101 Ways to Improve State Legal Systems

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

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HOW TO USE THIS GUIDE

As the nation struggles with sluggish economic growth and record levels of unemployment, state legislators, executives, and other policymakers must use all the tools available to them to aid in the economic recovery. An essential ingredient in this mix is legal reform. By adding rationality and predictability to the American civil justice system and rooting out unnecessary costs, civil justice reform can increase confidence in the economy and create or, at the very least, save jobs. In fact, an empirical study commissioned by the Institute for Legal Reform (ILR) estimated that the stimulus resulting from improvements to state legal systems could increase private sector employment by 1.0% to 2.8% in the states with the most costly legal environments, adding hundreds of thousands of jobs.¹

“101 Ways to Improve State Legal Systems in 2013 & Beyond” provides policymakers with a compilation of some of the many avenues available to foster a sound legal system that promotes states’ economies. The reforms are organized into five areas. The first section highlights five reforms that have gained momentum and should be of particular interest to state legislators. The report then considers fair and effective measures that would improve the litigation process, improve product liability law, promote rational liability rules, and rein in excessive damage awards. While this report presents proposals for legal reform options in a conceptual manner, it directs readers to recently enacted laws that show how legislators can move the proposals described in this guide from theory into practice.

After the “Spotlighted Reforms” section, the order in which these reforms are presented does not necessarily reflect their level of importance, priority, or effectiveness. The options in each section must be evaluated in light of a specific state’s political and legal landscape. ILR presents these options and recently enacted legislation to provide a useful resource to the reader. Inclusion of a legal reform in this report does not necessarily mean that ILR endorses a listed approach or favors one specific option over another.

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

PROVIDE TRANSPARENCY IN HIRING OF PRIVATE LAWYERS BY STATE OFFICIALS

Purpose:

State government officials are increasingly turning to private lawyers to pursue litigation on behalf of the state. Experience has shown that such arrangements are too often the result of “gentlemen’s agreements” made behind closed doors between public officials and private contingency fee lawyers without any public oversight. Because there is no public oversight, the attorney selection process can be abused for personal gain and political patronage.

The current lack of disclosure and legislative oversight can leave the public with a perception that the state hires attorneys based primarily on their personal and political connections and not their experience. Moreover, the government’s use of private lawyers, particularly on a contingency-fee basis, raises the potential for the government’s work to be motivated by profit, not the public interest.

Options:

• Require important transparency and oversight elements found in states such as Colorado, Connecticut, Kansas, Minnesota, North Dakota, Texas, and Virginia:
  ◦ Open and competitive bidding for outside contracts;
  ◦ Time and expense record-keeping requirements;
  ◦ Legislative oversight of contracts or legislative reporting; and
  ◦ Limiting the effective rate for contingency fees to no more than $1,000 per hour.

  ◦ Finding of need: Before hiring outside counsel on a contingency-fee basis, the government must find that the arrangement is both cost-effective and in the public interest in consideration of (1) whether the government has sufficient resources to handle the matter in house; (2) the time and labor required, complexity of the matter, and skill necessary; (3) the geographic area where the attorney services are to be provided; and (4) the amount of experience desired for the particular kind of attorney services to be provided and the nature of the private attorney’s experience with similar issues or cases.
  ◦ Request for proposals: The government must issue a request for proposals from private attorneys who seek to represent the state on a contingency-fee basis unless such a process is not feasible under the circumstances.
  ◦ Record keeping: Law firms must keep detailed time and expense records.
  ◦ Fee schedule: Contingency-fee percentages are set through a reasonable sliding scale based on amount of recovery and subject to an aggregate cap of $50 million, exclusive of reasonable costs and expenses.
  ◦ Transparency: Contingency-fee contracts and fee payments are promptly posted on a public website.
Oversight: The attorney general (AG) must submit an annual report to the legislature describing use of contingency-fee contracts in the preceding year.

- States might also consider:
  - Requiring safeguards in contracts with outside counsel that ensure that government attorneys retain complete control over the litigation and exclusive settlement authority; and
  - Providing that a contingency fee may not be based on penalties or civil fines awarded, as enacted in Mississippi H.B. 211 (2012) (to be codified at Miss. Code §§ 7-5-5, 7-5-8, 7-5-21, 7-5-39).

Recent enactments:

- Over the past two years, four states have enacted AG sunshine legislation:
  - Iowa H.F. 563 (2012) (to be codified at Iowa Code § 23B.1 et seq.).
  - Indiana S.B. 214 (2011) (codified at Ind. Code Ann. § 4-6-3-2.5).


**PREVENT “DOUBLE-DIPPING” AND FRAUD IN ASBESTOS LITIGATION**

**Purpose:**

Asbestos litigation is the longest-running mass tort in U.S. history. It has forced many employers into Chapter 11 bankruptcy, which has also had a devastating impact on workers, retirees, shareholders, and affected communities. A study by Nobel Prize-winning economist Joseph Stiglitz found that in just one three-year period, asbestos-related bankruptcies put as many as 60,000 people out of work, those workers and their families lost up to $200 million in wages, and their retirement assets declined by roughly 25%. Many of the employers that were forced into bankruptcy have established trusts to pay present and future asbestos-related claims. These trusts represent a major source of funding for asbestos claimants and have an estimated value of more than $36 billion.

In the absence of an interface between the trust and tort systems, asbestos claimants may “double-dip”—obtaining trust recoveries and tort damages for the same injury—while the thousands of asbestos personal injury lawsuits filed each year threaten the existence of many companies that had little, if anything, to do with manufacturing or supplying asbestos-containing materials. Defendants are unable to gain access to the information needed to adjudicate cases fully and fairly.

As asbestos litigation continues to force otherwise viable corporations into bankruptcy, employers left to defend asbestos lawsuits in the tort system have struggled to convince state court judges to account for bankruptcy trust recoveries in asbestos personal injury lawsuits. Existing statutes and judicial precedents do not account for the unique phenomenon of tens of billions of dollars flowing to tort claimants outside of the civil justice system. Tort system defendants face a continuing diminution of solvent co-defendants, with a concomitant increase in the asbestos trust compensation pool, but statutory law and common law have not evolved to reduce the disproportionate compensation burden imposed on those who remain in the tort system.

The present lack of transparency creates conditions that make it extremely difficult—if not impossible—to discover fraud or inconsistent claims. Here are three examples where lengthy litigation ultimately revealed such inconsistencies:

- In Cleveland, Ohio, Judge Harry Hanna barred a prominent California asbestos personal injury law firm from practicing before his court after he found that the firm and one of its partners failed to abide by the rules of the court proscribing dishonesty, fraud, deceit, and misrepresentation in withholding key discovery materials. Judge Hanna later reflected, “In my 45 years of practicing law, I never expected to see lawyers lie like this.” Judge Hanna added, “It was lies upon lies upon lies.” Judge Hanna’s ruling in *Kananian v. Lorillard Tobacco Co.* received national attention for exposing “one of the darker corners of tort abuse” in asbestos litigation: inconsistencies between allegations made in open court and those submitted to trusts set up by bankrupt companies to pay asbestos-related claims. As the *Cleveland Plain Dealer* reported, Judge Hanna’s decision ordering the plaintiff to produce proof of claim forms “effectively opened a Pandora’s box of deceit . . . . Documents from the six other compensation claims revealed that [plaintiff’s lawyers] presented conflicting versions of how [the plaintiff] acquired his cancer.” Emails and other documents from the plaintiff’s attorneys also showed that their client had accepted monies from entities to which he was not exposed, and one settlement trust form was “completely fabricated.”
• In a Maryland case (Warfield v. AC&S, Inc.), defendants were forced to file motions to compel discovery, despite prior rulings making clear that trust claim materials must be produced. The reason for the counsel’s reluctance to produce the trust materials became clear when the documents were produced shortly before trial—there were substantial and inexplicable discrepancies between the positions taken in court and before the trusts. Despite specific and explicit discovery requests, the plaintiff failed to disclose nine trust claims. In addition, the exposure period alleged in the litigation was significantly and materially different from the exposure period alleged in the trust claims.

• A Delaware judge was outraged when it was revealed that a Texas attorney submitted 20 claims to trusts on behalf of a Florida woman’s estate after he had referred the case to Florida attorneys who sued, among others, Foster Wheeler Energy Corp. in Delaware. The company did not learn about the bankruptcy trust claims until 36 hours before a trial was scheduled to begin. “This is really seriously egregiously bad behavior,” New Castle County Superior Court Judge Peggy Ableman said in a November 2011 hearing. “This is misrepresenting. This is trying to defraud.” “I don’t like that in this litigation, and it happens a lot. And I’m trying to put an end to it. This is an example of the games that are played.”

Options:

• Provide for the discovery and admissibility of claim forms filed by plaintiffs for compensation from asbestos bankruptcy trusts.
• Provide an offset in civil litigation for money that has been or will be received by the plaintiff from asbestos bankruptcy trusts.

Recent developments:

• A Pennsylvania appellate court approved the use of a trial court’s equitable powers to deduct bankruptcy trust recoveries from an asbestos plaintiff’s tort system recovery for claims involving the same alleged injury. See Marlene Reed v. Honeywell Int’l, Inc., 2011 WL 6645694 (Pa. Super. Ct. Dec. 6, 2011). State legislatures can add clarity to the law and avoid needless litigation on this issue through statutory enactment.
STOP THE SPREAD OF LAWSUIT LENDING THAT ENCOURAGES PROLONGED LITIGATION

Purpose:

In recent years, an industry has emerged in which lawsuit lenders offer to lend funds in exchange for a portion of the expected settlement to plaintiffs in personal injury lawsuits. The lawsuit lenders commonly charge interest rates as high as 15% per month. Plaintiffs who lose their cases are not obligated to repay the loan. This distinction allows lawsuit lenders to call the process “nonrecourse funding” and claim it is not a loan subject to safeguards applicable to other lenders.

Lawsuit lending encourages prolonged litigation. Injecting a third-party lender into a case incentivizes plaintiffs to reject reasonable settlement offers because of their obligation to share their recoveries with the lender. By the same token, a lender may pressure a borrower to reject a settlement offer that does not reimburse the lender’s full investment. To make matters worse, the longer a lawsuit drags on, the more the consumer owes the lender, as high interest rates compound monthly on the principal.

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

Notes:

While some lawsuit lending bills are touted as consumer protection bills, their real meaning and effect is to authorize the problematic practice of lawsuit loans. Instead of legitimizing the practice by adopting so-called consumer safeguards, legislators should consider the troubling issues raised by the practice and answer the more fundamental question of whether third-party litigation financing is appropriate in and of itself. The Chicago Tribune has taken the position that “the investors gambling on the outcome of these lawsuits have no interest in justice” and that passing legislation supported by lawsuit-lending industry “amounts to a free-for-all” (“Lawsuit Loan Sharks,” Chicago Tribune, December 23, 2010). Indeed, these bills typically provide that lawsuit loans are not “loans” and are not subject to any regulation governing loans or investment contracts. They purport to remove lawsuit loans from the ambit of a state’s fair-lending and usury protections, leaving lawsuit lenders free to charge any interest rate they want to consumers in consideration for these loans.
Options:

- Reject legislation that would expand the availability of lawsuit lending.
- Clarify that consumer lawsuit lending falls within the ambit of states’ existing fair-lending laws by:
  - Capping the interest consumer lawsuit lenders can charge at the state’s existing usury rate;
  - Requiring consumer lawsuit lenders to make the same disclosures regarding their loans as other providers of consumer credit; and
  - Making consumer lawsuit lenders themselves subject to the state’s existing regulations governing other providers of consumer credit.
- Provide much-needed disclosure regarding consumer lawsuit lending transactions by requiring a plaintiff who has received consumer lawsuit lending to produce in discovery any documents he or she may have shared with the consumer lawsuit lender and to file with the court a copy of the lending contract.

Recent developments:

- In 2011 and 2012, legislators rejected proposals that would have expanded third-party lawsuit lending in at least nine states: Alabama, Arkansas, Connecticut, Kentucky, Indiana, Maryland, Nevada, New York, and Tennessee.
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 health care providers, even when providers accepted a substantially lower amount as payment in full. Since it is not uncommon for billed amounts to be three or four times the amounts paid by patients or their insurers (including private insurers, Medicare, or Medicaid) due to negotiated rates, discounts, and write-offs, providers who are sued typically pay significantly inflated awards to reimburse a plaintiff for nonexistent medical expenses. Such damages serve no compensatory purpose and are passed on to consumers in the form of higher costs for goods and services and higher insurance rates. These “phantom damages” can also unjustly place costs on small businesses and nonprofits that are sued for common accidents such as slip-and-falls.

The following options present a modest commonsense approach to reducing excessive damages. It does not go as far as eliminating the collateral source rule (see p. 58) and therefore permits plaintiffs to continue to recover expenses even if those expenses were covered by insurance. The legislation places opponents on the defensive to explain why plaintiffs should recover amounts that are vastly in excess of the expenses actually paid.

Notes:

• About one-third of the states have limited recovery of “phantom damages” through court rulings or legislation. These states include Alabama, California, Connecticut, Florida, Idaho, Indiana, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, and Texas.
• The following states permit recovery of phantom damages: Arizona, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Mississippi, Nebraska, Oregon, South Carolina, South Dakota, Virginia, Washington, and Wisconsin. In the remainder of states, the ability to recover phantom damages is unclear or inconsistently applied.
• Texas was the first to address phantom damages through legislation, in 2003 (Tex. Civ. Prac. & Rem. Code § 41.0105). The one-line statute provides, “In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.”

Options:

• Provide that amounts billed that do not reflect the amounts actually paid are inadmissible at trial. California, North Carolina, Oklahoma, and Texas are among the states that follow this ideal approach.
• Allow the jury to hear evidence of both the amount billed and amount paid and reach its own determination of the reasonable value of the medical services.
• Some states permit the jury to learn only the amount billed, but then permit or require the judge to reduce the verdict by the amount of phantom damages. This approach is not ideal because misleading jurors to believe that the plaintiff has higher medical expenses may cause them to reach an inflated award for pain and suffering.
  - Florida allows the jury to hear evidence of the amounts billed only in cases in which the bill was paid in whole or in part by private insurance. After the verdict, Florida law requires the judge to “set off” (subtract) the amount of phantom damages.
  - Missouri law provides a rebuttable presumption that the amount accepted by a health care provider as full payment for a medical bill represents the value of the medical treatment rendered and allows the judge, outside the presence of the jury, to consider other evidence of the value of the medical treatment based on the medical bills incurred, the amount actually paid, and the amount of the medical bills that have not been paid but which the plaintiff is obligated to pay. See Mo. Rev. Stat. § 490.715 (enacted 2005).

Recent enactments:

• The California Supreme Court is the most recent state high court to rule that phantom damages are inadmissible evidence. Howell v. Hamilton Meats & Provisions, Inc., 257 P.3d 1130 (Cal. 2011). The Texas Supreme Court also clarified that billed amounts that do not reflect actual costs may not be presented at trial. Haygood v. De Escabedo, 356 S.W.3d 390 (Tex. 2011).
LOSERS PAY FOR FILING FRIVOLOUS LAWSUITS

Purpose:

State officials have increasingly expressed significant interest in adopting “loser pays”—a system under which the losing party in a lawsuit must pay the opposing party's attorneys’ fees and costs. A loser-pays system has strong appeal. It often takes little more than a small filing fee and generation of a form complaint to begin a lawsuit. It costs much more for a small business to defend itself. Even when an individual or business “wins” a lawsuit, the cost of defending against a meritless claim can easily rise into the tens or hundreds of thousands of dollars. These expenses, which are typically not recoverable, become a cost of doing business in America—part of the “tort tax.” Theoretically, a loser-pays law should deter lawyers from filing weak claims. Some respected scholars and advocacy groups strongly support a loser-pays system. There are questions, however, as to whether the pure form of a loser-pays law, known as the “English Rule,” achieves this result in practice. Some have expressed concern that a loser-pays system will be unevenly applied against defendants—adding attorneys’ fees on top of what may already be excessive liability. Legislation strengthening rules against frivolous claims, requiring losing parties to pay discovery expenses, or addressing vexatious litigants may provide better options.

Notes:

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

Options:

• Require those who file frivulous lawsuits to pay the defendant’s attorneys’ fees related to dismissal of the suit. A frivulous lawsuit is one that (1) is presented for an improper purpose, such as harassment; (2) is not supported by existing law or a legitimate argument for extending, modifying, or reversing existing law or for establishing new law; or (3) is not supported by the facts and is unlikely to have evidentiary support after a reasonable opportunity for further investigation or discovery. By way of contrast, a meritless lawsuit is one where there is a legitimate claim, but the plaintiff cannot, or does not, meet his or her burden of proof.
  ○ Return to or adopt the approach to frivolous claims applied in federal courts between 1983 and 1993:
    • Eliminate the 21-day “safe harbor” followed in federal courts and about one-third of state courts, which allows plaintiffs’ lawyers to withdraw frivolous claims without penalty even after imposing significant costs upon a defendant.
    • Require imposition of sanctions when a claim is found to be frivolous.
• Recognize that sanctions serve to reimburse a party subject to a frivolous claim for attorneys’ fees and costs.

Consider stronger statutes regarding frivolous claims adopted by these states:

• **Florida**: “Upon the court’s initiative or motion of any party, the court shall award a reasonable attorney’s fee to be paid to the prevailing party in equal amounts by the losing party and the losing party’s attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party’s attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) was not supported by the material facts necessary to establish the claim or defense; or (b) would not be supported by the application of then-existing law to those material facts.” Fla. Stat. Ann. § 51.105(1).

• **Georgia**: “In any civil action in any court of record of this state, reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position. Attorney's fees and expenses so awarded shall be assessed against the party asserting such, claim, defense, or other position, or against that party's attorney, or against both in such manner as is just.” Ga. Code Ann. § 9-15-14.

• **Michigan**: “(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney. (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees....” Mich. Comp. Laws § 600.2591.

• **Nebraska**: “The court shall assess attorney’s fees and costs if, upon the motion of any party or the court itself, the court finds that an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment. If the court finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct, including, but not limited to, abuses of civil discovery procedures, the court shall assess attorney’s fees and costs.” Neb. Rev. Stat. § 25-824(4).

• **Indiana**: “In all civil actions, the court shall determine whether a nonprevailing party: (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless; (2) continued to litigate the action or defense after the party’s claim or defense clearly became frivolous, unreasonable, or groundless; or (3) litigated the action in bad faith. If the court determines that a nonprevailing party engaged in any of the actions described in subdivisions (1) through (3), the court shall require the nonprevailing party to reimburse the prevailing party for the reasonable attorney’s fees incurred by the prevailing party.” S.B. 85 (2012, proposed amendment to Ind. Code § 34-52-1-1).
• Impose the costs of discovery on the losing party. This option would not place the full costs of the litigation on the losing party, but would discourage litigants from imposing excessive, time-consuming, and costly document production obligations on opponents in order to pressure them into an unfair settlement. Current law in many states already permits the prevailing party to seek recovery of costs. This approach would expand the definition of reimbursable costs to include expenses incurred in responding to written and oral discovery and producing documents.

• Adopt a vexatious litigant law that requires 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 California, Florida, Hawaii, Ohio, and Texas.

Recent enactments:

• Legislation enacted in Wisconsin illustrates that states can strengthen their rules against frivolous claims. S.B. 1, § 28, Spec. Sess. (Wis. 2011) (codified at Wis. Stat. § 895.044):
  ○ The Wisconsin law provides a more limited safe harbor than the federal rule and permits the use of sanctions to reimburse victims of frivolous lawsuits. Unlike the federal rule, the Wisconsin law allows a judge to award court costs and attorneys’ fees to the defendant even if the plaintiff’s attorney withdraws the frivolous action within 21 days. If the frivolous action is not withdrawn, then the defending party is entitled to recovery of reasonable court costs and attorneys’ fees. The Wisconsin law also requires reimbursement of attorneys’ fees if the sanctioned party pursues and loses an appeal. Costs and fees may be assessed fully against the party bringing the action or the attorney representing the party, or both, jointly and severally, or may be assessed so that the party and the attorney each pay a portion of the costs and fees.

• Texas enacted legislation providing that the prevailing party on a motion to dismiss is entitled to recover its attorneys’ fees and costs. H.B. 274, 82nd Leg., Reg. Sess. (Tex. 2011). Prior to this legislation, Texas did not have a mechanism for early dismissal of weak claims. If applied in states with established rules governing motions to dismiss, such legislation could have the unintended effect of discouraging defendants from seeking prompt dismissal of meritless claims, because judges rarely grant such motions.
  ○ Tennessee recently enacted a law that is similar to, but varies in significant ways from, the Texas approach. H.B. 3124 (2012) (amending Tenn. Code Ann. § 20-12-119). The Tennessee law provides that when a plaintiff’s claims are dismissed, a defendant is entitled to recover up to $10,000 in attorneys’ fees and costs that resulted from the filing of those claims. The court will not require a plaintiff to pay if (1) the plaintiff withdraws or amends the complaint to state a claim; (2) the plaintiff is a pro se litigant, unless the court finds the plaintiff acted unreasonably in bringing, or refusing to withdraw, the dismissed claim; (3) the complaint specifically pleads that its purpose is to extend, modify, or reverse existing precedent, law, or regulation, or establish the meaning, lawfulness, or constitutionality of a law, regulation, or United States or Tennessee constitutional right where the meaning, lawfulness, or constitutionality is a matter of first impression that has not been established by precedent in a published appellate court opinion; or (4) the court granted the motion to dismiss the claim due to the subsequent repeal, amendment, overruling, or distinguishing of the applicable law, regulation, or published court precedent.
ENSURE THAT JURIES REPRESENT THE ENTIRE COMMUNITY, NOT JUST SELECT SEGMENTS

Purpose:

Representative juries that include people from all walks of life reduce the potential for outlier decisions. The jury service laws of some states exempt certain professionals, make it easy for citizens to simply avoid jury service, and provide inadequate compensation for working jurors to serve on particularly long, high-stakes trials. More representative juries can be secured by reducing the burdens of jury service and more effectively requiring all people to serve.

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

Notes:

Jury service laws and court structures vary significantly from state to state. Many states have adopted reforms reflected in the American Legislative Exchange Council’s model Jury Patriotism Act (JPA), which is a compilation of nationally recognized best practices.

Options:

- Consider updating state jury service laws to provisions of the JPA, such as:
  - A procedure to automatically reschedule jury service;
  - A term of service that lasts no more than one day or one trial;
  - A strengthened hardship excuse standard;
  - Elimination of all exemptions based on profession or occupation;
  - Prohibition against employers’ requiring use of leave or vacation time for jury service;
  - Protection of small businesses that may suffer from a temporary loss of more than one employee on jury service; and
  - An increase in civil fines for failure to respond to a juror summons (e.g., $500).
- In coordination with the state’s judiciary, consider adopting legislation to authorize, study, or fund jury service innovations included in the National Center for State Courts Jury Trial Innovations (2d ed. 2006) guide or the recommendations of the American Bar Association’s Principles for Juries and Jury Trials (2005). These guides support several of the reforms bulleted above but also recommend additional practices, such as allowing juror note taking.
• 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.
  ○ Such a system is currently operating in Arizona and Oklahoma.
    • Ariz. Rev. Stat. § 21-222 et seq.: Jurors who serve more than five days who document that they are not receiving their usual income can receive their daily loss up to $300 for each day of jury service. Supplemental compensation is fully funded by a $15 court fee assessed on the filing of civil complaints, answers to civil complaints, and motions to intervene in civil cases filed in superior court.
    • Okla. Stat. tit. 28, § 86: Jurors who serve more than 10 days who document that they are not receiving their usual income can receive their daily loss up to $200 for each day of jury service beginning the fourth day of service. The court may also award replacement wages of up to $50 per day for the fourth to the tenth days of jury service when a juror serves more than 10 days if it finds that jury service for a particular individual is a significant financial hardship. This wage replacement is fully funded by a $10 court fee assessed on the filing of civil complaints.

Recent enactments:

• Oregon H.B. 3034 (2011) (amending Or. Rev. Stat. §§ 10.055, 10.090): Provides that a judge or court clerk may grant a summoned juror’s second request for a deferral of jury service if the person provides a list of no fewer than 10 dates within the six-month period following the date of the request on which the person would be able to serve. An employer may not require that an employee use vacation, sick, or annual leave for time spent in responding to summons for jury duty and must permit the employee to take leave without pay for time spent.
• Indiana S.B. 232 (2006): Eliminates all automatic exemptions from jury service based on occupation. Provides a one-time deferral of jury service to another date within one year upon a showing of hardship, extreme inconvenience, or necessity. Protects an individual called for jury service who provides reasonable notice to his or her employer from being subjected to adverse employment action. Prohibits requiring or requesting employees to use annual leave for jury service.
REDUCE FORUM SHOPPING

Purpose:

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

The practice has led to an influx of litigation in certain jurisdictions. This can provide plaintiffs with an unfair and inappropriate advantage in litigation and place an undue burden on the judicial system and taxpayers of these jurisdictions. Choice of forum is typically governed by state venue laws or the doctrine of forum non conveniens, which provides a court with discretion to dismiss a case more appropriately heard in another forum.

Options:

• 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.
• Limit the ability of a plaintiff to file a lawsuit in a jurisdiction other than where the action arose, where the plaintiff resides, or where the defendant has its principal place of business, and require that, in any civil action where more than one plaintiff is joined, each plaintiff shall independently establish proper venue.
• Tighten venue rules by providing that owning property and transacting business in a county is insufficient in and of itself to establish the principal place of business for a corporation.
• Specify factors pursuant to which a court may dismiss or transfer a case when the lawsuit is more closely related, and is more appropriately decided, in another jurisdiction. Such factors may include where the injury occurred, where the parties are located, the location and availability of witnesses, the ease of access to evidence, the possibility of harassment to the defendant in an inconvenient forum, the enforceability of a judgment, whether the litigant is attempting to circumvent the time limit for bringing a claim in another state, which state’s law would govern the case, and the burden on the court and jury of deciding a matter that is not of local concern.

Recent enactments:

• Louisiana H.B. 464 (2012) (to be codified at La. Civ. Code Art. 38): Provides that a business’s residence (domicile) for venue purposes is either the state of its formation or the state of its principal place of business, whichever is most pertinent to the particular issue.
• Alabama S.B. 212 (2011) (amending Ala. Code § 6-5-410): Requires wrongful death actions to be brought in the county where the decedent could have filed suit, preventing the practice of finding a personal representative in a plaintiff-favorable county solely for purposes of obtaining venue there.
businesses must be filed in the county where all or a substantial part of the events or omissions giving rise to the cause of action occurred, or the county where any defendant maintains its principal office. If the defendant is an out-of-state business, the action must be filed in the county where the defendant’s registered agent for service of process is located; or, if the defendant does not maintain a registered agent within Tennessee, the county where the person designated by statute as the defendant’s agent for service of process is located.

- Oklahoma H.B. 1603, §§ 6-8 (2009) (codified at Okla. Stat. tit. 12, §§ 140.2, 140.3, 144): Provides that if a court finds that, in the interest of justice and for the convenience of the parties, a claim or action would be more properly heard in another forum either in Oklahoma or another state, the court shall decline to exercise jurisdiction under the doctrine of *forum non conveniens* and shall stay or dismiss the claim or action. Provides factors for the court to consider in determining whether to dismiss a case for this reason. In cases with multiple plaintiffs, each individual must establish proper venue with certain exceptions.

- Florida H.B. 7529 (2006) (codified at Fla. Stat. Ann. § 768.734): Limits members of class action lawsuits to residents of Florida unless the claim occurred or emanated from Florida or the nonresident cannot obtain personal jurisdiction over the defendant in his or her home state.
SAFEGUARD THE RIGHT TO APPEAL

Purpose:

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

Structure of the judiciary/right to appeal. States vary in the opportunity they provide for appellate review. While most states have a supreme court and intermediate appellate court or appellate division (with two layers of review), 11, mostly smaller, states provide only a single appellate court. Most states provide litigants with at least one appeal as a matter of right (mandatory review). Many states that have two levels of review provide that review in the state supreme court is discretionary, similar to the federal system in which the U.S. Supreme Court grants certiorari in a relatively small number of cases each year to decide issues of broad impact. As smaller states have increased in population and litigation, they may wish to consider developing intermediate appellate courts to ensure thorough appellate review and relieve the burden placed on the state’s high court. Justice demands that every litigant have the right to at least one full appellate review.

Note: West Virginia remains the only state that lacks both an intermediate appellate court and full appellate review as a matter of right in the state’s high court. In 2011, the court rejected an independent commission’s proposal to create an intermediate appellate court, opting instead to marginally expand its own appellate review of cases. The commission recognized that while the number of cases heard by the high court has remained stable, the number of appeals has doubled. It concluded, “By virtually any measure, the Supreme Court of Appeals is one of the busiest state appellate courts in the entire country. An intermediate court, comprised initially of appointed judges, would ease the burden on the Supreme Court of Appeals, free the high court to continue hearing a discretionary docket focused on important or novel legal issues and expand the core functions of our appellate judicial system.”

Nevada, another state that does not have an intermediate appellate court, is considering establishing such a court. Currently, the seven-member Nevada Supreme Court must address more than 2,000 matters annually—one of the heaviest caseloads in the nation.

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

More than two-thirds of states currently have appeal bond limits of some sort. Five states do not require appeal bonds at all. Only Alaska, District of Columbia, Delaware, Illinois, Maryland, Montana, and New York are without limits. Several states, however, limit the reform to signatories to the “Master Settlement Agreement” (tobacco companies). In a few states, the appeal bond limit applies only to the punitive damages portion of the judgment, if any.

For example, California law generally requires an appeal bond for double the amount of the judgment or order unless given by an admitted surety insurer, in which event the judgment would be 1½ times the amount of the judgment or order. In 2012, two proposals to amend this law failed. A.B. 2377 would have provided judges with discretion to set a lower amount for good cause shown. S.B. 1478 would have limited the amount of an appeal bond to $25 million and set a lower cap, $1 million, for small businesses.

Options:

- Appellate review:
  - Establish an intermediate appellate court with mandatory review; and
  - Provide interlocutory (immediate) appeal orders granting or denying class certification (see p. 21).
- 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:

- South Carolina H. 3775 (2011) (amending S.C. Code Ann. § 18-9-130): Limits the amount required to secure the right to appeal a decision to $25 million for businesses with 50 or more employees and gross revenue of more than $5 million, and $1 million for all other entities.
- Tennessee H.B. 2008 (2011) (amending Tenn. Code Ann. § 27-1-24): Lowers the amount a defendant can be required to pay to appeal a decision from $75 million to $25 million, not to exceed 125% of the judgment.
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 as reliable within the expert’s particular field. The general acceptance test, known as the Frye standard, was applied liberally to favor admissibility of expert testimony. The U.S. Supreme Court's landmark decision in Daubert emphasized the obligation of the trial court to serve as a “gatekeeper,” guarding the courthouse against untrustworthy expert testimony. The Daubert decision, however, is binding only in federal courts. For this reason, a clear gap remains between evidentiary standards in federal courts and some state courts.

Notes:

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

- A shrinking minority of just nine states reject Daubert and apply the less rigorous Frye standard for admission of expert testimony: California, Florida, Illinois, Kansas, Maryland, New York, North Dakota, Pennsylvania, and Washington. These states are in greatest need of expert testimony reform.
- The majority of states have adopted Daubert or deemed their state rule consistent with its approach: Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Georgia, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, South Dakota, Texas, West Virginia, Wisconsin, and Wyoming.
- Fifteen states use a hybrid standard of Daubert or apply their own standard: Colorado, Hawaii, Idaho, Iowa, Maine, Minnesota, Missouri, Nevada, New Jersey, Rhode Island, South Carolina, Tennessee, Utah, Vermont, and Virginia.

Options:

- Amend state rules for admission of expert testimony to be consistent with the Federal Rules of Evidence, Rules 701, 702, and 703.
- Provide that the state’s standard for admission of expert testimony is to be interpreted consistently with Daubert and its progeny, including the “gatekeeping” function.
- Require courts to hold a pretrial hearing on an expert’s proposed testimony upon motion of a party, mandate pretrial disclosure of expert testimony, and limit an expert’s testimony to the particular field in which the expert is qualified.
Recent enactments:

STEM CLASS ACTION ABUSE

Purpose:

Class action abuse is a long-standing issue at both the federal and state levels. Many of these lawsuits have led to “coupon” settlements, which provide highly lucrative fee awards to the lawyers responsible for the creative theories behind such suits, while their purported “clients,” the consumers of the products, must fill out paperwork to obtain a nearly worthless recovery. As the U.S. Supreme Court unanimously found in “one of the most expansive class actions ever” in June 2011, the lawsuit against Wal-Mart brought on behalf of 1.5 million current and former employees nationwide, there must be commonality among the claims to justify trying them together. Otherwise, those who are sued must unfairly attempt to defend themselves during a single trial against a wide range of accusations. Courts that improperly certify class actions place tremendous pressure on the defendant to settle the case, as the alternative is to “bet the company” on the colossal lawsuit.

Congress passed the Class Action Fairness Act of 2005 (CAFA) in response to many of these widespread abuses. CAFA, however, does not directly affect state class actions, where many of these issues remain unaddressed. Therefore, state class action reform is needed to complement federal improvements.

Options:

• Provide a right to interlocutory (immediate) appeal of the grant or denial of class certification. Several states provide a right to appeal class certification orders through statute or court rule:
  - Iowa: Iowa R. Civ. P. 1.264(3).
  - Kentucky: Ky. R. Civ. P. 23.06.
  - Ohio: Ohio Rev. Code § 2505.02(B)(5).
• Provide that classes may be certified only after the class representative makes a preliminary factual showing of a reasonable likelihood of success on the merits.
• Reform attorney’s fee arrangements through adoption of a “declining percentage principle,” whereby the percentage of recovery allocated to attorneys’ fees decreases as the size of the recovery increases.
• Establish in the case of a coupon class action settlement that an attorney’s fee is determined based on the value to class members of coupons that are actually redeemed, as opposed to the total award.
• Direct courts to provide greater scrutiny to class action settlements, especially those involving coupons or other noncash settlements.

Recent enactments:

• Louisiana H.B. 464 (2012) (to be codified at La. Code Civ. Proc. §§ 593.1, 593.2): Permits a defendant to have duplicative class actions filed in multiple Louisiana courts transferred to the district court where the event occurred, or, where the conduct occurred at multiple locations, to the district court where the first suit was brought. If within 30 days of certification of a class action there are related putative class actions pending, then courts may transfer those actions to the court that certified the related action.
• Kentucky Rule of Civil Procedure 23.06 (amended effective 2011): “An order granting or denying class action certification is appealable within 10 days after the order is entered. An appeal does not stay proceedings in the circuit court unless the circuit judge or the Court of Appeals so orders. The matter shall be expedited in the appellate courts.”
• Tennessee H.B. 2008, § 9 (2011) (amending Tenn. Code Ann. § 27-1-125): “The court of appeals shall hear appeals from orders of trial courts granting or denying class action certification if a notice of appeal is filed within ten (10) days after entry of the order. All proceedings in the trial court shall be automatically stayed pending the appeal of the class certification ruling.”
• Oklahoma H.B. 1603, §§ 1, 23 (2009):
  ○ Authorizes the court to appoint an independent attorney to represent the class in any dispute over attorneys’ fees (codified at Okla. Stat. tit. 5, § 7.2).
  ○ Provides that “[i]f any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorney fees awarded in the class action shall be in cash and noncash amounts in the same proportion as the recovery for the class.”
  ○ Provides for closer appellate review of class action certification orders.
  ○ Provides factors for determining a reasonable attorney fee.
  ○ Limits membership in class actions to individuals who are Oklahoma residents or nonresidents of Oklahoma who own property located in Oklahoma that is relevant to the class action (amending Okla. Stat., tit. 12, § 2023).
**PROMOTE FAIRNESS IN JUDGMENT INTEREST ACCRUAL**

**Purpose:**
Many state legislatures have enacted laws that allow for interest to compensate plaintiffs for the often considerable lag between the event giving rise to the cause of action, or filing of the lawsuit, and the actual payment of damages.

Interest can accrue for both prejudgment and postjudgment time delays. Prejudgment interest is awarded for the time between the injury or loss and the time that judgment is entered (after trial). Postjudgment interest is awarded for the period between the final judgment and the time when the full amount owed is paid.

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

Although well intended, the practical effects of judgment interest statutes can be inequitable and punitive in nature where the statutory interest rate fails to approximate prevailing market rates. Statutory interest rates that greatly exceed market rates can result in overcompensation and a windfall recovery for plaintiffs. For example, if a statute provides a judgment interest rate of 12% and prevailing market rates are only 3%, a plaintiff’s recovery would far exceed the real dollar value of the judgment. This excess interest payment, in effect, acts as a penalty for defendants. Further, because awards of judgment interest are generally unrelated to the merits of a claim or conduct of the parties, this penalty is unconnected to any willful or reckless misconduct, which is the traditional linchpin for allowing punitive recovery. As a result, a defendant may be penalized simply for resolving to exercise his or her legal rights.

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

Recent enactments:

• Tennessee H.B. 2982 (2012) (to be codified at Tenn. Code Ann. § 47-14-121): Provides that the interest rate on judgments is 2% less than the Federal Reserve System’s published average prime loan rate.

• Alabama S.B. 207 (2011) (codified at Ala. Code § 8-8-10): Reduces the postjudgment interest rate from 12% to 7.5%.

• Florida H.B. 567 (2011) (amending Fla. Stat. §§ 55.03, 17.1341): Provides that, absent contractual agreement, the pre- and postjudgment interest rate is set by Florida’s chief financial officer based on the discount rate of the Federal Reserve Bank of New York for the preceding 12 months plus 4%.

• Wisconsin S.B. 14 (2011) (amending Wis. Stat. §§ 807.01(4), 814.04(4) and 815.05(8)): Lowers the postjudgment interest rate on judgments from 12% to 1% plus the prime rate, as reported by the Federal Reserve Board.

• Oklahoma H.B. 1603, § 7 (2009) (amending Okla. Stat. tit. 12, § 727.1): Provides that prejudgment interest does not begin to accrue until three years after the beginning of a lawsuit. Sets the postjudgment interest rate as the prime interest rate plus 2%. Sets the prejudgment interest rate as a rate equal to the average U.S. Treasury bill rate of the preceding calendar year.
PROTECT THE RIGHTS OF CONSUMERS OF LEGAL SERVICES

Purpose:

For the average person, the legal process is confusing and expensive. The often complex path to justice is strewn with undisclosed costs and is further complicated by the abuse of contingency fees. Many consumers cannot comparison shop for cost-effective legal services because they lack the background to make informed decisions about their own legal actions. Consequently, plaintiffs may emerge from the legal system twice injured—once in the accident that spawned their lawsuit and once by the legal system itself at the hands of their own lawyers. Ordinary consumers need a “bill of rights” to help them become smart shoppers in the market for legal services.

Notes:

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

Options:

- Forbid an attorney and any of his or her representatives from making unsolicited contact with a potential claimant for 45 days after an event resulting in personal injury or death that could give rise to a cause of action by that claimant.
- 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.
- Require attorneys in personal injury cases to provide a full written explanation of the fee agreement and alternative billing options, as well as an up-front estimate of the probability of success, likely recovery, hours of work to be expended, and all expenses that may be incurred.
- Mandate that, in any contingency-fee agreement, attorneys disclose all fees and costs anticipated and provide an explanation of how the contingent fee will be calculated and how costs will be handled. Give the prospective client at least three days to review the agreement for services.
- Mandate that attorneys keep accurate time records and at the end of the case provide the client with detailed information regarding the amount of time spent on the case and any fees and expenses to be charged.
- Require attorneys to provide copies of all major documents and to notify clients within a reasonable time of any settlement offer, dispositive motion, or court ruling.
- Require that an attorney disclose any agreement or intent to have an outside counsel provide any of the legal services, including the scope and anticipated costs associated with engaging outside counsel. If the decision to use outside counsel is made after the legal services agreement is entered into, the attorney must receive the client’s consent in writing.
• Require attorneys to advise clients of their ability to obtain an objective review of the contingent fee by a court or through a bar association committee, and to provide clients with a closing statement and complete accounting of all financial transactions related to the provision of legal services.

• Require attorneys who maintain a fiduciary or escrow account with collective deposits in excess of $1 million during a calendar year to file a certification from an outside financial expert that the account has been maintained in accordance with all applicable laws and regulations.

• Provide that failure to comply with these requirements renders the fee agreement voidable at the option of the plaintiff, and the attorney shall thereupon be limited in recovery to a reasonable fee for services rendered.

• Provide that failure to meet these disclosure obligations is considered an unfair or deceptive trade practice under state law.

• Provide that the legislation is in addition to and not in lieu of any other available remedies or penalties, including any ethics rules applicable to attorneys that provide additional protections for legal consumers. An attorney who fails to comply shall be subject to court sanctions, disciplinary action by the state bar association or other such professional organization through existing procedures, and civil liability in an action brought by a party alleging injury from failure to comply with legislation.

• Offer an exception to these provisions when the client is a “knowledgeable consumer of legal services,” including a sole proprietorship or a business that has counsel to review such an agreement or has at least 30 employees.

Recent enactments:

• Wisconsin S.B. 12 (Spec. Sess. 2011) (codified at Wis. Stat. § 814.045): Provides a presumption that reasonable attorney fees are no more than three times the amount of the compensatory damages awarded. This presumption may be overcome if the court determines, after considering factors provided by the Wisconsin law, that a greater amount is reasonable.
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 that services are provided in a manner that adequately protects consumers. Nevertheless, even the most closely regulated businesses face lawsuits advancing theories of liability that create tension with the reasoned decisions of government regulators. Such claims impose liability, and sometimes even punitive damages, on businesses that faithfully comply with the law. By adding congruity between government regulations and the liability system, state reforms can provide much-needed clarity, stability, and predictability in the law; treat manufacturers, product sellers, and service providers with fairness; and protect the public interest.

Notes:

Several states provide some level of protection from liability where a defendant’s conduct was in compliance with federal or state regulations or a government agency approved the product or warnings at issue. These provisions typically establish a “rebuttable presumption” that a product or service that complies with government regulations is not defective unless a plaintiff provides sufficient proof to overcome that presumption.


This reform is sound public policy because it reduces unnecessary and cumbersome litigation in which a product or service that has already undergone a lengthy approval process or complied with detailed government safety standards is effectively subjected to a more speculative process of a “battle of experts” before a lay jury. Moreover, product liability litigation has many examples of inconsistent verdicts regarding the safety of the same product. The overall effect of a regulatory compliance statute encourages safety and lawful conduct, and promotes consistency, while allowing some 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 states have enacted laws providing that punitive damages are not appropriate when the product at issue was approved by a government agency or in compliance with government regulations. Such protection typically does not apply if the manufacturer knowingly, in violation of applicable U.S. Food and Drug Administration (FDA) regulations, withheld from or misrepresented to the FDA 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.

With the exception of broader laws in Arizona, Ohio, and Tennessee, these laws apply specifically to FDA-approved pharmaceuticals and medical devices.

Options:

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

Recent enactments:

• Arizona H.B. 2503 (2012) (to be codified at Ariz. Rev. Stat. § 12-689): Prohibits an award of punitive damages against any manufacturer, service provider, or product seller when the product or service at issue was approved by a government agency or in compliance with government safety standards with respect to the aspect at issue in the lawsuit, with certain exceptions.
• Tennessee H. 2008, §§ 10, 11 (2011) (codified at Tenn. Code Ann. §§ 29-28-104, 29-39-104): Prohibits the award of punitive damages against drug or device manufacturers when the product was manufactured in accordance with relevant federal law, with certain exceptions. Prohibits the award of punitive damages when the defendant was in compliance with relevant federal and state regulations setting forth specific standards applicable to the activity in question to protect a class of persons or entities that includes the plaintiff.
PREVENT LAWYERS FROM CIRCUMVENTING PRODUCT LIABILITY REQUIREMENTS

Purpose:

Some plaintiffs’ lawyers have attempted to circumvent the core requirements of product liability law. These efforts involve novel tort theories or novel applications of traditional tort theories to go after the deep-pocket manufacturer, often regardless of fault. In high-profile industry litigation over lead paint, firearms, and other products, some have tried to subject manufacturers to public nuisance liability for harms that were actually caused by individuals who misused the products, for example by allowing lead paint to fall into a state of disrepair or through criminal gun violence. In these cases, it is not alleged that the products were defective, which is the linchpin for liability under product liability law. Lawsuits have also sought to impose liability on entire industries based on market share, conspiracy, or other means rather than on the company actually responsible for the plaintiff’s harm.

In pharmaceutical litigation, some plaintiffs’ lawyers are seeking to subject manufacturers of brand-name drugs to liability even when they fully acknowledge that their clients took only generic versions of those drugs, which were manufactured by a competitor. 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. This attempt to hold manufacturers liable for products that they neither made, distributed, nor sold has now extended beyond the pharmaceutical industry. It can be safely predicted that, without reform, this trend will continue.

Product liability claims are also routinely cast as consumer protection claims to avoid the need to show an actual physical injury and causation. A class action brought on behalf of uninjured cell phone users claimed that radiation from their use placed users at risk of developing cancer, but that the manufacturers represented such products as safe. Likewise, plaintiffs’ lawyers often attack the safety of prescription drugs under state consumer protection statutes by alleging that they are not as safe or beneficial, or have greater risk, than the manufacturer represented. Such methods attempt to eliminate the need to show that the product had an inadequate warning or actually harmed a patient, as required by product liability law.

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

Notes:

- Approximately 20 states have codified their product liability laws. Several others have adopted specific product liability reforms, such as innocent seller protection (p. 31) or a statute of repose (p. 33).
Options:

- If the state has codified a Product Liability Act, clarify that the act establishes the exclusive theories of liability for any civil action for harm caused by a product.
- 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. Provide that a product seller may not be held liable in a product liability action based on market share, enterprise, or industry-wide liability.
- Require plaintiffs to identify the specific product and manufacturer that allegedly caused the plaintiff’s injury.
- Require plaintiffs who allege that a manufacturer or seller should be liable because of an agreement among companies to engage in wrongful conduct to show “concert of action,” a conscious and deliberate agreement to, acknowledgment of, and collaborative participation in wrongful conduct.
- Require plaintiffs who claim a product 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.

Recent enactments:

- Wisconsin S.B. 1 (2011):
  - Requires proof of a “reasonable alternative design” in an alleged defective design of a product, moving Wisconsin away from the broad “consumer expectation” test. Wis. Stat. § 895.047.
  - Overturned a Wisconsin Supreme Court decision, *Thomas v. Mallet* (2005), where the court adopted a “risk contribution” theory in cases involving lead-based paint that allowed plaintiffs to sue without identifying which company’s product was responsible for their injury. Provides that a manufacturer, distributor, seller, or promoter of a product may be held liable only if the claimant proves, in addition to any other elements required to prove his or her claim, that the manufacturer, distributor, seller, or promoter of a product manufactured, distributed, sold, or promoted the specific product alleged to have caused the claimant’s injury or harm, with narrow exceptions. Wis. Stat. § 895.046.
PROTECT INNOCENT PRODUCT SELLERS

Purpose:

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

Notes:

A majority of states have acted to protect innocent sellers, including Alabama, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, South Dakota, Tennessee, Texas, Washington, and Wisconsin.

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

Options:

- Limit the scope of product liability actions such that they may be permitted only against the manufacturer of the allegedly defective product and not a seller that had no knowledge of or control over the defect.
- Consider exceptions in which the product seller may be held strictly liable, such as:
  - The product seller exercised substantial control over the aspect of the design, testing, manufacture, packaging, or labeling of the product that caused the alleged harm for which recovery of damages is sought;
  - The product seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought;
The product seller made an express warranty as to such product independent of any express warranty made by a manufacturer as to such product, such product failed to conform to the product seller’s warranty, and the failure of such product to conform to the warranty caused the harm alleged by the claimant;

The claimant is unable, despite a good-faith exercise of due diligence, to identify the manufacturer of the product;

The manufacturer is not subject to service of process under the laws of the state; or

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

Recent enactments:

- **Alabama S.B. 184 (Ala. 2011)** (codified at Ala. Code § 6-5-501): Provides that no product liability action may be brought against a product seller that is not the manufacturer, unless (1) the product seller is also the manufacturer; (2) the product seller exercised substantial control over the aspect of the product at issue; or (3) the product seller altered or modified the product in a manner that was a substantial factor in causing the injury. A product liability action may also be brought against a product seller if the plaintiff files an affidavit asserting that he or she is unable to identify the manufacturer of the defective product. If the product seller then files an affidavit identifying the manufacturer, the plaintiff must file an action against the manufacturer and dismiss all claims against the product seller.

- **Tennessee H.B. 2008 (Tenn. 2011)** (amending Tenn. Code Ann. § 29-28-106): No “product liability action” shall be commenced or maintained against any seller other than the manufacturer, unless (1) the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging, or labeling of the product that caused the alleged harm for which recovery of damages is sought; (2) the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; (3) the seller gave an express warranty; (4) the manufacturer or distributor of the product or part in question is not subject to service of process in the state of Tennessee and the long-arm statutes of Tennessee do not serve as the basis for obtaining service of process; or (5) the manufacturer has been judicially declared insolvent.

- **2011 Wis. Act 2** (codified at Wis. Rev. Stat. § 895.047(2)): (a) A seller or distributor of a product is not liable based on a claim of strict liability to a claimant unless the manufacturer would be liable under sub. (1) and any of the following applies: (1) the claimant proves by a preponderance of the evidence that the seller or distributor has contractually assumed one of the manufacturer’s duties to manufacture, design, or provide warnings or instructions with respect to the product; (2) the claimant proves by a preponderance of the evidence that neither the manufacturer nor its insurer is subject to service of process within this state; or (3) court determines that the claimant would be unable to enforce a judgment against the manufacturer or its insurer. (b) The court shall dismiss a product seller or distributor as a defendant based on par. (a) (2) if the manufacturer or its insurer submits itself to the jurisdiction of the court in which the suit is pending.
RECOGNIZE THAT PRODUCT LIABILITY ENDS AT THE EXPIRATION OF A PRODUCT’S USEFUL LIFE

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

Notes:
The following states have enacted generally applicable statutes of repose: Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, North Carolina, Ohio, Oregon, Tennessee, Texas, and Washington. Courts in some states, such as North Dakota and Utah, have found statutes of repose unconstitutional. Most other courts have upheld such laws.

Options:
- Establish a statute of repose (e.g., 10, 12, or 15 years) for products, starting at the time of initial sale to consumers, in order that a product liability claim would be precluded after the statutory period has elapsed. (This reform should apply only to those products with a useful life under a specified period of time and not where the product is specifically warranted to have a useful life longer than this period.)

Recent enactments:
- Texas H.B. 4 (2003) (codified at Tex. Civ. Prac. & Rem. Code § 16.012): Provides a 15-year statute of repose for product liability cases. In cases involving latent diseases, the plaintiff must have been exposed within 15 years of the product’s sale and must show symptoms no more than 15 years after the sale.
PRIORITIZE RECOVERY FOR SICK LITIGANTS
IN ASBESTOS LITIGATION

Purpose:

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

Filings by unimpaired claimants have created judicial backlogs and exhausted resources needed to compensate sick claimants with legitimate claims. Plaintiffs’ lawyers have responded to asbestos-related bankruptcies by dragging many small and medium-size companies into the litigation. The Wall Street Journal has editorialized that “the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing.” A former plaintiffs’ attorney candidly described the litigation as an “endless search for a solvent bystander” (Editorial, “Lawyers Torch the Economy,” Wall Street Journal, April 6, 2001).

Notes:

A growing number of states have responded to the serious problems created by mass filings generated by for-profit litigation screeners by enacting “medical criteria” laws for asbestos and silica cases. These laws generally include procedures that require claimants to submit credible and objective evidence of physical impairment in order to bring or maintain an asbestos or silica claim. The presently unimpaired are protected from having their claims time-barred should they develop an impairing condition in the future. Thus, sick claimants with legitimate claims are given priority so they can receive more timely and adequate recoveries; defendants are relieved from having to spend critical resources on premature or meritless claims; the nonsick have their claims preserved; and court dockets are unclogged.

Options:

- Medical criteria procedures for asbestos and silica cases were enacted in Ohio in 2004, Texas and Florida in 2005, Kansas and South Carolina in 2006, Georgia in 2007, and Oklahoma in 2009. Tennessee enacted medical criteria procedures for silica cases in 2006.

Recent enactments:

STOP UNWARRANTED EXPANSION OF LIABILITY TO TRESPASSERS

Purpose:

States have long maintained clear and sound rules regarding the liability of land possessors to those who trespass on their property. Typically, a land possessor owes no duty to a trespasser except to not intentionally injure him or her. This “no duty” rule applies in all but a few narrow and well-defined circumstances. For example, most states have adopted the “attractive nuisance” doctrine, which avoids the harsh results of treating children as trespassers with respect to such areas as swimming pools.

A new Restatement of the Law Third Torts: Liability for Physical and Emotional Harm, approved by the American Law Institute (ALI), upends the traditional rule that a land possessor generally has no legal duty to make his or her property safe for trespassers. Section 51 of the Restatement Third imposes on land possessors a duty to exercise reasonable care to all entrants, including unwanted trespassers. The only exception to the broad new duty rule would be for harms to “flagrant trespassers”—a concept that is not defined in the new Restatement and that appears in no state’s tort law. The flagrant trespasser concept will likely generate substantial litigation over its meaning. Ultimately, this exception may be sharply limited, barring recovery only for a very narrow category of trespassers, such as armed burglars. While the new Restatement, like other “restatements” of the law adopted by the ALI, does not have the force of law by itself, such restatements are highly influential with courts.

Options:

• Adopt legislation that would codify the historical common law approach and “freeze” the law of trespasser liability as it exists today, preempting courts from adopting the nontraditional approach found in the new Restatement.

Recent enactments:

In just two years, 10 states have enacted laws that accomplish this goal, with substantial bipartisan support:

• South Dakota H.B. 1087 (2011) (codified at S.D. Codified Laws § 20-9-11.1 et seq.).
RESTORE COMMON SENSE IN CONSUMER PROTECTION LAWSUITS

Purpose:

In 1914, Congress established the Federal Trade Commission (FTC) and, over time, empowered it to regulate unfair and deceptive trade practices. States developed so-called little FTCs to stop fraudulent acts within their jurisdictions. Unlike the federal FTC Act, however, most of the state consumer protection acts (CPAs) allow consumers to bring private lawsuits for any conduct that could be considered “unfair” or “deceptive,” in addition to government enforcement of the statute. These laws often permit private litigants to recover statutory damages—a minimum amount per violation regardless of a litigant's actual injury—and most permit or require an award of three times the amount of actual or statutory damages (known as treble damages) as well as attorney's fees and legal costs.

Over the past few years, CPA actions have become viruses that attach themselves to traditional tort claims and seek to successfully attack defendants where these more traditional tort claims fail. More specifically, CPA claims are increasingly tacked on to product liability, public nuisance, and other claims where plaintiffs are unable to otherwise satisfy the well-reasoned elements of these claims. CPA actions are frequently being used to stretch tort law and expand liability in unanticipated and unpredictable ways, improperly regulating entire industries through litigation.

Options:

• Require the individual to show (1) reliance on an unfair or deceptive act or practice that is objectively reasonable; (2) an ascertainable loss of money or property; and (3) proof that the violation caused the plaintiff's injury.

• Provide that a court may not find conduct unfair or deceptive if the conduct is required or permitted by or in accord with state or federal law, rule or regulation, judicial or administrative decision, or formal or informal agency action.
  ○ The majority of states have adopted regulatory compliance provisions, though the scope or application varies considerably: Alaska, Arizona (FTC-regulated conduct only), Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Indiana, Iowa (FTC-regulated conduct only), 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.

• Require proof that the defendant willfully deceived the public where an award of treble damages is available or required and provide that punitive or exemplary damages are not permitted in a CPA action to avoid double punishment of a defendant that has already been required to pay treble damages.

• Encourage courts to apply traditional class action safeguards, such as requiring that common questions of law and fact predominate, where class actions are available.
  ○ Alabama, Georgia, Louisiana, Mississippi, Montana, and South Carolina do not allow consumer protection claims to be brought as class actions.
• Do not permit statutory damages in class actions.
  ◦ Currently law in Colorado, New York, Ohio, Oregon, and Utah.
• Require a person, prior to bringing a private action under a CPA, to provide the prospective defendant with 10 days’ notice of the intended action to promote prompt resolution of the dispute without the need for litigation.
  ◦ Currently law in Georgia.
• Allow awards of attorneys’ fees and costs to prevailing plaintiffs only in cases in which the defendant’s conduct was willful.
  ◦ Currently law in Minnesota, North Carolina, and North Dakota.

Recent enactments:

  ◦ Provides that a “catchall” provision generally prohibiting “any other act or practice which is deceptive” is to be exclusively enforced by the government, not through private lawsuits;
  ◦ Clarifies that a court may not award treble (triple) damages authorized for willful or knowing violations and punitive damages for the same conduct; and
  ◦ Does not permit class actions under the consumer fraud statute.
CREATE TRANSPARENCY AS TO WHEN LEGISLATURES CREATE NEW WAYS TO SUE

Purpose:

On occasion, courts create an “implied” cause of action or a right to sue based on their subjective views about whether a state legislature intended to do so. For example, the legislature may intend for the state health department to enforce a law regulating restaurant practices in disclosing fat content of fast food, but attorneys may use this regulatory law to attempt to create a new type of private lawsuit. The principles for when courts will or will not create these implied causes of action are vague and uncertain. The result is that defendants may face unexpected, new, and expanded liability. In addition, plaintiffs waste time and money litigating claims that courts may later find do not exist. Courts spend substantial judicial resources considering such issues. Whether a private right to sue exists may also have unanticipated implications for government policymaking and enforcement of a law. For these reasons, legislation should be transparent as to whether any act of the legislature creates a new right to sue. This proposal would provide greater transparency in the legislative process and clarity in the courts. In plain English terms, if a state legislature is going to create a new way to sue, it should say so directly.

Options:

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

Recent enactments:

- Tennessee S.B. 2140 (2012) (codified at Tenn. Code Ann. § 1-3-119): (“(a) In order for legislation enacted by the general assembly to create or confer a private right of action, the legislation must contain express language creating or conferring the right. (b) In the absence of the express language . . . no court of this state, licensing board or administrative agency shall construe or interpret a statute to impliedly create or confer a private right of action except as otherwise provided by this section. . . .”).

- Georgia S.B. 138 (2009) (codified at Ga. Code § 9-2-8): “(a) No private right of action shall arise from any Act enacted after the effective date of this Code section unless such right is expressly provided therein. (b) Nothing in subsection (a) of this Code section shall be construed to prevent the breach of any duty imposed by law from being used as the basis for a cause of action under any theory of recovery otherwise recognized by law. . . .”
REJECT EXPANSIONS OF BAD FAITH LIABILITY THAT DRIVE UP INSURANCE RATES

Purpose:

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

Traditionally, “bad faith” has been interpreted as an intentional or reckless denial of a claim; however, some states have diluted this standard by holding that minor and unintended technical violations of an insurance statute may constitute bad faith for the purposes of a tort action. This may enable a claimant to recover a broad array of damages against an insurer, such as the full value of the underlying insurance policy, extracontractual damages (e.g., compensatory damages multiplier), attorneys’ fees and court costs, and potentially punitive damages. State insurance regulators may levy additional penalties.

Plaintiffs’ lawyers are pushing legislation to dramatically expand such lucrative lawsuits against insurers. They have sought to accomplish this in four key ways: (1) create new statutory private rights of action for bad faith; (2) dilute any intentional conduct standard for claiming bad faith; (3) enumerate strict criteria purporting to show bad faith; and (4) increase and expand penalties for bad faith actions. By establishing new private rights of action for insureds and third parties, and then diluting the standards for maintaining such claims, plaintiffs’ lawyers are able to fashion a broad and highly malleable tort action that can transform even the most minor insurer error into a multimillion-dollar lawsuit.

Ultimately, costs associated with such lawsuits are not borne by a “wealthy insurer,” but rather by individuals, small businesses, and other insurance consumers onto whom higher premiums are passed. The increase in costs might also price many consumers out of the market for insurance altogether, increasing the number of uninsured and underinsured, and further increasing costs for those able to maintain insurance. Some insurers may discontinue or substantially curtail their services because it would be too risky to do business in a jurisdiction with an overly expansive bad faith law. This would additionally penalize consumers through less insurer competition in an already heavily regulated industry and provide fewer coverage choices.

Notes:

States vary on whether a private right of action by a direct insured against his or her insurer (i.e., first-party claimant) is provided by statute or common law, although such an action is generally available. Approximately a dozen states permit claims by someone other than the insured individual (i.e., third-party claimant). Accordingly, many bills advanced by plaintiffs’ lawyers seek to create a private right of action for third-party claimants or codify the common law action for first-party claimants in a way that expands the opportunities for filing bad faith lawsuits. 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).
Options:

- Provide a safe harbor from bad faith claims, during which the insurer can properly investigate the claim and decide whether to offer policy limits.
- 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.
- Eliminate dual enforcement of bad faith actions under statute and common law such that a claimant failing to make a claim under statute cannot revive his or her claim through a common law tort action, or vice versa.
- Provide or clarify that any statutory private right of action is limited to the direct insured and not other third-party claimants.
- Clarify that enforcement of the state’s unfair claims settlement statute is limited to the state insurance commission or department, and that any private statutory right of action must be established separately.
- Establish limits on extracontractual and/or punitive damages available in bad faith actions.
- Oppose legislation that creates a private right of action for third-party claimants, reduces or eliminates the standard for finding bad faith, or increases penalties.

Recent developments:

- Florida H.B. 427 / S.B. 1224 (2012), helpful legislation that would have required specific procedures for bringing a bad-faith action under either statute or common law and permitted insurers’ use of general releases to curtail dual enforcement, died in the House Civil Justice Subcommittee.
- An example of pending legislation that would expand bad-faith lawsuits is New York A.B. 10045 (2012). It would create a bad faith cause of action for third-party claimants.
- Several plaintiffs’ bar-supported bills failed in recent years. Examples include:
  - Michigan S.B. 71 (2011), which would create a bad faith cause of action for “any person” (i.e., first- and third-party claimants) and authorize consequential and exemplary damages, died in the Committee on Insurance.
  - Oregon H.B. 2618 (2011), which would provide a bad faith cause of action for first- and third-party claimants for up to triple the amount of actual and consequential damages, died in the House Judiciary Committee.
COMPARATIVE FAULT: FAIRLY ALLOCATE FAULT BETWEEN PLAINTIFF AND DEFENDANT

**Purpose:**

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

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

**Notes:**

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

- Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, South Dakota, and Washington follow this approach.

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

- Alabama, District of Columbia, Maryland, North Carolina, and Virginia follow this approach.

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

**Options:**

- Disallow recovery if plaintiff’s negligence was greater than the negligence of the person against whom recovery is sought (See, e.g., Colo. Rev. Stat. § 13-21-11; Minn. Stat. Ann. § 604.01.) or if the plaintiff bears a greater percentage of fault than the combined percentage of fault attributed to others. (See, e.g., Iowa Code § 668.3; N.H. Rev. Stat. Ann. § 507:7-d; N.D. Cent. Code § 32-03.2-02; Ohio Rev. Code § 2315.33.)
• Provide or clarify that the jury is permitted to consider all of the potentially responsible parties when allocating fault, including parties that settled before suit and those that are otherwise not before the court. Some state laws require defendants to provide notice to plaintiffs of responsible third parties before trial. See, e.g., Ark. Code Ann. § 16-55-202(b)(1); Colo. Rev. Stat. § 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).
JOINT AND SEVERAL LIABILITY: FAIRLY AND PROPORTIONATELY ALLOCATE LIABILITY AMONG PARTIES

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 negligence. Where multiple defendants are sued for causing a plaintiff’s injuries, the fact finder attributes to each party a percentage of fault in causing the plaintiff’s injuries under the presumption that each defendant will pay his or her corresponding percentage of damages.

Problems arise, however, where a defendant is insolvent, has already settled with the plaintiff, or is otherwise unable to pay the apportioned amount of damages. Under a system of “pure” joint liability, a defendant found to be 1% at fault can be forced to pay 100% of the damages if the other defendants in the suit are judgment proof, beyond the court’s jurisdiction, or otherwise not party to the litigation. This reform corrects such fundamental unfairness by tailoring the law to have defendants pay only the percentage of fault for which they are responsible and not for damages attributed to others.

Notes:
States most in need of reform (those with pure joint liability) include Alabama, Delaware, Maryland, North Carolina, Rhode Island, and Virginia.

Options:

• Adopt pure several liability: Limit a defendant’s liability to the percentage of fault attributed to that defendant.

• 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.

• Implement modified joint and several liability: Joint liability is barred for defendants found to be less than 50% at fault.
  ○ Variants of this approach are currently law in Iowa, Minnesota, Missouri (less than 51%), Montana, New Hampshire, New Jersey (less than 60%), Ohio (for economic damages), Pennsylvania (less than 60%), South Carolina, Texas, and Wisconsin (less than 51%).

• Bar joint liability for recovery of noneconomic damages, retaining joint liability for economic damages only.
  ○ Currently law in California, Nebraska, and New York (for defendants less than 50% at fault).
Recent enactments:


- Pennsylvania S.B. 1131 (2011) (amending Pa. Consol. Stat. tit. 42, § 7102): Bars the application of the rule of joint and several liability in the recovery of all damages, except when a defendant has been (1) found liable for intentional fraud or tort; (2) held at least 60% liable; (3) held liable for environmental hazards; or (4) held civilly liable as a result of drunk driving.

PLACE REASONABLE BOUNDS ON SUBJECTIVE NONECONOMIC DAMAGE AWARDS

Purpose:

Historically, pain and suffering damages were modest in amount and often had a close relationship to a plaintiff’s actual pecuniary loss, such as medical expenses. In recent years, a confluence of factors has led to a significant rise in the size of pain and suffering awards, creating the need for legislation to guard against excessive and unpredictable outlier awards. Such awards may occur when juries are improperly influenced by sympathy for the plaintiff, bias against a deep-pocket defendant, or a desire to punish the defendant rather than compensate the plaintiff. Excessive pain and suffering awards raise the costs of goods and services for the public, increase insurance rates, and limit the availability of medical care.

Notes:

• Seventeen states limit noneconomic damages in health care liability lawsuits:
  ○ Alaska, California, Colorado, Florida, Indiana, Louisiana, Maryland, Michigan, Mississippi, Nebraska, Nevada, North Carolina, Ohio, South Carolina, South Dakota, Texas, and West Virginia.
• Ten states limit noneconomic damages in all personal injury claims:
  ○ Alaska, Colorado, Hawaii, Idaho, Kansas, Maryland, Mississippi, Ohio, Oklahoma, and Tennessee.

Options:

• Limit noneconomic damages in all personal injury actions to a specific amount. See, e.g., Cal. Civ. Code § 3333.2(b) (limiting noneconomic damages to $250,000 in any action for injury against a health care provider based on professional negligence).
• 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) or to a certain amount per year of the plaintiff’s life expectancy (See, e.g., Alaska Stat. § 09.17.010).
• Authorize noneconomic damage awards to exceed the cap in cases involving defined catastrophic injuries (see, e.g., Tenn. Code Ann. § 29-39-102, or do not apply the limit in such cases, see, e.g., Ohio Rev. Code Ann. § 2315.18) or provide for periodic adjustment of the noneconomic damage limit to account for inflation. (See, e.g., Idaho Code § 6-1603 (adjusts $250,000 limit set in 2004 based on the state’s average annual wage adjustments).)
Recent enactments:

- North Carolina S.B. 33 (2011) (codified at N.C. Gen. Stat. § 90-21.19): Limits noneconomic damages in medical liability cases to $500,000 subject to adjustments every three years starting on January 1, 2014, based on the Consumer Price Index. Does not apply if (1) the plaintiff suffered disfigurement, loss of use of part of the body, permanent injury or death; and (2) the defendant's acts or failures, which are the proximate cause of the plaintiff's injuries, were committed in reckless disregard of the rights of others, grossly negligent, fraudulent, intentional, or with malice.

- Oklahoma H.B. 2128 (2011) (amending Okla. Stat. tit. 23, § 61.2): Reduces the limit on the amount of noneconomic damages that may be awarded for noneconomic loss arising from a claim of bodily injury from $400,000 to $350,000. Does not apply if the defendant's actions were (1) in reckless disregard for the rights of others; (2) grossly negligent; (3) fraudulent; or (4) intentional or with malice.

- Tennessee H.B. 2008 (2011) (codified at Tenn. Code § 29-39-102): Limits noneconomic damages to $750,000 or $1 million if the injury or loss is catastrophic in nature. Does not apply if the defendant intended to inflict serious injury, intentionally destroyed or falsified records, or acted under the influence of drugs or alcohol.
PREVENT EXCESSIVE PUNITIVE DAMAGES AWARDS

Purpose:

In a surprising number of decisions, the Supreme Court of the United States has affirmatively responded to Justice Sandra Day O’Connor’s observation that punitive damages have “run wild” in this country. Although the Court has provided constitutional guidelines for determining whether an award is excessive, state court decisions frequently evade both the letter and spirit of these rulings. To promote a more stable legal climate, some states have adopted statutory limits on punitive damages. Statutory limits provide greater predictability and certainty in litigation, eliminate outlier verdicts, and avoid constitutionally excessive awards.

Notes:

• About half of the states that permit punitive damages have enacted statutory limits:
  ○ Alabama, Alaska, Colorado, Connecticut (product liability only), Florida, Georgia, Idaho, Indiana, Kansas, Maine (wrongful death cases only), Mississippi, Missouri, Montana, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, and Wisconsin.
• Six states generally do not permit punitive damages awards:
  ○ Louisiana, Massachusetts, Michigan, Nebraska, New Hampshire, and Washington.
• The following states have no statutory limit:
  ○ Arizona, California, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Kentucky, Maryland, Minnesota, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, West Virginia, and Wyoming.
• The Arkansas Supreme Court struck down the state’s statutory limit on punitive damages in 2011. Other state high courts have upheld such measures.

Options:

• Limit punitive damages awards to the greater of three times compensatory damages or a specific cap (possibly adjusting periodically for inflation).
• 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.
• For individuals or small businesses, limit punitive damages awards to three times compensatory damages or a certain percentage of net worth, whichever is less.
• Provide that the limit shall not be disclosed to the trier of fact, but applied by the court to any punitive damages verdict.
• When compensatory damages are above a certain amount, provide that punitive damages are not to exceed compensatory damages.
Recent enactments:

  - Limits punitive damages to the greater of three times compensatory damages awarded to each claimant or $500,000.
  - Permits punitive damages of up to the greater of four times compensatory damages awarded to each claimant or $2 million if the trial court determines that (1) the wrongful conduct was motivated primarily by unreasonable financial gain, and the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was known or approved by the person responsible for making policy decisions; or (2) the defendant’s actions could subject the defendant to conviction of a felony.
  - No statutory limit if the trial court determines that (1) the defendant had an intent to harm the claimant; (2) the defendant has pled guilty to or been convicted of a felony arising out of the same act or course of conduct; or (3) the defendant acted or failed to act while under the influence of alcohol, drugs, or other substances.

- Tennessee H.B. 2008 (2011) (codified at Tenn. Code Ann. § 29-39-104): Limits punitive damages to two times compensatory damages or $500,000, whichever is greater. Does not apply if the defendant intended to inflict serious injury, intentionally destroyed or falsified records, or acted under the influence of drugs or alcohol.

- Wisconsin S.B. 1 (2011) (codified at Wis. Stat. § 895.043(6)): Limits punitive damages to $200,000 or two times compensatory damages, whichever is greater. Does not apply to defendants who drive under the influence of an intoxicant.
PROTECT DUE PROCESS IN PUNITIVE DAMAGES DETERMINATIONS

Purpose:

The Supreme Court of the United States has ruled that the lack of adequate court procedures to guard against arbitrary and inaccurate deprivations of property violates a defendant’s due process rights. In so doing, the Court considers whether a lower court’s method of determining punitive damages departs from traditional procedures. The adequacy of procedural protections is particularly important when they involve punitive damages, because such awards “pose an acute danger of arbitrary deprivation of property” and come with “the potential that juries will use their verdicts to express biases against big business, particularly those without strong local presences.” In recent years, courts have adopted helpful practices with respect to punitive damages that may be more specifically addressed through legislation.

Options:

• 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.
• Stop duplicative punishment for the same conduct. Punitive damages may not be awarded if the defendant establishes before trial that punitive damages have previously been awarded against it for the same action or course of conduct. If the court determines by clear and convincing evidence that the punitive damages award was insufficient, then the court may permit the jury to consider a subsequent award.
• Require “clear and convincing” evidence to support an award of punitive damages. Many states follow this approach, but it is still needed in Connecticut, Delaware, Illinois, New Mexico, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wyoming. Clear and convincing evidence is a standard in between “beyond a reasonable doubt” of criminal law and “preponderance of the evidence” of civil liability.
• Eliminate prejudgment interest on punitive or exemplary damages (see “Promote Fairness in Judgment Interest Accrual,” p. 20).

Recent enactments:

**Purpose:**

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

**Notes:**

- Several states, such as California, Massachusetts, Pennsylvania, Tennessee, Utah, Washington, and West Virginia, have eliminated the collateral source rule in cases asserting negligent medical care, but preclude consideration of collateral source evidence in other cases.
- The proposal to eliminate phantom damages (p. 9) 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:**

- Permit the jury to consider collateral source payments in all civil actions.
- Provide 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 offset the judgment by the amount of the payments from collateral sources.
  - Variations of this approach are currently law in Colorado, Connecticut, Florida, Idaho, Michigan, New Jersey, New York, and Oregon.

**Previous enactments:**

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

Purpose:

The societal impact of excessive civil liability is nowhere more evident than in medical liability. Widely disparate awards across states for the same or substantially similar injuries demonstrate medical liability’s systemic problems. These inequities and inefficiencies negatively affect the affordability and accessibility of health care. They also encourage the practice of defensive medicine as a means of reducing or avoiding tort liability, which is a major contributor to skyrocketing health care costs. Medical liability reforms have dramatically improved the health care environment in such states as Mississippi, Pennsylvania, Texas, and West Virginia.

Options:

- Establish a limit on noneconomic damages in medical liability cases (see “Place Reasonable Bounds on Subjective Noneconomic Damage Awards,” p. 45) or establish a limit on total damages (e.g., $1 million) in medical liability cases.
  - Limits on the total award exist in Colorado, Indiana, Nebraska, Texas, and Virginia.
- Allow admission of evidence of payments to the plaintiff from sources other than the defendant, or a setoff for collateral source recovery (see “Provide Juries with Full Information on Plaintiffs’ Actual Losses,” p. 50).
- 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 (see “Reduce Forum Shopping,” p. 15).
- Limit the liability of physicians and other medical professionals who provide voluntary or emergency care.
- Eliminate phantom damages (see “Ensure That Damages for Medical Expenses Reflect Actual Costs,” p. 8).
- Provide a sliding scale for contingency fees in medical liability cases (e.g., up to 40% of the first $150,000 recovered, 33% of the next $150,000, 25% of the next $200,000, and 20% of any amount recovered over $500,000).
  - States with similar provisions include California, Connecticut, Delaware, Florida, Illinois, Massachusetts, Nevada, New Hampshire, New Jersey, New York, and Wisconsin.
- Set conditions on the use of expert witnesses:
  - An expert witness must be licensed and trained in the relevant discipline, certified by a board recognized by the state, and substantially familiar with the standard of care on the date of injury.
  - An expert witness must be licensed in the forum state or a contiguous state and have practiced for one year preceding the date of injury.
  - Prohibit testimony from expert witnesses whose compensation depends upon the outcome of the lawsuit.
- Require the plaintiff to obtain and file a certificate of merit from a qualified physician in support of the claim.
Recent enactments:

- **Florida H.B. 479 (2011) (codified in scattered sections of the Florida statutes):**
  - Requires doctors licensed in another state to obtain an expert witness certificate before providing expert testimony in Florida.
  - Gives the Boards of Medicine, Osteopathic Medicine, and Dentistry the specific authority to discipline any expert witness, both those licensed in the state and those with an expert witness certificate, who provide deceptive or fraudulent expert witness testimony.
  - Provides that an expert witness who submits the presuit verified expert medical opinion is not immune from discipline.
  - Provides that volunteer team physicians are generally immune from liability when they gratuitously and in good faith provide care at a school athletic event.
  - Requires expert witnesses in medical liability cases to review all reasonably available medical records, rather than relying on hypothetical scenarios, when evaluating a deviation in the standard of care.
  - Provides that in any medical liability action arising out of the provision of emergency services, the health care provider is not liable unless the care provided was not in accordance with the standard of practice among members of the same profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act that gave rise to the cause of action.
  - Provides that in the treatment of an emergency medical condition, the plaintiff must prove a violation of the standard of care by clear and convincing evidence.
  - Limits noneconomic damages in medical liability cases to $500,000.
101 Ways to Improve State Legal Systems

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