some have expressed concern that a loser-pays system

will be unevenly applied against defendants—adding attorneys' fees on top of what may already be excessive liability.

Concern that the English Rule might not result in a loser pays system, but instead "defendant pays," stems from the considerable discretion that judges typically have to avoid imposing fees on individuals whose good-faith claims could not be proven 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. Even if a judge imposed fees on a losing plaintiff, in many cases, such individuals are "judgment proof" and a defendant that pursues fees would spend more money chasing after unattainable reimbursement.

Options

1. Strengthen the state's existing statute or rule against frivolous claims. A frivolous lawsuit is one that: (1) is presented for an improper purpose; (2) is not supported by existing law or a legitimate argument for extending, modifying, or reversing existing law or for establishing new law; or (3) is not supported by the facts and is unlikely to have evidentiary support after a reasonable opportunity for further investigation or discovery. By way of contrast, a meritless lawsuit is one where a legitimate claim is filed, but the plaintiff cannot, or does not, meet his or her burden of proof.
   - Eliminate the 21-day "safe harbor" (available in federal courts and about one-third of state courts), which allows plaintiffs' lawyers to withdraw frivolous claims without penalty even after imposing significant costs on a defendant.
   - Require courts to impose sanctions when a judge finds that a claim or defense is frivolous.
   - Authorize courts to reimburse a victim of lawsuit abuse for reasonable attorneys' fees and costs incurred as a direct result of the frivolous claim.
   - Place the cost of frivolous legal claims or defenses on the attorney responsible.
2. Require a plaintiff whose case is dismissed at an early stage for failure to state a claim to pay the defendant's attorneys' fees and costs. Colorado, Tennessee, and Texas have variations of this approach.[127] 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 laws or 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.

Address Shotgun Pleading

Purpose

Shotgun pleading is a practice by which a plaintiffs' 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 involved. 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.[128] 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.

This practice 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."[129] Personal injury lawyers now name over 74 defendants in an average asbestos complaint. About 25 percent of asbestos lawsuits name over 100 defendants.[130] A study of a sample of asbestos lawsuits filed in Philadelphia, for example, found that about half of the companies named as defendants were never identified in the complaint as sources of the plaintiff's exposure.[131]

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.[132] As this type of litigation proceeds, those who are pulled in may feel compelled to settle to avoid mounting defense costs, even if they are not responsible for the plaintiffs' injuries. Improper naming of defendants has

"In other words, rather than conduct an adequate investigation before filing a complaint, plaintiffs' lawyers simply take an indiscriminate 'sue everyone' approach."

also contributed to recent bankruptcies.[133]

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

- *Alabama S.B. 104 (2024) (amending Ala. Code §§ 6-5-691, 6-5-692, and 6-5-693)*: Within 45 days of filing an asbestos action, the plaintiff must provide the parties with an information form specifying the basis for each claim against each defendant along with supporting documentation. A court must dismiss an asbestos action without prejudice if the plaintiff fails to file or supplement the required form, or if the defendant's product or premises is not identified as a source of exposure. Also requires a plaintiff, within 60 days of filing an asbestos action, to file all available asbestos trust claims and provide the parties with all trust claim materials available to the plaintiff or his or her counsel in relation to the plaintiff's exposure to asbestos.
- *Utah H.B. 328 (2023) (codified at Utah Code § 78B-6-2402)*: Within 21 days of an answer filed in an asbestos action, a plaintiff must provide the parties with a sworn declaration providing the basis for each claim against each defendant with supporting documentation. The court must dismiss a plaintiff's action without prejudice as to any defendant whose product or premises is not identified in the required disclosures, absent a showing of good cause.
- *Arizona S.B. 1157 (2022) (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."[134] The costs associated with civil discovery have grown exponentially, frustrating the goal of obtaining just, speedy, and inexpensive determination of every action and imposing significant burdens on both litigants and the judiciary. It is estimated that discovery costs comprise between 50 and 90 percent of the total litigation costs in a given case.[135] 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.

"The costs associated with civil discovery have grown exponentially, frustrating the goal of obtaining just, speedy, and inexpensive determination of every action and imposing significant burdens on both litigants and the judiciary."

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 in turn may involve seeking judicial, rather than legislative, action.

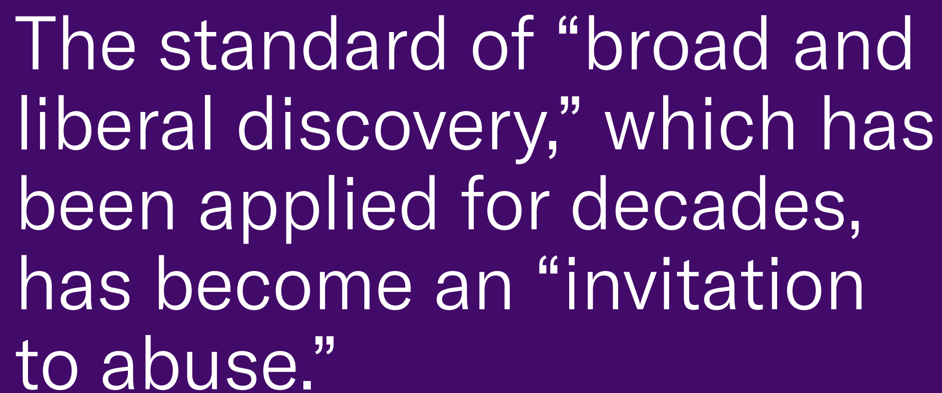
Options

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 information, the parties' resources,[136] 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

- *Florida Supreme Court (2024)*: Amended the Florida Rules of Civil Procedure to include a requirement that discovery must be proportional to the needs of the case.[137]

- *Missouri Supreme Court (2021) and Ohio Supreme Court (2020)*: Adopted amendments similar to the Florida Supreme Court amendments described above.[138]



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.[139]

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."[140]

As another court recognized, "high ranking and important executives can be easily subjected to unwarranted harassment and abuse."[141]

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 may be inappropriately used by plaintiffs' lawyers as a means to pull the official into the litigation.

In response, many courts have adopted the "Apex Doctrine," which promotes sound public policy by curbing abusive discovery. This doctrine reduces the potential for abuse by limiting apex depositions 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[142] when determining whether high-level officers can be deposed.[143]

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.[144] 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."[145] 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 the misuse of discovery that would subject corporate executives to time-consuming and intrusive depositions when the officer has no firsthand knowledge of the events involved in the lawsuit by adopting the "Apex Doctrine."

Recent State Judicial Action

- *Indiana Supreme Court (2022)*: Accepted the Apex Doctrine's basic principles but did not expressly adopt the doctrine.[146] The court characterized its decision as establishing "a legal framework that harmonizes [the Apex Doctrine's] underlying principles with [Indiana's] existing discovery rules."[147]
- *Florida Supreme Court (2021)*: Amended Florida Rule of Civil Procedure 1.280(h) to codify the Apex Doctrine.

Recent Legislative Enactments

- *Georgia S. 74 (2023) (codified at Ga. Code Ann. § 9-11-26.1)*: Codifies the Apex Doctrine, providing that an organization may obtain a protective order prohibiting the deposition of current or former high-ranking corporate officers or government officials who lack unique personal knowledge of matters relevant to a lawsuit.

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 $3.9 billion on defending themselves against class action lawsuits in 2023. Class action litigation is the fastest-growing area of legal spending.[148] About 62 percent of major companies face class action litigation, with the average number of class matters per company rising from 5.1 in 2014 to 9.8 in 2023.[149]

> "It is not uncommon for consumers to receive less money from a class action settlement than goes to paying attorneys' fees, litigation expenses, and the costs of administering the claims process."

Many class action lawsuits provide little or no value to consumers. Often, businesses privately settle these claims soon after they are filed at their nuisance value (less than what it would cost to obtain dismissal), making the attorney who filed the case and the individual who agreed to serve as the representative plaintiff the sole beneficiaries.

When a case settles on a class-wide basis, it is common for the lawyers to receive hundreds of thousands of dollars in fees. Their purported "clients" either receive nothing of value or must fill out paperwork to obtain a nearly worthless recovery.[150] 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 goes to paying attorneys' fees, litigation expenses, and the costs of administering the claims process.[151]

Typically, more than 90 percent of class members receive no benefit whatsoever from the litigation.[152] The claims rates, sometimes as low as one to three percent, suggest 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, while preserving the ability of parties to settle these cases. 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 present 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 attorney fee awards on a reasonable percentage of the money actually received by class members.

   - Determining attorneys' fees through a "declining percentage principle," whereby the percentage of recovery allocated

to attorneys' fees decreases as the size of the recovery increases.

- Prohibiting attorney fee awards that exceed the amount of money distributed to the class members.

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

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, attorneys' fees must be based on the amount of time reasonably expended.

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.[153] Scores of trusts have been created to pay claims related to those companies' asbestos products. Between 2004 and 2020, these bankruptcy trusts amassed nearly $60 billion from debtor funding commitments, insurance contributions, and investment gains, while distributing nearly $34 billion in claim payments.[154]

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 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."[155] 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...."[156] Evidence Garlock needed to attribute plaintiffs' injuries to insulation products

> **"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."**

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)."[157]

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 enacted asbestos trust claim transparency laws between 2012 and 2019. These states include Alabama, Arizona, Iowa, Kansas, Michigan, Mississippi, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, Wisconsin, and Utah.

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.*[158] The Court's ruling emphasized the obligation of the trial court judges to serve as "gatekeepers," guarding the courthouse against untrustworthy expert testimony.

When courts evaluate expert testimony under this approach, which is reflected in Rule 702 of the Federal Rules of Evidence, they consider such factors as whether the method has been empirically tested, whether the method has been subject to peer review and publication, the potential rate of error associated with the technique, and whether the method is generally accepted in the relevant scientific community. Courts applying this approach have also considered whether the expert developed the theory for purposes of testifying in litigation, jumped to an unfounded conclusion, or did not account for obvious alternative explanations.[159]

> "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."

Effective December 1, 2023, the federal judiciary strengthened Rule 702 by making clear that the proponent of expert testimony must "demonstrate to the court that it is more likely than not" that all of the rule's admissibility requirements are met.[160] Committee Notes explain that this change responds to courts that have misapplied the rule by punting shaky expert opinions to juries by viewing their testimony as raising "questions of weight and not admissibility."[161] Another change to the

rule "emphasize[s] that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology."[162]

Only federal courts are bound to follow Federal Rule 702 and case law interpreting its requirements. While many states have adopted the core requirements of Rule 702 that apply 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.

Note

- About three-quarters of states follow a gatekeeping approach similar to that applied in federal courts.[163] The five most recent jurisdictions to adopt the federal approach are Maryland, Florida, New Jersey, Missouri, and the District of Columbia.

Options

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

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

- Thus far, the Supreme Courts of Arizona, Kentucky, Michigan, and Ohio have amended their state's evidence rules to conform to the 2023 amendments to Federal Rule of Evidence 702.[164]
- 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.[165] The court declined, however, to amend its expert evidence rule to reflect the federal changes in 2024.[166]

Recent Legislative Enactments

- *Louisiana S.B. 16 (2024)*: Updates Louisiana Code of Evidence Article 702 to align with the 2023 amendments to Federal Rule of Evidence 702.

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), eight, 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

> "In some states, however, the structure of the judicial system, statutes, or court rules hinders the ability of a party to exercise this right."

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 percent 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.

Note

In 2023, the Colorado Supreme Court upheld the state's $25 million supersedeas bond cap, holding that the statute does not unconstitutionally infringe on the court's rulemaking authority or violate equal protection principles.[167]

Options

1. Appellate review:
    - Establish an intermediate appellate court with mandatory review.
    - Provide interlocutory (immediate) appeal orders granting or denying class certification.
2. Appeal bonds:
    - Apply appeal bonds limits to all civil case judgments regardless of legal theory or type of defendant.
    - Provide a separate, lower cap for small businesses or a limit based on a defendant's net worth.
    - Limit the necessary appeal bond to the compensatory damages portion of the verdict (exclude the need to post bond to cover the punitive damage portion of the award, if any).

Recent Enactments

- *West Virginia S.B. 275 (2021) (codified at W. Va. Code Ann. §§ 51-11-1 et seq.)*: Establishes 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.

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.

> **"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 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 percent pre- and post-judgment interest rates.[168] At least eight states retain a judgment interest rate of 10 percent.[169] Several other states apply a fixed interest rate of eight percent or nine percent.[170] These fixed rates are grossly disproportionate and arbitrary when compared to historic market rates.

Excessive judgment interest rates unfairly discourage

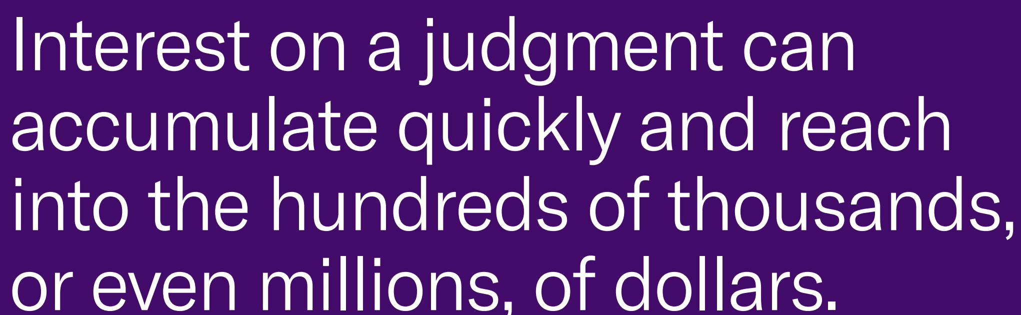
civil defendants from mounting a fair defense, and, instead, increase pressure on defendants to settle claims quickly, regardless of the merits.

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

- *Kansas S. 75 (2023) (amending Kan. Stat. Ann. § 16-201)*: Reduced the rate on prejudgment interest in civil tort actions, when available under current law, from a fixed rate of 10 percent per annum to a rate that reflects the federal discount rate plus two percent.



Interest on a judgment can accumulate quickly and reach into the hundreds of thousands, or even millions, of dollars.

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.

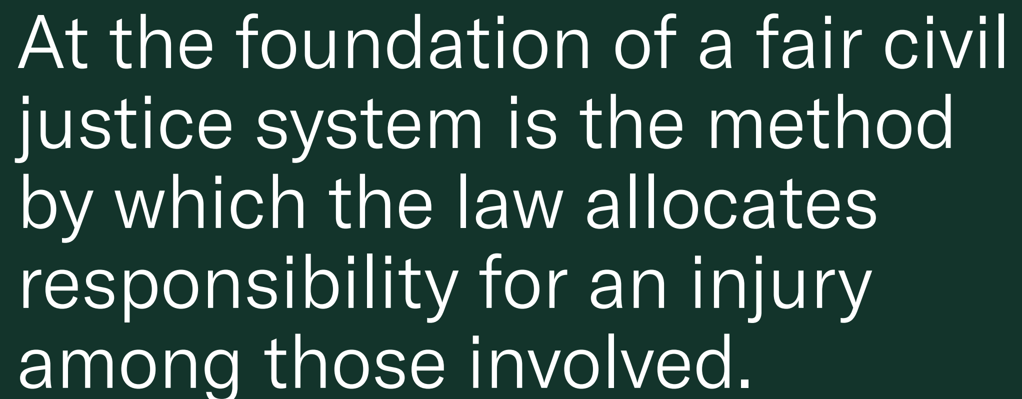
At the foundation of a fair civil justice system is the method by which the law allocates responsibility for an injury among those involved. For many years, the law barred a person who was partially at fault for his or her own injury from recovery. Now, most states have replaced this doctrine of contributory 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 percent 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 percent at fault) to "roll the dice" in court.

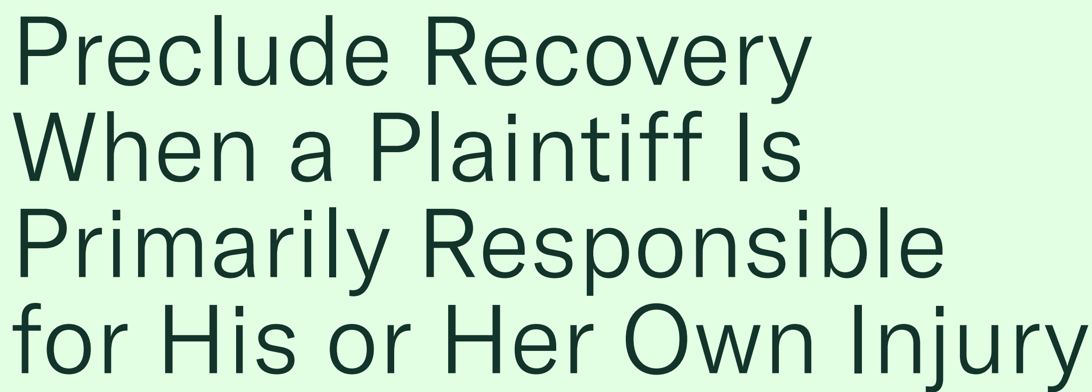
States are also moving away from joint and several liability, which unjustly requires a defendant that is as little as one percent at fault for an injury to pay the entire damage award if others responsible are immune, judgment proof, beyond the court's jurisdiction, or not named as a defendant for some 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. To properly allocate fault, states are clarifying that juries should consider everyone that may have contributed to an injury, regardless of whether a person or business is named as a defendant. This approach makes it more likely that defendants will pay their fair share, rather than paying for injuries 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, safety standards does not receive recognition under the law for its responsible behavior. 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 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.

"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."

Note

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

- Alaska, Arizona, California, 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, 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.

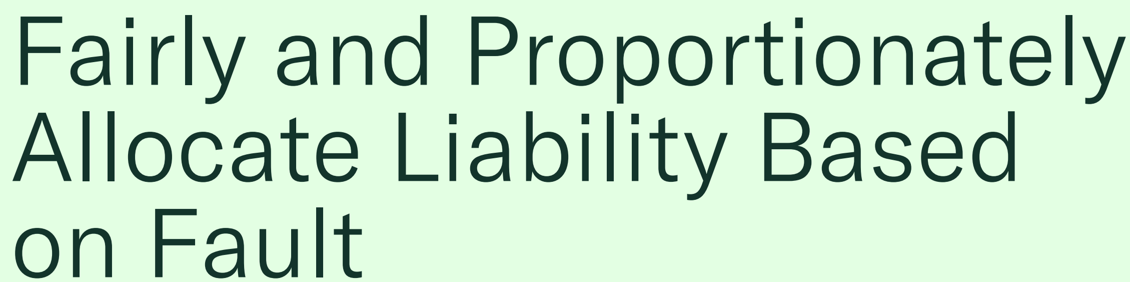
States also vary in whether, and how, juries allocate fault to parties that may have contributed to the plaintiff's injury but are not present in the litigation. Responsible parties may not be present at trial for many reasons. The plaintiff may have settled with a party or the tortfeasor may be insolvent, 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;[171]
   - the plaintiff bears a greater percentage of fault than the combined percentage of fault attributed to others;[172] or
   - the plaintiff is 50 percent or more responsible for the injury or damages claimed.[173]
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.[174]
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. 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.[175]

Recent Enactments

- *Indiana H.B. 1090 (2024) (to be codified at Ind. Code § 9-19-11-8.5)*: Provides that evidence of a plaintiff's failure to wear a seatbelt is admissible to mitigate damages in a personal injury or wrongful death action if the plaintiff was at least 15 years old at the time of the incident and was inside a motor vehicle manufactured after Sept. 1, 1986, that had at least one inflatable restraint system.
- *Florida H.B. 837 (2023) (amending Fla. Stat. Ann. §§ 768.81, 768.0701)*: Moves from pure to modified comparative fault, prohibiting recovery where a plaintiff is 51 percent or more at fault for his or her own harm. Requires juries to consider the fault of all persons who contributed to an injury in actions seeking damages against a property owner, lessor, operator or manager involving the criminal act of a third party.
- *Montana S.B. 216 (2023) (amending Mont. Code Ann. § 27-1-719(4))*: Permits use of contributory negligence as a defense to a product liability claim. Provides that a plaintiff engages in the unreasonable misuse of a product, and cannot recover when the plaintiff uses the product in a manner that contravenes an express warning or instruction, if the user or consumer knew or with the exercise of reasonable and diligent care should have known of the instructions or warnings.
- *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 seatbelt in violation of state law as evidence of comparative negligence or for purposes of mitigation of 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 a plaintiff names multiple parties as defendants, 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, immune from suit, 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 one percent at fault can be forced to pay 100 percent of the damages if others who contributed to the injury are not also defendants in 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.

Note

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

Options

1. Adopt pure several liability. Limit a defendant's liability only to the percentage of fault attributed to that defendant.

    - Currently law in states such as Alaska, Arizona, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Michigan, Mississippi, Oklahoma, Tennessee, Utah, and Wyoming.

2. Implement modified joint and several liability.

"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."

Several liability applies unless a defendant is 50 or 51 percent or more at fault.

- Minnesota, Missouri, Montana, New Hampshire, New Jersey (60 percent), Pennsylvania (60 percent), 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 percent at fault), Nebraska, New York (for defendants less than 50 percent at fault), and Ohio (for defendants less than 50 percent 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

- *Montana S.B. 216 (2023) (amending Mont. Code Ann. § 27-1-703(6))*: Provides that in strict liability or breach of warranty actions, in addition to negligence claims, defendants may assert as a defense that the claimant's damages were caused in full or in part by a person with whom the claimant has settled or whom the claimant has released from liability.

- *Georgia H.B. 961 (2022) (amending Ga. Code Ann. § 51-12-33)*: Provides that in cases involving one or more defendants, damages are apportioned according to the percentage fault of each person who contributed to the alleged injury, regardless of whether that person is named as a party to the lawsuit. 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.

Treat Businesses Operating in Higher-Crime Areas Fairly

Purpose

Property owners and lessors generally have a duty to ensure that visitors are reasonably safe from foreseeable dangers. But what happens when a business provides products or services in a high-crime area? Should it face a lawsuit, along with the threat of a nuclear verdict, whenever a person is a victim of a crime on or near its property? These types of lawsuits often speculate that the business might have prevented the crime, even if it is unlikely that the action that the business purportedly failed to take would have made any difference.

Businesses face a rising threat of these types of "negligent security" claims.[176] Courts have returned multi-million-dollar verdicts of this kind against pharmacies,[177] restaurants,[178] shopping malls,[179] supermarkets,[180] and others. For example, a convenience store was hit with a $91 million verdict after a robber attacked a customer who responded to a clerk's plea to call 911.[181] Apartment complexes and other housing providers have also experienced massive verdicts following crimes on their properties.[182] Businesses have even been held liable for assaults that occurred after visitors left their grounds.[183]

Businesses, however, are limited in how much they can do to stop crime and protect the public. For that reason, tort law typically recognizes that business owners' duty to protect customers from crime extends only to addressing specific risks that come to light after similar prior crimes on their property.

"Businesses face a rising threat of these types of 'negligent security' claims."

For instance, if a convenience store has experienced multiple robberies, the owner may have a duty to hire security guards or install cameras. Businesses provide products and services; they are not police forces charged with securing the neighborhood.

In some instances, however, courts have ruled that general knowledge of crime in the surrounding area, even when dissimilar to what occurred, is enough to make a crime on a business's property "foreseeable," subjecting it to liability.[184] Juries have sometimes found a business fully or almost completely responsible for a crime victim's injury, disregarding the

perpetrator's conduct. These outcomes may occur either because state law does not permit juries to consider the fault of intentional tortfeasors (the assailants) when allocating fault among responsible parties or due to a jury's understandable sympathy for the victim.

Without balanced premises liability law, these types of lawsuits can have significant adverse consequences. They may result in shifting responsibility from a criminal to an innocent business viewed as having deep pockets to compensate a victim or a victim's family. The broader impact is that lawsuits of this kind may discourage businesses from operating in neighborhoods that may need them most. Owners and employees of businesses operating in these communities already do so at risk to their own safety and property loss. Liability for crime committed by others makes it even less likely that a person will open or continue to operate a business in a high-crime area.

Options

1. Require the fact finder to apportion fault among all individuals and entities that contributed to a plaintiff's injury, including intentional tortfeasors, regardless of whether they are parties in the litigation.

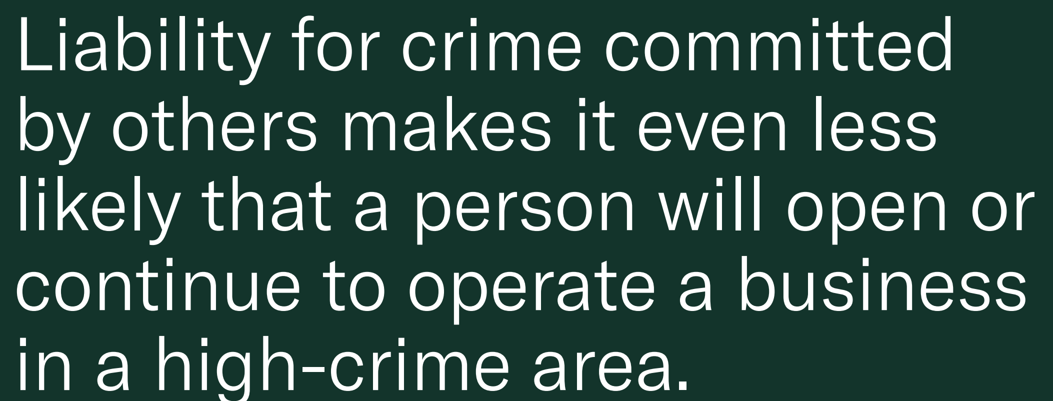
2. Codify the principle that the mere fact that a premises is situated in a high-crime area is not, on its own, sufficient to establish a general duty to keep the premises safe from criminal activity.

3. Establish a safe harbor providing a presumption that a business or housing provider that implements certain security measures is not liable for criminal conduct on its property.

Recent Legislation & Enactments

- *Georgia S.B. 186 (2024) (reported favorably from Senate committee)*: Provides that landowners are generally not liable for the willful, wanton, or intentional tortious conduct of third parties unless there is clear and convincing evidence that (1) the conduct occurred on the landowner's property; (2) the landowner affirmatively impelled the third party's action or had actual knowledge of the specific threat of imminent harm to the invitee from the third party and could have taken reasonable action to prevent the harm; and (3) the landowner's conduct proximately caused the plaintiff's harm. A landowner is not subject to liability based on constructive knowledge of prior crimes on or near the landowner's property or upon the landowner's alleged constructive knowledge of the prior crimes or violent nature of the third party who caused the injury. Requires a jury to apportion damages fairly and accurately among the landowner and third party, and authorizes the court to require a retrial if the jury does not allocate an appropriate degree of fault to the third party.

- *Florida H.B. 837 (2023) (amending Fla. Stat. Ann. §§ 768.81 and 768.0701, and enacting § 768.0706)*: Requires juries to consider the fault of all persons who contributed to an injury in actions seeking damages against a property owner, lessor, operator or manager involving the criminal act of a third party. Provides a presumption that owners of multi-family housing complexes are not liable for criminal conduct on their property if they have implemented certain security enhancements, such as security cameras, lighting, deadbolts and other locks, train employees in crime deterrence and safety, and maintain substantial compliance with a crime prevention assessment conducted by a law enforcement agency every three years.



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.

Several states have enacted 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.[185] 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

"Lawsuits may seek to impose liability, and sometimes even punitive damages, on businesses that faithfully comply with the law."

service complied with government regulations.[186] 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, Montana, Oklahoma, and Tennessee apply to all products approved by a government agency. The Arizona and Tennessee laws also apply to government-approved services.

Note

During the COVID-19 pandemic, 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. These laws varied from state to state, but generally considered an organization's compliance when deciding liability for a person's exposure to the virus. Some of these laws expired upon the conclusion of the declared public health emergency or a specific sunset date.

Options

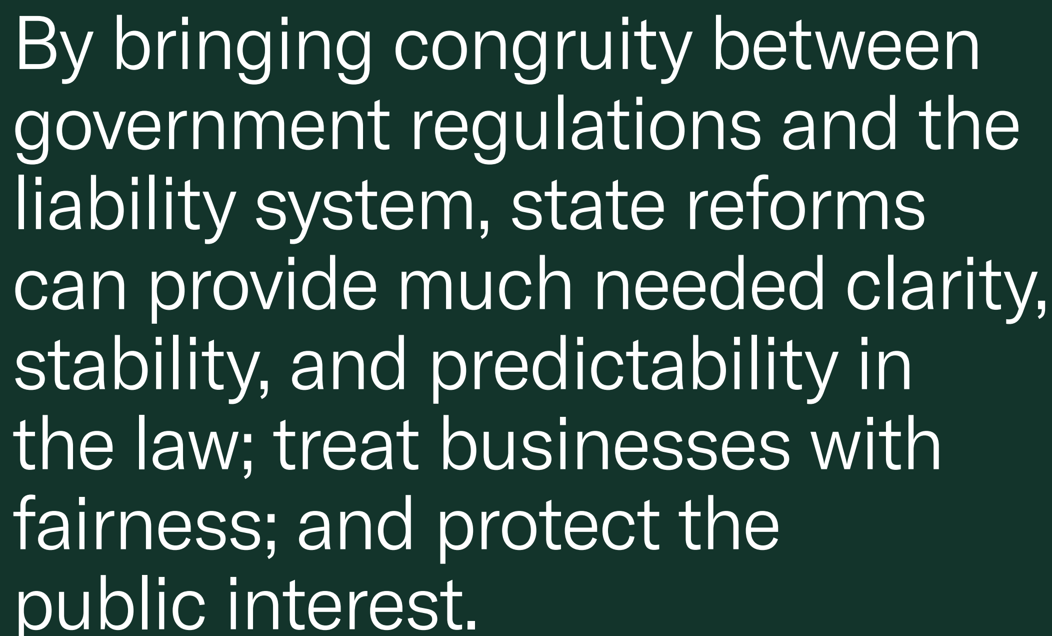
1. Establish a rebuttable presumption that a product, service, or conduct that complies with government regulations is not subject to liability.

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

- *Montana S.B. 216 (2023) (adding Mont. Code Ann. § 27-1-719(7))*: Provides a rebuttable presumption that a product was not defective and that the product's manufacturer or seller was not negligent if, at the time the product was first sold, leased, or otherwise placed in the stream of commerce, the product complied with mandatory safety standards adopted by a federal or state government or agency, the product was subject to premarket licensing or approval by a federal or state government or agency, or the product was an FDA-approved drug or medical device that complied with FDA approval at the time of sale and was not sold after any order by the FDA to remove the product from the market or withdraw its approval.



Prevent Adoption by Courts of Novel and Unsound Restatements of Law

Purpose

The American Law Institute (ALI) has been 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. 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 the liability of civil defendants.

> **"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 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.[187]

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, 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.

The ALI plans to complete the Restatement of Torts, Third: Miscellaneous Provisions in 2025. This document is a "catch all" of different tort issues not covered elsewhere. The current draft, which is preliminarily approved, includes several liability-expanding provisions. For example, this Restatement endorses a novel rule allowing certain claimants to recover for medical monitoring expenses, even if they are uninjured.[188]

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 courts should not rely upon it.

Recent Enactments (General)

- *Missouri S.B. 775, 751 & 640 (2022) (codified at Mo. Rev. Stat. § 1.016)*: Provides that a secondary source, including a legal treatise, scholarly publication, textbook, or other explanatory text, does not constitute the law or public policy of this state to the extent its adoption would create, eliminate, expand, or restrict a cause of action, right, or remedy, or to the extent it is inconsistent with, or in conflict with, or otherwise not addressed by, Missouri statutory law or Missouri appellate case law precedent.

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.

Recent Enactments (Trespasser Rule)

As noted, 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. The most recently enacted such law is:

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

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 denying 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.[189]

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 a minor insurer error into a multi-million-dollar lawsuit.

"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 a 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.[190]

Ultimately, costs associated with these lawsuits are not only 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.

Note

- 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).[191]

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 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. 837 (2023) (amending Fla. Stat. Ann. § 624.155)*: Recognizes that mere negligence alone is insufficient to constitute bad faith. Prohibits a bad faith claim when an insurer has tendered the policy limit or amount demanded by the claimant within 90 days of receiving actual notice of a claim accompanied by sufficient supporting evidence of its amount. Establishes that an insured, claimant, and representative of the insured or claimant have a duty to act in good faith in pursuing and settling a claim.

- *Montana S.B. 165 (2023) (codified at Mont. Code Ann. § 33-18-243 and amending § 33-18-242)*: Establishes a duty of cooperation for insureds and third-party claimants toward insurers. Breach of that duty may be asserted by an insurer as an affirmative defense to a claim by an insured or third-party claimant alleging breach of contract or breach of the implied covenant of good faith and fair dealing by the insurer. Amends Montana's bad faith insurance claim statute to provide that a third-party claimant who has suffered damages as a result of the handling of an insurance claim may bring an action against the insurer for fraud, but no other cause of action. A third-party claimant may not bring an action for bad faith in connection with the handling of an insurance claim.

- *Montana S.B. 236 (2023) (codified at Mont. Code Ann. § 33-18-251)*: Establishes requirements for time-limited demands from claimants to insurers to settle claims, including the need for the claimant to provide all available information and supporting documents so the insurer has an opportunity to investigate and evaluate the claims presented without the risk of having an unfair claim settlement practices or insurance bad faith claim alleged against it.

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.[192] Over the past several years, state legislatures have 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, which 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.[193]

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 a fingerprint or retina scan, 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. Plaintiffs' lawyers can seek thousands of dollars for mere technical violations.[194]

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.[195] These "gotcha" class actions

"This approach undermines government enforcement, results in inconsistent court rulings, and leads to settlements that benefit lawyers more than consumers."

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.[196] 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.[197]

The situation deteriorated further after the Illinois Supreme Court ruled in 2023 that a BIPA violation occurs each time an entity collects or discloses biometric information, not just the first time it does so.[198] This decision permitted plaintiffs' lawyers to seek up to $5,000 for each employee whose fingerprint is scanned without a required BIPA notice to 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. The Court acknowledged but dismissed concerns that interpreting the statute in this manner would lead to "astronomical" damage awards that would constitute "annihilative liability" not contemplated by the legislature and that may be unconstitutional. Fortunately, the Illinois General Assembly addressed this aspect of the BIPA's excessive liability in 2024.

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 from BIPA, Illinois' law illustrates a problematic approach that states should ultimately avoid.[199]

Another approach that poses problems comes from California. In 2018, California enacted the first comprehensive data privacy bill in the country that includes a private right of action following a data breach.[200] Under the California Consumer Privacy Act (CCPA), statutory damages range from $100 to $750 "per consumer per incident," which can easily turn into an astronomical sum. Since enactment of the CCPA, California passed another significant piece of privacy legislation, the California Privacy Rights Act (CPRA), which amends the CCPA, effective January 1, 2023.

Instead of following Illinois and California, states should pursue alternative approaches that protect privacy without unnecessary litigation. As indicated below, since 2020, many states have enacted data privacy laws that are exclusively enforced by the state's attorney general or other government officials.

Ohio's commonsense cybersecurity law, enacted in 2018, encourages businesses and others to adopt a program to protect personal information that "reasonably conforms to an industry recognized cybersecurity framework."[201] Organizations that meet the Ohio law's requirements receive safe harbor from tort liability in the event of a data breach.[202] The Ohio statute also instructs that it does not provide a private right of action with respect to any act or practice it regulates.[203] Other states, such as Connecticut, Iowa, and Utah, have followed in adopting cybersecurity safe harbor statutes.[204]

In sum, legislation addressing data security and collection of biometric information should provide clear guidance to businesses about their responsibilities, encourage adoption of reasonable security safeguards of personal information, and empower government agencies or officials—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 biometric privacy legislation. Oppose legislation that authorizes a private right of action, allowing 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 and biometric 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.[205]

6. If a law provides for statutory damages or civil penalties, carefully define "per violation" to avoid duplicative damages or provide a maximum amount of damages for any related series of violations.

Recent Data Privacy Enactments

Approximately 20 states have enacted comprehensive data privacy laws. States enacting such laws since 2020 with exclusive enforcement by the state's attorney general (often providing businesses with a period to cure a violation), include:

- *Kentucky H.B. 15 (2024) (to be codified in Ky. Rev. Stat. ch. 367)*: Effective January 1, 2026.
- *Maryland S.B. 541 (2024) (to be codified at Md. Comm. Law Code 14-601 et seq.)*: Effective October 1, 2025.
- *Nebraska L.B. 1074 (2024)*: Effective three months after session adjournment.
- *New Hampshire S.B. 255 (2024) (to be codified at N.H. Rev. Stat. 507-H:1 et seq.)*: Effective January 1, 2025.
- *New Jersey S.B. 332 (2024) (to be codified at N.J. Stat. Ann. 56:8-166.4 et seq.)*: Effective January 16, 2025.
- *Indiana S.B. 5 (2023) (codified at Ind. Code Ann. §§ 24-15 et seq.)*: Effective January 1, 2026.
- *Iowa S.F. 262 (2023) (codified at Iowa Code §§ 715D.1 to 715D.9)*: Effective January 1, 2025.
- *Montana S.B. 384 (2023) (codified at Mont. Code Ann. §§ 30-14-2801 et seq.)*: Effective October 1, 2024.
- *Oregon S.B. 619 (2023) (codified at Or. Rev. Stat. §§ 646A.570 to 646A.589)*: Effective July 2024.
- *Tennessee H.B. 1181 (2023) (codified at Tenn. Code Ann. §§ 47-18-3201 et seq.)*: Effective July 1, 2025.

- *Texas H.B. 4 (2023) (codified at Tex. Bus. & Comm. Code §§ 5401 et seq.)*: Effective January 1, 2025.

- *Connecticut S.B. 6 (2022) (codified at Conn. Gen. Stat. §§ 42-515 et seq.)*: Effective July 1, 2023.

- *Virginia H.B. 2307 (2021) (codified at Va. Code Ann. §§ 59.1-575 et seq.)*.

- *Colorado S.B. 21-190 (2021) (codified at Colo. Rev. Stat. §§ 6-1-1301 et seq.)*.

- *Utah H.B. 80 (2021) (codified at Utah Code Ann. §§ 78B-4-701 et seq.)*: Includes an affirmative defense to tort claims stemming from a data breach if they have a cybersecurity program in place meeting certain requirements.

Data Breach Enactments

- *Tennessee H.B. 2434 (2024) (to be codified within Tenn. Code Ann. § 29-34, Part 2)*: Provides that private entities are not liable in class actions resulting from cybersecurity events unless the cybersecurity event was caused by willful, wanton, or gross negligence on the part of the entity.

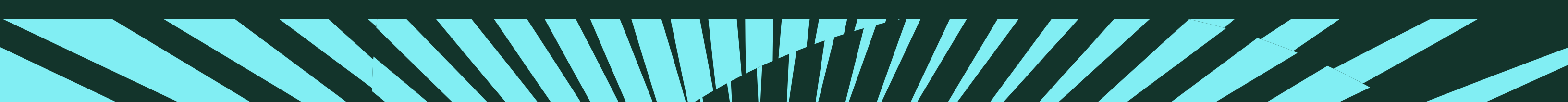
- *Iowa H.F. 553 (2023) (codified at Iowa Code § 554G.2)*: Provides an affirmative defense to tort claims arising out of a data breach if the company implements a written cybersecurity program that reasonably conforms to an industry-recognized framework. To qualify for the affirmative defense, a company must invest an amount at least as much as its "maximum probable loss" from a data breach into its cybersecurity program.

- *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.

Other Enactments

- *Illinois S.B. 2979 (2024) (amending 740 Ill. Comp. Stat. § 14/20)*: Amends the Biometric Information Privacy Act (BIPA) to provide that a private entity that more than once collects or discloses a person's biometric identifier or biometric information from the same person in violation of the Act has committed a single violation for which the aggrieved person is entitled to, at most, one recovery.

This highly litigious environment discourages companies from adopting innovative technology (like biometric authentication) that actually improves the security of sensitive information.



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.

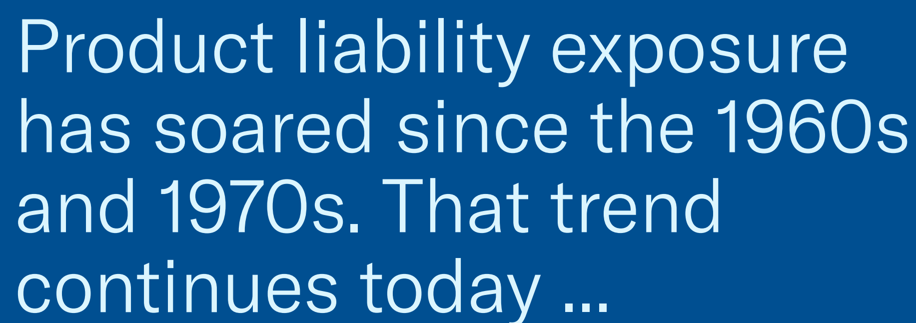
The proposals presented in this section help maintain balance. They codify core principles of product liability law and curb excesses allowed by some courts. For example, plaintiffs would be required to identify the particular manufacturer and product that caused injury. They would not be able to take shortcuts to 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.

The options would also 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.

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.

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 that is actually responsible for the plaintiff's harm.[206]

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.[207] 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.[208]

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

"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."

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.

And, as discussed earlier in Chapter 2 of this paper, some high-profile lawsuits have claimed that lawfully manufactured products are a public nuisance.[209] However, these cases do not allege that the products are defective, which is the linchpin for liability under 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.[210]

Recent Enactments

- *Montana S.B. 216 (2023) (adding Mont. Code Ann. § 27-1-719(6)(a))*: Provides defendants in actions alleging that a product was defectively designed with an affirmative defense when the product "could not have been made safer by the adoption of a reasonable alternative that was available at the time the product was first sold to a user or consumer."

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.

Note

Most states have protected innocent sellers from such liability, 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.

"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 … "

Options

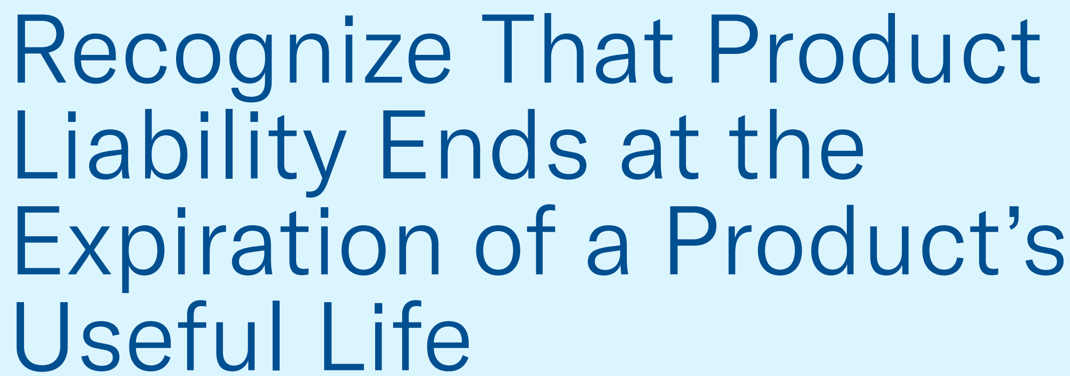
1. Limit the scope of product liability actions such that they may be permitted only against the manufacturer of the allegedly defective product and not against a seller that had no knowledge of or control over the defect. Consider exceptions in which the product seller may be held strictly liable, such 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

- *Montana S. 216 (2023) (adding Mont. Code Ann. § 27-1-719(8))*: Provides that a product liability action may not be brought against a seller that is not also a manufacturer unless the seller modified the product after it left the manufacturer's possession, the seller made an express factual representation about the product independent of any express warranty made by the manufacturer, the manufacturer cannot be identified, despite a good faith exercise of due diligence to identify the manufacturer, personal jurisdiction over the manufacturer cannot be obtained in the state, the manufacturer has been adjudicated bankrupt and a judgment is not otherwise recoverable from the assets of the manufacturer's bankruptcy estate, or the seller knew that the product was defective at the time of sale and the known defect proximately caused the plaintiff's harm.

- *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.



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.

Note

The following states have a statute of repose for product liability actions: Alabama (common law), Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Montana, 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

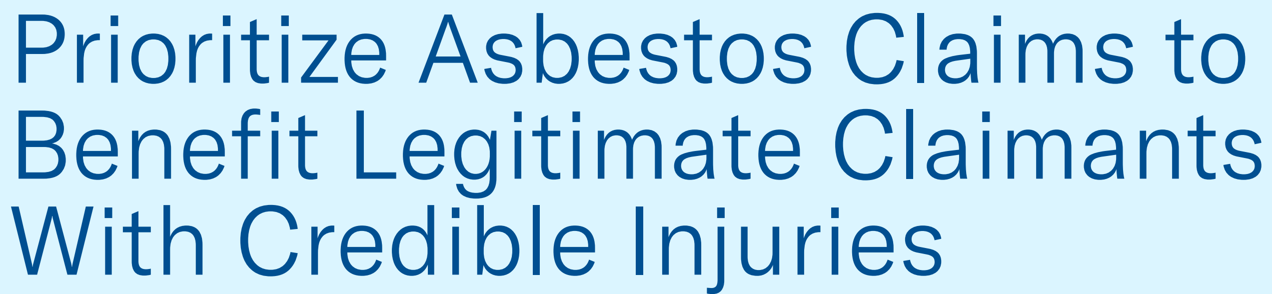
1. Establish a statute of repose (e.g., 10, 12, or 15 years) for products, starting at the time of initial sale to consumers, which precludes a product liability claim after the statutory period has elapsed.

2. Apply this reform only to those products with a useful life under a specified period (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 Enactments

- *Montana S.B. 216 (2023) (adding Mont. Code Ann. § 27-1-719(6)(b))*: Adopts a 10-year statute of repose for product liability claims. Exceptions include if: (1) the seller knowingly concealed a defective or unsafe condition that resulted in the claimant's harm; (2) the product is subject to a government-mandated recall related to consumer safety; (3) the claim is brought with respect to a product that is real property or an improvement to real property; (4) the product causes a respiratory

or malignant disease with a latency of more than 10 years, and the defendant seller is also the manufacturer of the product claimed to be defective; or (5) the seller made an express warranty or advertised that the product had an expected useful safe life greater than 10 years.



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."[211] 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.[212] 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. A former plaintiffs' attorney candidly described the litigation as an "endless search for a solvent bystander."[213]

Note

Many 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.

These laws protect the presently unimpaired from having their claims time-barred should they develop an impairing condition in the future. Medical criteria laws prioritize the legitimate claims of sick claimants so they can receive more timely and adequate recoveries; relieve defendants from having to spend critical resources on premature or meritless claims; preserve the claims of the non-sick; and unclog court dockets.

"Plaintiffs' lawyers have responded to asbestos-related bankruptcies by dragging many small and medium-sized companies into the litigation."

Options

1. Require claimants to submit credible and objective evidence of physical impairment caused by asbestos or silica to bring or maintain a claim.

   - Florida, Georgia, Iowa, Kansas, Ohio, North Dakota, Oklahoma, South Carolina, Tennessee, Texas, Utah, and West Virginia have enacted medical criteria procedures for asbestos and silica cases.

Recent Enactments

- *Utah H.B. 328 (2023) (codified at Utah Code § 78B-6-2403)*: Within 90 days of filing a complaint alleging an asbestos-related nonmalignant condition, a plaintiff must file a detailed narrative medical report and diagnosis, signed under oath by a qualified physician and accompanied by supporting test results, indicating that the exposed individual has a physical impairment for which exposure to asbestos was a substantial contributing factor.
- *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 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.

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.

In personal injury lawsuits, damages for medical expenses are often inflated. In many states, a person can recover 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 its market 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 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, 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 from the court 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 liability claims and are considering other options.

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, and reforms that address the increasing proliferation of nuclear verdicts, which have a fundamentally destabilizing effect on the civil justice system itself.

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 "list prices" or 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.

> **"[Phantom 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."**

The following options present a modest commonsense approach to reducing excessive damages. It does not go as far as eliminating the collateral source rule and therefore permits plaintiffs to continue to recover expenses even if those expenses were covered by insurance. Those who oppose such an approach must explain why plaintiffs should recover amounts that vastly exceed actual costs.

Note

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."[214] The Texas Supreme Court has applied this provision to preclude admission of billed amounts that do not reflect actual costs as evidence at trial.[215]

- In some states that limit phantom damages, plaintiffs' lawyers engaged in tactics that continued to allow inflated recovery. They did 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. Florida addressed such abuse through comprehensive legislation in 2023. The Texas Supreme Court has also 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.[216]

The following jurisdictions permit recovery of phantom damages: Alaska, Arizona, Arkansas, Colorado, Delaware (when medical expenses are paid by private insurers), District of Columbia, Georgia, Hawaii, Illinois, Kentucky, 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.[217] 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."[218]

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

Options

1. Provide that amounts billed that do not reflect 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 tied to 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

- *Tennessee S.B. 2253 (2024) (amending Tenn. Code Ann. § 29-26-119)*: Limits damages in health care liability actions to past and future actual economic losses (i.e., amounts that have been paid or will be paid by the claimant and amounts the claimant's providers have accepted or will accept as full payment for reasonable and necessary medical care, rehabilitation services, or custodial care).
- *Florida H.B. 837 (2023) (codified at Fla. Stat. Ann. § 768.0427)*: Provides that evidence of past damages for medical treatment is limited to the amount actually paid, regardless of the source of payment. Provides requirements for establishing the value of future medical expenses tied to how much health care providers accept to satisfy charges from private insurance, Medicare, or Medicaid. Requires disclosure of letters of protection, of whether the claimant had health care coverage, and of referral relationships between attorneys and health care providers, among other provisions.
- *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,"

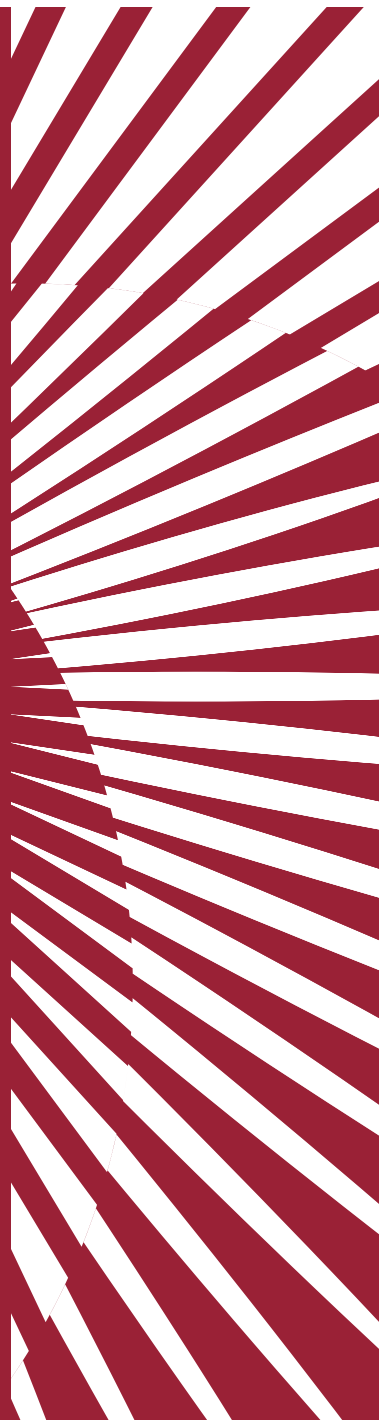
"necessary to satisfy charges that have been incurred and at the time of trial are still owing and payable to health care providers for reasonable and necessary medical services or treatment rendered to the plaintiff," and "necessary to provide for any future reasonable and necessary medical services 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 percent 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.

Those who oppose [limiting recovery of phantom damages] must explain why plaintiffs should recover amounts that vastly exceed actual costs.



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

Purpose

As discussed in the previous section, 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.

Note

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.

"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."

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 offset 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 losses, 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.[219]

Juries may reach verdicts with large noneconomic damage awards due to sympathy for the plaintiff, anti-corporate bias, 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.

Note

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.

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

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

In addition, state wrongful death laws provide a means for family members to recover for pecuniary losses

resulting from the death, but many limit the available forms of noneconomic damages. Most do not allow, for example, damages for unquantifiable grief or mental anguish that typically results from losing a loved one. Some states that allow loss of consortium, loss of society, or other nonpecuniary damages subject them to a statutory limit.

As discussed below in the section on nuclear verdicts, the plaintiffs' bar has engaged in a concerted campaign to increase or eliminate statutory limits on noneconomic damages and expand the forms of damages available in wrongful death suits.

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

- In 2022, the Ohio Supreme Court, for the third time,[220] reaffirmed the constitutionality of the state's limit on noneconomic damages in personal injury cases, but a split court found that an exception to the cap provided for plaintiffs with permanent and substantial physical injuries must also extend to plaintiffs who establish similarly severe and permanent psychological injuries.[221]
- In 2021, the New Mexico Supreme Court upheld a $600,000 aggregate limit on non-medical and punitive damages awards in medical liability actions.[222] 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.[223] 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.[224]
- In 2021, the Missouri Supreme Court upheld a statute limiting noneconomic damages in medical malpractice cases to $400,000 for non-catastrophic and $700,000 for catastrophic personal injuries.[225] 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.[226]
- 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 "catastrophic loss or injury") satisfies the Tennessee Constitution's right to jury trial, separation of powers, and equal protection provisions.[227] That year, a Maryland appellate court also reaffirmed the

constitutionality of the state's statutory limit on noneconomic damages in personal injury cases.[228]

- State supreme courts that have invalidated statutory limits on noneconomic damages over the past decade include Oregon (2020),[229] Kansas (2019),[230] Oklahoma (2019),[231] and Florida (2014/2017).[232]

Options

1. Limit noneconomic damages to a specific amount. *See, e.g.*, Nev. Rev. Stat. Ann. § 41A.035 (limiting noneconomic damages to $350,000 in any action for injury against a healthcare provider based on professional negligence).

2. Limit noneconomic damages to the greater of a specific amount or a multiplier of the compensatory damage award. *See, e.g.*, Ohio Rev. Code Ann. § 2315.18 (greater of $250,000 or three times economic loss up to a maximum of $350,000).

3. Limit noneconomic damages to a certain amount per year of the plaintiff's life expectancy. *See, e.g.*, Alaska Stat. § 09.17.010 (limiting noneconomic damages to the greater of $400,000 or injured person's life expectancy in years multiplied by $8,000 and, in cases involving severe permanent injuries, to the greater of $1 million or injured person's life expectancy in years multiplied by $25,000).

4. Authorize higher noneconomic damage awards in cases involving defined catastrophic injuries. *See, e.g.*, W. Va. Code Ann. § 55-7B-8(b) ($250,000 limit rises to $500,000 in cases involving wrongful death and certain permanent and substantial injuries in professional liability actions against a healthcare provider).

5. Provide for periodic adjustment of the noneconomic damage limit to account for inflation. *See, e.g.,* Idaho Code § 6-1603 (adjusts $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 $490,512 after July 1, 2024).

6. Oppose legislation that proposes to repeal statutory limits on noneconomic damages, raise existing limits to unjustifiable levels, or allow new forms of nonpecuniary damages in wrongful death actions.

Recent Enactments

- *West Virginia S.B. 583 (2024) (to be codified at W. Va. Code § 55-7-32)*: Limits noneconomic damages in personal injury and wrongful death actions involving commercial motor vehicles to $5 million per plaintiff, unless the employee was under the influence of alcohol, a controlled substance, or refused to be tested, provided the employer

has at least $3 million in commercial motor vehicle insurance.

- *Iowa H.F. 161 (2023) (amending Iowa Code § 147.136A)*: Establishes a $250,000 cap on noneconomic damages in medical liability actions that applies unless the jury determines "there is a substantial or permanent loss or impairment of a bodily function, substantial disfigurement, loss of pregnancy, or death, which warrants a finding that imposition of such a limitation would deprive the plaintiff of just compensation for the injuries sustained," in which case the amount recoverable shall not exceed $1 million (or $2 million if the action includes a hospital). The limitations on damages increase by two and one-tenth percent on January 1, 2028, and each January 1 thereafter.

- *Iowa S.F. 228 (2023) (codified at Iowa Code §§ 668.12A, 668.15A)*: Limits noneconomic damages in personal injury or death actions against commercial trucking companies to $5 million per plaintiff, with several exceptions. The cap adjusts for inflation on January 1, 2028, and every even-numbered year thereafter.

- *West Virginia H.B. 3270 (2023) (codified at W. Va. Code Ann. § 23-4-2a)*: Sets a maximum award of noneconomic damages of the greater of $500,000 or two times a plaintiff's economic damages in certain cases alleging workplace injuries against employers that fall outside the workers' compensation system.

- *California A.B. 35 (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 rose 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 two percent 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 began to increase annually for inflation 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 limits do not apply to damages for past and future medical care or punitive damages.

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."[233] 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

"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.'"

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.[234]

Recent Enactments

- *Montana S.B. 169 (2023) (amending Mont. Code Ann. § 27-1-221(5))*: Prohibits inclusion of a claim for punitive damages in an initial pleading, i.e. the complaint. After discovery has commenced, a party may move the court to allow the party to amend the pleading to assert a claim for punitive damages. The court may not allow a party to assert a claim for punitive damages unless affidavits and supporting documentation submitted by the party seeking punitive damages provide specific facts supported by admissible evidence adequate to establish the existence of a triable issue on all elements of a punitive damages claim.

- *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.

- *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 2020 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."[235] 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 jurisdictions have no statutory limit:

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

The vast majority of state high courts have upheld statutory limits on punitive damage.[236] 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.[237] The Georgia Supreme Court upheld its $250,000 limit on punitive damages in tort actions in 2023.[238]

"Statutory limits provide greater predictability and certainty in litigation, eliminate outlier verdicts, and avoid constitutionally excessive awards."

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 percent of surgeons and obstetricians/gynecologists age 55 or older have been sued, and data shows that 99 percent of doctors in high-risk specialties are subject to a lawsuit during their career.[239] Data also indicates that about two-thirds of these claims are dropped or dismissed.[240] The cost of defending such lawsuits is high—on average it costs more than $30,000 to defend against a dropped claim.[241] When a lawsuit goes to trial, the litigation expenses alone can be about five to 10 times that amount.[242] As a result of lawsuits, some physicians in certain states face liability premiums that exceed $100,000 or even $200,000 per year.[243]

> **"Widely disparate awards for the same or substantially similar injuries demonstrate medical liability's systemic problems."**

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.[244]

Note

During the COVID-19 pandemic, states were concerned that healthcare workers struggling to treat surges of patients would face lawsuits because 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.

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 percent of the first $150,000 recovered, 33 percent of the next $150,000, 25 percent of the next $200,000, and 20 percent of any amount recovered over $500,000).

    - States with similar provisions include California, Connecticut, Delaware, Florida, Illinois, Massachusetts, 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.

Recent Enactments

- *Georgia H.B. 1409 (2024) (to be codified at Ga. Code Ann. § 51-129.7)*: Limits the liability of mental health care providers to actions showing gross negligence and provides that mental health care providers are not subject to punitive damages unless a claimant proves the provider engaged in willful misconduct, or recklessly or intentionally inflicted harm.

- *Tennessee S.B. 2253 (2024) (amending Tenn. Code Ann. § 29-26-119)*: Abolishes the collateral source rule in health care liability actions. Limits damages in health care liability actions to past and

future actual economic losses (i.e., amounts that have been paid or will be paid by the claimant and amounts the claimant's providers have accepted or will accept as full payment for reasonable and necessary medical care, rehabilitation services, or custodial care).

- *Iowa H.F. 161 (2023) (amending Iowa Code § 147.136A)*: Limits noneconomic damages to $250,000 in medical liability actions unless the jury determines "there is a substantial or permanent loss or impairment of a bodily function, substantial disfigurement, loss of pregnancy, or death, which warrants a finding that imposition of such a limitation would deprive the plaintiff of just compensation for the injuries sustained," in which case the maximum amount recoverable is $1 million (or $2 million if the action includes a hospital). The damage limits increase by 2.1 percent on January 1, 2028, and each January 1 thereafter.
- *California A.B. 35 (2022) (codified at Cal. Health & Safety Code § 104340)*: Provides that communications expressing sympathy, regret, a general sense of benevolence, or suggesting, reflecting, or accepting fault relating to the pain, suffering, or death of a person, or to an adverse patient safety event or unexpected health care outcome are inadmissible in any civil proceeding.

Address Tactics That Manipulate Juries Into Awarding Nuclear Verdicts

Purpose

Nuclear verdicts are often defined as verdicts of $10 million or more. In personal injury and wrongful death cases, research indicates that nuclear verdicts are comprised mainly of subjective awards of noneconomic damages such as pain and suffering, and that the most extraordinary awards typically include punitive damages.[245] These outlier verdicts, which can reach hundreds of millions or even billions of dollars, 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.

Nuclear verdicts are increasing in frequency and amount in personal injury and wrongful death cases.[246] 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.[247] 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 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.[248] 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, as discussed in Chapter 3.

Some state legislators, over the past two years, have made nuclear verdicts even more likely by attempting to repeal or substantially raise existing limits on noneconomic damages or expanding the types of damages in wrongful death cases.[249] In some states, they were successful. For example, following threats to repeal its caps, Colorado significantly increased noneconomic damage limits applicable to personal injury, medical liability, and wrongful death cases.[250] Minnesota altered its wrongful death and survival statutes to permit recovery beyond economic losses.[251] Maine and New Hampshire boosted limits for certain types of nonpecuniary damages in wrongful death actions.[252] Delaware and Illinois added the threat of punitive damages in wrongful death claims.[253] These efforts continue.[254]

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 verdict amounts that courts have, or are likely to, reduce or overturn, as discussed in other sections of this paper.
3. Promote sound science in the courtroom, as discussed in other sections of this paper.
4. Adopt TPLF disclosure and other safeguards, 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.
6. Prohibit plaintiffs from pursuing direct negligence claims against a defendant when the defendant stipulates that the person involved was an employee acting within the scope of employment,

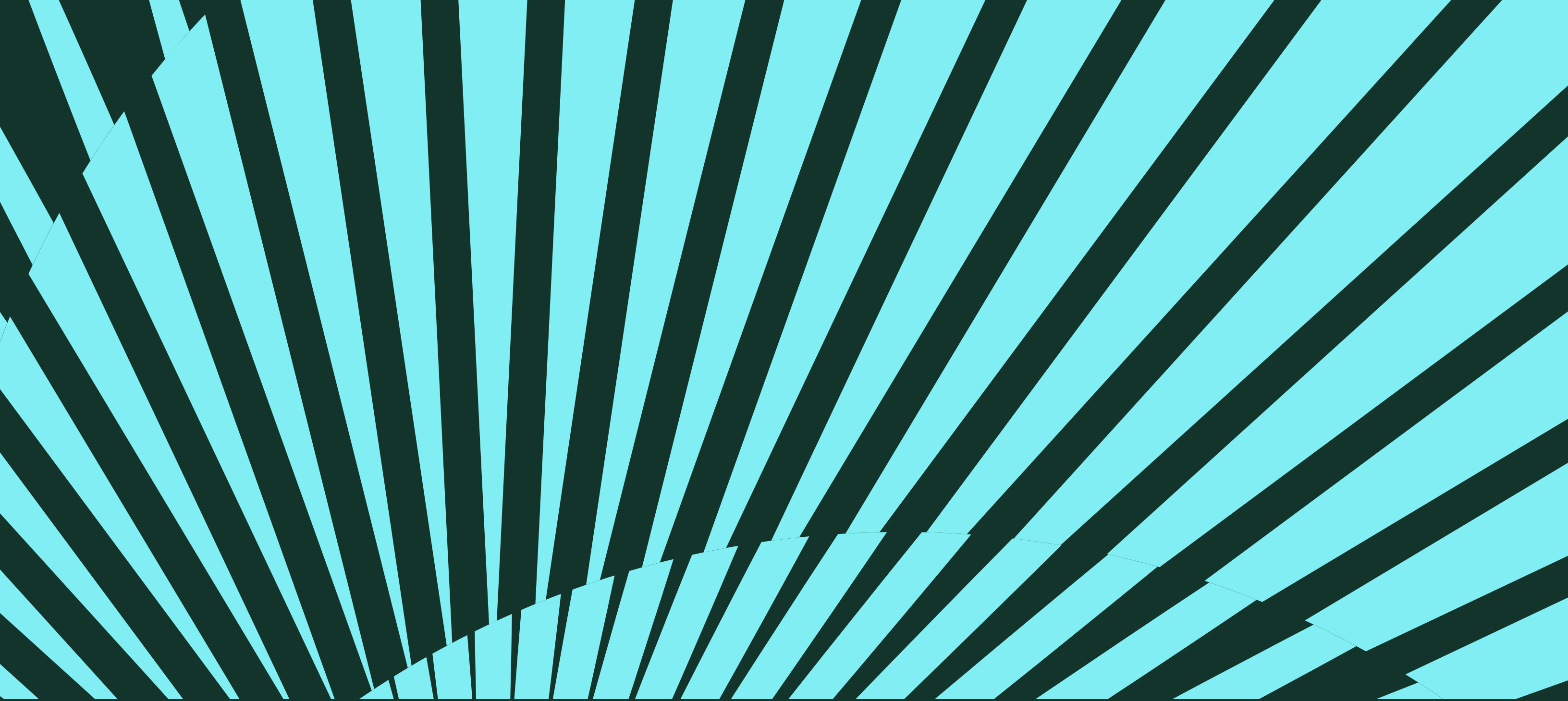
subjecting the defendant to liability for the employee's negligence under the doctrine of respondeat superior (this is known as the *McHaffie* doctrine).

7. Reject proposals that would fuel more nuclear verdicts, such as by repealing or significantly increasing statutory limits on damages or expanding the damages available under wrongful death acts.

Recent Enactments

- *West Virginia S.B. 583 (2024) (to be codified at W. Va. Code § 55-7-32)*: Limits noneconomic damages in personal injury and wrongful death actions involving commercial motor vehicles to $5 million per plaintiff, unless the employee was under the influence of alcohol, a controlled substance, or refused to be tested, provided the employer has at least $3 million in commercial motor vehicle insurance.
- *Iowa S.F. 228 (2023) (codified at Iowa Code §§ 668.12A, 668.15A)*: Provides that commercial trucking companies are not subject to negligent hiring claims if the employer stipulates that the driver whose negligence is alleged to have caused damages was an employee acting within the course and scope of employment. If an employer makes those stipulations, and the employee's negligence is found to have caused or contributed to causing the plaintiff's damages, the employer's liability is decided solely based on respondeat superior. Limits noneconomic damages in personal injury or wrongful death actions against commercial trucking companies to $5 million per plaintiff, with several exceptions. The cap adjusts for inflation on January 1, 2028, and every even-numbered year thereafter.
- *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.

Nuclear verdicts.... which can reach hundreds of millions or even billions of dollars, 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.



Endnotes

[1] *See* David McKnight & Paul Hinton, *Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System - Third Edition*, U.S. Chamber of Commerce Inst. for legal Reform, Nov. 2024 (estimating tort costs in 2022 of $529 billion or 2.1 percent of the U.S. gross domestic product, including $296 billion in general and commercial liabilities, $215 billion in automobile accident claims, and $17.5 billion in medical liability claims).

[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* Rob McKenna, Elbert Lin & Drew Ketterer, *Mitigating Municipality Litigation: Scope and Solutions*, U.S. Chamber of Commerce Inst. for Legal Reform, Mar. 2019.

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

[6] Jan Hoffman, *Opioid Settlement Money is Being Spent on Police Cars and Overtime*, N.Y. Times, Aug. 14, 2023.

[7] *See, e.g.*, Aneri Pattani, *A Rural County's Choice: Use Opioid Funds to Pay Off Debt, or Pay Them Forward to Curb Crisis*, KFF Health News, May 16, 2023.

[8] *See* Aneri Pattani, *In 2023, Opioid Settlement Funds Flowed to States. Here's How It's Going*, NPR, Dec. 21, 2023.

[9] Joshua K. Payne & Jess R. Nix, *Waking the Litigation Monster: The Misuse of Public Nuisance*, U.S. Chamber of Commerce Inst. for Legal Reform, Mar. 2019.

[10] *People v. Atlantic Richfield Co.*, No. 100CV788657, 2014 WL 1385823, at *52-53 (Cal. Super. Ct. Mar. 26, 2014).

[11] *Id.*

[12] Transcript, *In re Nat'l Prescriptions Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Dec. 19, 2018).

[13] Philip S. Goldberg, *Is Today's Attempt at a Public Nuisance "Super Tort" The Emperor's New Clothes of Modern Litigation?*, 31 Mealey's Emerging Toxic Torts 15, Nov. 1, 2022.

[14] *See City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1112 (Ill. 2004) ("We are also reluctant to recognize a public right so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to threaten it."); *see also Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 539 (3d Cir. 2001) ("[T]he scope of nuisance claims has been limited to interference connected with real property or infringement of public rights.").

[15] *In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007) ("In public nuisance terms . . . the conduct of merely offering an everyday household product for sale" does not "suffice for the purpose of interfering with a common right as we understand it.").

[16] *See State v. Lead Indus. Ass'n*, 951 A.2d 428, 434–35 (R.I. 2008) ("Causation is a basic requirement in any public nuisance action. . . . In addition to proving that defendant is the cause-in-fact of an injury, a plaintiff must demonstrate proximate cause.").

[17] *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986) (referring to control as a "basic element of the tort").

[18] See Victor E. Schwartz & Philip S. Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 2006.

[19] *Johnson County, by and through Bd. of Educ. of Tenn. v. U.S. Gypsum Co.*, 580 F. Supp. 284 (E.D. Tenn. 1984).

[20] *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).

[21] *In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007).

[22] *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (App. Div. 2003).

[23] Elbert Lin, et al., *ILR Briefly: Taming the Litigation Monster: The Continued Threat of Public Nuisance Litigation*, U.S. Chamber of Commerce Inst. for Legal Reform, Dec. 2022.

[24] Ohio R.C. 2307.71(A)(13) (enacted 2005 and 2007).

[25] *Id.*

[26] 42 U.S.C. § 1396h(b).

[27] *Qui tam* claims under the False Claims Act increased from 314 in FY 2001 to 712 in FY 2023, peaking at 757 claims in 2013. Plaintiffs' lawyers have filed an average of 656 *qui tam* claims annually over the last five fiscal years. *See* U.S. Dep't of Justice, Fraud Statistics – Overview, October 1, 1986 – September 30, 2023.

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

[29] *See* CABIA Found., California Private Attorneys General Act of 2004: Outcomes and Recommendations, Oct. 2021.

[30] *See* Madeline Lyskawa, *9th Circ. Affirms Ax of Calif. Glyphosate Cancer Warning Label*, Law360, Nov. 7, 2023 (discussing Nat'l Ass'n of Wheat Growers v. Bonta, 85 F.4th 1263 (9th Cir. 2023)).

[31] Amy Yee, *U.S. Businesses Get Hit With Record Numbers of Disability Lawsuits*, Bloomberg, Apr. 14, 2022.

[32] *See* Cary Silverman, James Muehlberger & Adriana Paris, *The Food Court: Developments in Litigation Targeting Food and Beverage Marketing*, at 12-14, U.S. Chamber of Commerce Inst. for Legal Reform, Aug. 2021.

[33] Georgia, Kansas, and Tennessee have enacted legislation taking this sound approach. Ga. Code Ann. § 9-2-8; Kan. Stat. Ann. § 60-5201; Tenn. Code Ann. § 1-3-119.

[34] 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 Inst. for Legal Reform, Oct. 2013, and Robert Salcido & Emily Gerry, *ILR Briefly: Fixing the FCA Health Care Problem*, U.S. Chamber of Commerce Inst. for Legal Reform, Aug. 2022.

[35] *See* Cary Silverman, James Muehlberger & Adriana Paris*, The Food Court: Developments in Litigation Targeting Food and Beverage Marketing*, U.S. Chamber of Commerce Inst. for Legal Reform, Aug. 2021; *see also* Britta Lokting, *Lawyer Up: Class-Action Suits Are Thriving in New York*, N.Y. Times, Apr. 27, 2023.

[36] *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, 2006.

[37] Jacob Gershman, *Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight*, Wall St. J., Mar. 21, 2018.

[38] *See* Westfleet Advisors, *The Westfleet Insider: 2023 Litigation Finance Market Report*, at 3, 2024.

[39] *See* Swiss Re Institute, *U.S. Litigation Funding and Social Inflation*, at 8, Dec. 2021.

[40] *See* Westfleet Advisors, *The Westfleet Insider: 2023 Litigation Finance Market Report*, at 6, 8, 2024.

[41] Emily R. Siegel, *Fortress' Billions Quietly Power America's Biggest Legal Fights*, Bloomberg Law, Oct. 16, 2024.

[42] Emily R. Siegel, *Mass Tort Marketer Hires Ex-LexShares CEO to Lead Funding Program*, Bloomberg Law, Aug. 20, 2024.

[43] *See* Cary Silverman & Christopher E. Appel, *An Update on Nuclear Verdicts: Trends, Causes, and Solutions,* at 40-42, U.S. Chamber of Commerce Inst. for Legal Reform, May 2024.

[44] Leslie Stahl, *Litigation Funding: A Multibillion-dollar Industry for Investments in Lawsuits with Little Oversight*, CBS's "60 Minutes," Dec. 18, 2022 (interview with Prof. Maya Steinitz).

[45] Jacob Gershman, *Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight*, Wall St. J., Mar. 21, 2018 (quoting Allison Chock, chief investment officer for IMF Bentham's U.S. division (now Omni Bridgeway)).

[46] *See* John Beisner et al., *Selling More Lawsuits, Buying More Trouble* 18-22, U.S. Chamber of Commerce Inst. for Legal Reform, Jan. 2020.

[47] *See* Editorial, *The Litigation Finance Snare*, Wall St. J., Mar. 21, 2023; Hannah Albarazi, *When a Litigation Funder is Accused of Taking Over the Case*, Law360, Mar. 15, 2023.

[48] *In re Pork Antitrust Litig.*, No. 18-cv-1776 (JRT/JFD), 2024 WL 511890, at *1 (D. Minn. Feb. 9, 2024), *aff'd*, 2024 WL 2819438 (D. Minn. June 3, 2024).

[49] *In re Pork Antitrust Litig.*, 2024 WL 2819438, at *4 (D. Minn. June 3, 2024).

[50] Emily R. Siegel, *Mass Tort Marketer Hires Ex-LexShares CEO to Lead Funding Program*, Bloomberg Law, Aug. 20, 2024.

[51] *See Nimitz Techs. LLC v. CNET Media, Inc.*, Nos. 21-1247-CFC, 21-1362-CFC, 21-1855-CFC, 22-413-CFC, 2022 WL 17338396 (D. Del. Nov. 30, 2022), *mandamus pet. denied sub nom. In re Nimitz Techs. LLC*, 2022 WL 17494845 (Fed. Cir. Dec. 8, 2022); *see also Mellaconic IP LLC v. Timeclock Plus, LLC*, 2023 WL 3224584, at *1 (D. Del. May 3, 2023) (denying motion to set aside Nov. 2022 disclosure order).

[52] *Nimitz Techs. LLC v. CNET Media, Inc.*, Nos. 21-1247-CFC, 21-1362-CFC, 21-1855-CFC, 22-413-CFC, 22-244-CFC, 22-541-CFC, 22-418-CFC, 22-1017-CFC, 2023 WL 8187441, at *35 (D. Del. Nov. 27, 2023).

[53] *Id.* at *36 (quoting *Huber v. Taylor*, 469 F.3d 67, 82 (3d Cir. 2006)).

[54] Michael Shapiro, *Courts Not a Casino, Says Judge Seeking Third-Party Transparency*, Bloomberg L., Mar. 28, 2024 (quoting Judge Connolly).

[55] Donald J. Kochan, Editorial, *Keep Foreign Cash Out of U.S. Courts*, Wall St. J., Nov. 24, 2022, at A13.

[56] *Id.*

[57] U.S. Gov't Accountability Office, GAO-23-105210, *Third-Party Litigation Financing: Market Characteristics, Data, and Trends* 10, Dec. 2022.

[58] Emily R. Siegel, *Litigation Finance Trade Group Shrugs Off Disclosure Push*, Bloomberg Law, Nov. 15, 2023.

[59] *See id.*

[60] Emily R. Siegel, *China Firm Funds US Suits Amid Push to Disclose Foreign Ties*, Bloomberg Law, Nov. 6, 2023 (quoting Joe Matal, former acting director of the U.S. Patent and Trademark Office); *see also* Joseph Matal, *Patent Lawsuits Are a National Security Threat*, Wall Street Journal, Mar. 20, 2024.

[61] Emily R. Siegel & John Holland, *Putin's Billionaires Dodge Sanctions by Financing Lawsuits*, Bloomberg Law, Mar. 28, 2024.

[62] Donald J. Kochan, Editorial, *Keep Foreign Cash Out of U.S. Courts*, Wall St. J., Nov. 24, 2022, at A13.

[63] *See* Fed. R. Civ. Proc. 26(a)(1)(A)(iv).

[64] *See* D. N.J. Civ. R. 7.1.1, Disclosure of Third-Party Litigation Funding (adopted June 21, 2021).

[65] *See* Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022).

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

[67] *See* Order Regarding Third-Party Contingent Litigation Financing, *In re Nat'l Prescription Opiate Litig.*, No. 1:16-MD-2804, 2018 WL 2127807 (N.D. Ohio May 7, 2018); Order, *In re Zantac (Ranitidine) Prods. Liab. Litig.*, No. 20-MD-2924, 2020 WL 1669444 (S.D. Fla. Apr. 3, 2020); Case Management Order No. 61 (Third Party Litigation Funding), *In re: 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-md-02885 (N.D. Fla. Aug. 29, 2023).

[68] Nate Raymond, *US Judicial Panel to Examine Litigation Finance Disclosure*, Reuters, Oct. 10, 2024.

[69] For an example at the federal level, *see* the Litigation Transparency Act of 2024, H.R. 9922, 118th Cong.

[70] *See* Protecting Our Courts from Foreign Manipulation Act of 2023, S. 2805 / H.R. 5488, 118th Cong.

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

[72] *See, e.g.*, Testimony of Eric Schuller, President, The Alliance for Responsible Consumer Legal Funding (ARC), Before the Kansas House Committee on Judiciary, H.B. 2694, Feb. 15, 2022.

[73] *See, e.g.*, Shawn Cohen et al., *Inside the Cottage Industry that's Fleecing NYC Taxpayers*, N.Y. Post, Jan. 2, 2018.

[74] *See* Leslie Stahl, *Litigation Funding: A Multibillion-dollar Industry for Investments in Lawsuits with Little Oversight*, 60 Minutes / CBS News, Dec. 18, 2022 (reporting the case of NYPD officer Donald Sefcik, who took a $25,000 lawsuit loan while awaiting a $90,000 victims' compensation fund payment, and had to pay the lender $64,800 of his recovery).

[75] Ken Belsen, *Widespread Deceptive Practices May Reduce Payouts in N.F.L. Concussion Settlement*, N.Y. Times, Sept. 19, 2017 (quoting plaintiffs' attorney Christopher Seeger); Mike Scarcella, *Litigation Funder Thrivest Loses Challenge Over NFL Concussion Payouts*, Reuters, Oct. 27, 2023; Ken Belsen, *N.F.L. Concussion Payouts Have Lenders Circling*, N.Y. Times, May 9, 2016.

[76] Case Management Order No. 61 (Third Party Litigation Funding), *In re: 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-md-02885 (N.D. Fla. Aug. 29, 2023), at 1.

[77] *See id.* at 2.

[78] *See* Cary Silverman, *Bad for Your Health Lawsuit Advertising and Solutions*, U.S. Chamber of Commerce Inst. for Legal Reform, Oct. 2017 [hereinafter *Bad for Your Health*].

[79] *See generally* Cary Silverman, *Gaming the System: How Lawsuit Advertising Drives the Litigation Lifecycle*, U.S. Chamber of Commerce Inst. for Legal Reform, Apr. 2020.

[80] Jack Newsham, *Inside America's Wildest – and Most Lucrative – Lawsuits*, Bus. Insider, Sept. 5, 2024.

[81] *See id*. (reporting that an executive with one lender, Counsel Financial, indicated that it has lent more than $1.5 billion to law firms and estimated that at least two dozen plaintiffs' firms each had a debt load of at least $100 million).

[82] *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.

[83] 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).

[84] *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.

[85] *See Bad for Your Health*, *supra*, at 21.

[86] 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 percent) 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).

[87] *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).

[88] *Id*. at 962.

89 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.

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

91 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.

92 *See* Cary Silverman & Christopher E. Appel, *Nuclear Verdicts: An Update on Trends, Causes, and Solutions* 12, U.S. Chamber of Commerce Inst. for Legal Reform, May 2024.

93 *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).

94 *See* FTC, Letter Regarding Proposed Amendments to the Tennessee Rules of Professional Conduct Relating to Attorney Advertising, Jan. 24, 2013.

95 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.

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

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

98 A survey revealed that only 17 percent 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.

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

100 King & Tippett, *Drug Injury Advertising*, at 150.

101 *See Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977).

102 *Id*. at 383.

103 *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 650 (1985) (upholding disciplinary action for attorney in *Dalkon Shield* mass tort litigation whose ads did not inform clients that they would be liable for costs, even if their claims were unsuccessful).

104 *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464-65 (1978) (upholding state rules prohibiting lawyers from soliciting people in person or by phone when they are injured or distressed).

105 *Recht v. Morrisey*, 32 F.4th 398, 417 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 527 (2022) (internal quotations omitted).

106 *Id*. at 419-20.

107 *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).

108 *See* Angela Couloumbis & Stephen Caruso, *Major Shift in Medical Malpractice Rules in Pa. Could Help Victims, but Opponents Fear the Cost*, Spotlight PA, Aug. 25, 2022.

109 *In re: Order Amending Rules 1006, 2130, 2156, and 2179 of the Pennsylvania Rules of Civil Procedure*, No. 736 (Pa. Aug. 25, 2022).

110 Aleeza Furman, *What Venue Fights Look Like Post-Pennsylvania's Med Mal Rule Change*, Legal Intelligencer, Oct. 1, 2024.

111 Aleeza Furman, *Philadelphia's Med Mal Filings Hit 15-Year High in 2023*, Legal Intelligencer, Jan. 16, 2024.

112 Couloumbis & Caruso, *supra* (quoting Curt Schroder, Executive Director of the Pennsylvania Coalition for Civil Justice Reform).

113 *See* Amicus Curiae Brief of Illinois Trial Lawyers Association in Support Of Defendant-Appellant, *Piasa Armory, LLC v. Raoul*, No. 130539 (Ill. filed Aug. 1, 2024).

114 *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122 (2023).

115 *See, e.g.*, S. 7476 / A. 7351 (N.Y. 2023) (vetoed).

116 *See Mallory in the States – A Year After the Deluge*, Drug & Device Law, June 3, 2024.

117 N.Y. Gov. Kathy Hochul, Veto Memo No. 147, S. 7476, Dec. 22, 2023.

118 *See* Brendan W. Clark, *Juror Compensation in the United States* at 4-5, NCSC Center for Jury Studies, Apr. 2022.

119 *See, e.g.*, Tom Latek, *No Vote Taken on Bill that Would Increase Jury Duty Pay to $125 Per Day*, Kentucky Today, Feb. 21, 2024 (reporting that Kentucky's $5 jury per diem and $7.50 for expenses has not increased since 1978).

120 Paula Hannaford-Agor, *The Arizona Lengthy Trial Fund – A Ten-Year Success Story*, Court Manager, vol. 29, iss. 2, at 48-49, May 2014; *see also* G. Thomas Munsterman & Cary Silverman, *Arizona's Experience with the Jury Patriotism Act: Assessing the First Year of New Jury Reforms,* 45 Judges' J. 18, 2006.

[121] Cary Silverman, *Higher Juror Compensation Trend Is Good for Justice System*, Law360, Dec. 15, 2023.

[122] *Berkson v. State ex rel. Askins*, 532 P.3d 36, 56 (Okla. 2023).

[123] 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. Apr. 2004).

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

[125] First Judicial District of Pennsylvania, Juror Participation Initiative, at 33, 2018.

[126] 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).

[127] *See* Colo. Rev. Stat. § 13-17-201; Tenn. Code Ann. § 20-12-119(c)(1); Tex. Civ. Prac. & Rem. Code § 30.021; Tex. Gov't Code § 22.004(g).

[128] *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)).

[129] "Medical Monitoring and Asbestos Litigation"—A Discussion with Richard Scruggs and Victor Schwartz, 17:3 Mealey's Litig. Rep.: Asbestos 19 (quoting Richard Scruggs), Mar. 2002.

[130] KCIC, Asbestos Litigation: 2023 Year in Review 14, 2024.

[131] C. Anne Malik, *ILR Briefly: The Asbestos Over-Naming and Trust Transparency Problem: A Philadelphia Case Study*, 5, U.S. Chamber of Commerce Inst. for Legal Reform, Mar. 2024.

[132] 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, at 22, Jan. 24. 2018.

[133] Mark A. Behrens & Christopher E. Appel, *Over-Naming of Asbestos Defendants: A Pervasive Problem in Need of Reform*, 36:4 Mealey's Litig. Rep.: Asbestos, at 4, Mar. 24, 2021.

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

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

[136] In evaluating a party's resources for purposes of the proportionality requirement in discovery, courts should consider whether a party has accepted third-party litigation funding. *See* John H. Beisner et al., *Selling More Lawsuits, Buying More Trouble* at 27, U.S. Chamber of Commerce Inst. for Legal Reform, Jan. 2020.

[137] *In re Amendments to Florida Rules of Civil Procedure*, No. SC2023-0962 (Fla. May 23, 2024); *see also In re: Amendments to Florida Rules of Civil Procedure*, No. SC2023-0962 (Fla. Dec. 5, 2024).

[138] *See* Order dated March 2, 2021, re: Rules 56.01, 57.01, 57.03, 57.04, 58.01, 59.01 and 61.01 (Mo. Mar. 2, 2021); Amendment to the Ohio Rules of Practice and Procedure (Ohio S. Ct., effective July 1, 2020).

[139] *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").

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

[141] *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).

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

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

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

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

[146] *National Collegiate Athletic Ass'n v. Finnerty*, 191 N.E.3d 211 (Ind. 2022).

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

[148] Carlton Fields, *2024 Carlton Fields Class Action Survey* 6-7, 2024.

[149] *Id.* at 8, 18.

[150] 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*, at 12-26, U.S. Chamber of Commerce Inst. for Legal Reform, Aug. 2022.

[151] *See, e.g.,* Jones Day, *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010–2018)*, at 8, 12, Apr. 2020 (finding that in 16 of 44 class settlements, the amount paid to class counsel exceeded that paid to class members, and that in cases settling for injunctive relief, class counsel received an average amount of about $500,000 in attorneys' fees and costs, while class members received no monetary benefit).

[152] *See id.* at 4; *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).

[153] *See* Crowell Moring, List of Asbestos Bankruptcy Cases (last updated May 6, 2024) (compiling all asbestos bankruptcies between 1982 and early 2024).

[154] C. Anne Malik, *ILR Briefly: The Asbestos Over-Naming and Trust Transparency Problem: A Philadelphia Case Study*, at 3-4, U.S. Chamber of Commerce Inst. for Legal Reform, Mar. 2024.

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

[156] *Id*. at 86.

[157] *Id.* at 84.

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

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

[160] Fed. R. Evid. 702 advisory committee's note to 2023 amendment (stating "expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule.").

[161] *Id*.

[162] *Id*.

[163] Cary Silverman, *Fact or Fiction: Ensuring the Integrity of Expert Testimony*, at 18, U.S. Chamber of Commerce Inst. for Legal Reform, Feb. 2021.

[164] *In the Matter of Rule 702, Rules of Evidence*, No. R-23-0004 (Ariz. Aug. 24, 2023); Order, *In re: Amendment of Rule 506 and Rule 702 of the Kentucky Rules of Evidence*, No. 2024-19 (Ky. June 24, 2024); Order, *Amendments of Rules 702 and 804 of the Michigan Rules of Evidence*, ADM File No. 2022-30 (Mich. Mar. 27, 2024) (effective May 1, 2024); Amendment to Rule of Evidence 702 (Ohio, effective July 1, 2024).

[165] *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.

[166] Rules Order (Md. Apr. 5, 2024).

[167] *Antero Treatment, L.L.C. v. Veolia Water Techs., Inc.*, 546 P.3d 1140, 1143-49 (Colo. 2023).

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

[169] States with 10 percent 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.

[170] Colorado, Illinois, Oregon, New York have eight or nine percent 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.

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

[172] *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.

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

[174] *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).

[175] *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).

[176] *See* Taylor Greene, *The Rising Threat of Negligent Security Claims: Proactive Measures for Mitigation*, ALM Property Casualty 360, July 13, 2023.

[177] *Georgia CVS Pharmacy, LLC v. Carmichael*, 890 S.E.2d 209 (Ga. 2023) (reversing $45 million verdict in which the jury allocated 95 percent of the fault to the CVS and five percent of fault to a plaintiff who was shot in a robbery attempt in the store's parking lot).

[178] *Welch v. Pappas Restaurants, Inc*., which was consolidated with *Georgia CVS Pharmacy*, 890 S.E.2d at 218, involved a customer who was killed in an armed robbery in the store's parking lot.

[179] *Hedges v. Planned Security Servs. Inc.*, 140 N.Y.S.3d 487 (N.Y. App. Div. 2021) (affirming jury's allocation of 65 percent of fault to property owners, 25 percent of fault to the security company, and just 10 percent of fault to the nonparty tortfeasors, but ordering reduction of a portion of the verdict, in negligent security case in which two teenagers threw a shopping cart over the fourth floor railing of a shopping mall, striking plaintiff).

[180] Verdict, *Taylor v. The Kroger Co.*, No. 15A57407E3 (Ga. St. Ct., DeKalb County, Apr. 19, 2019) (allocating 86 percent of fault against supermarket, and seven percent each against two nonparty assailants out of $81 million verdict following robbery, carjacking and shooting of 27-year-old veteran in a store parking lot).

[181] Alexis Krell, *Jury Faults Convenience Store Company, Awards Millions to Man Severely Beaten by Robber*, Tacoma News Tribune, June 18, 2021.

[182] *See, e.g.*, Kelcey Caulder, *Ga. Mobile Home Park Hit With $31M Verdict In Shooting Case*, Law360, Aug. 1, 2023 (reporting verdict in case in which the plaintiff was shot and killed when attempting to stop a thief from stealing a car).

[183] *See Six Flags Over Ga. II, LP v. Martin*, 801 S.E.2d 24 (Ga. 2017) (affirming imposition of liability on theme park where gang incident began on its property and led to assault on plaintiff at bus stop outside of the park's boundaries, but requiring retrial on apportionment of a $35 million damage award in which the jury allocated 92 percent of fault against Six Flags and just two percent each against four assailants).

[184] *See, e.g., Carmichael,* 890 S.E.2d at 218 (finding a duty may arise based on the "totality of the circumstances," including crime reports in the surrounding area, even absent substantially similar prior criminal activity on the defendant's property).

[185] *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).

[186] *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.

[187] *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).

[188] *See generally* Victor E. Schwartz & Christopher E. Appel, *The Restatement (Third) of Torts Proposes Abandoning Tort Law's Present Injury Requirement to Allow Medical Monitoring Claims: Should Courts Follow?*, 52 Sw. U. L. Rev. 512, 2024.

[189] *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").

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

[191] *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.

[192] *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 Inst. for Legal Reform, Apr. 2017.

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

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

[195] 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.

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

[197] 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.

[198] *Cothron v. White Castle System, Inc.*, 216 N.W.3d 918 (Ill. 2023).

[199] *See, e.g.*, H.B. 72 (Alaska 2017); 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) (pending); *see also ILR Briefly, A Bad Match: Illinois and the Biometric Information Privacy Act*, U.S. Chamber of Commerce Inst. for Legal Reform, Oct. 2021.

[200] 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.

[201] Ohio Rev. Code § 1354.02(A).

[202] Ohio Rev. Code § 1354.02(D).

[203] Ohio Rev. Code § 1354.04.

[204] H.B. 6607 (Conn. 2021); H.F. 553 (Iowa. 2023); H.B. 80 (Utah 2021).

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

[206] *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.

[207] *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.

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

[209] *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.

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

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

[212] 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.

[213] "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).

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

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

[216] *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.

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

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

[219] *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).

[220] *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).

[221] *Brandt v. Pompa*, 220 N.E.3d 703 (Ohio 2022).

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

[223] *Id*. at 1277.

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

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

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

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

[228] *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).

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

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

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

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

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

[234] *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.

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

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

[237] *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).

[238] *Taylor v. Devereux Found., Inc*., 885 S.E.2d 671, 676-77 (Ga. 2023).

[239] Am. Med. Ass'n, *Medical Liability Reform – NOW!*, at 1, 2024 ed.

[240] *Id*.

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

[242] *Id*.

[243] *Id*. at 2.

[244] *See id*. at 20-23; *see also* Mark A. Behrens, *Medical Liability Reform: A Case Study of Mississippi*, 118:2 Obstetrics & Gynecology 335-39, Aug. 2011.

[245] Cary Silverman & Christopher E. Appel, *An Update on Nuclear Verdicts: Trends, Causes, and Solutions*, U.S. Chamber of Commerce Inst. for Legal Reform, May 2024.

[246] *See id*.

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

[248] 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.

[249] *See, e.g.*, S.B. 538 (Md. 2024) (not enacted) (as introduced, proposing to repeal noneconomic damages in personal injury and wrongful death cases, except for medical liability cases; as amended proposing a near doubling of the limits as well as raising automatic annual increases); S.74A (N.Y. 2022) (vetoed Jan. 30, 2023).

[250] H.B. 24-1472 (Colo. 2024) (raising inflation-adjusted cap on noneconomic damages from $729,790 (which may be increased upon clear and convincing evidence to $1,459,000) to $1.5 million outside of medical liability cases and from $300,000 to $875,000, over five years, in medical liability actions, with higher limits in wrongful death cases).

[251] S.F. 2909, § 33-34 (Minn. 2023) (amending Minn. Stat. § 573.02 to authorize recovery of "all damages").

[252] H.P. 581 – L.D. 934 (Me. 2023) (amending Me. Rev. Stat. tit. 18-C §§ 1-108(2) and 2-807(2)) (raising amount recoverable for loss of comfort, society and companionship, including emotional distress, from $750,000 to $1 million, which will automatically increase each year for inflation, and increasing the law's punitive damages maximum from $250,000 to $500,000); S.B. 462 (N.H. 2024) (increasing loss of consortium damage cap applicable in wrongful death cases from $150,000 to $500,000 for spouses and from $50,000 to $300,000 for the loss of a parent or child).

[253] S.B. 81 (Del. 2023) (amending Del. Code § 3723); H.B. 219 (Ill. 2023) (amending 740 ILCS §§ 180/1 and 180/2, and 755 ILCS § 5/27-6).

[254] *See, e.g.*, A. 9232B / S. 8485B (N.Y. 2024) (passed June 4, 2024, awaiting consideration by Governor).

202.463.5724 main
1615 H Street, NW
Washington, DC 20062
instituteforlegalreform.com

U.S. Chamber of Commerce
Institute for Legal Reform