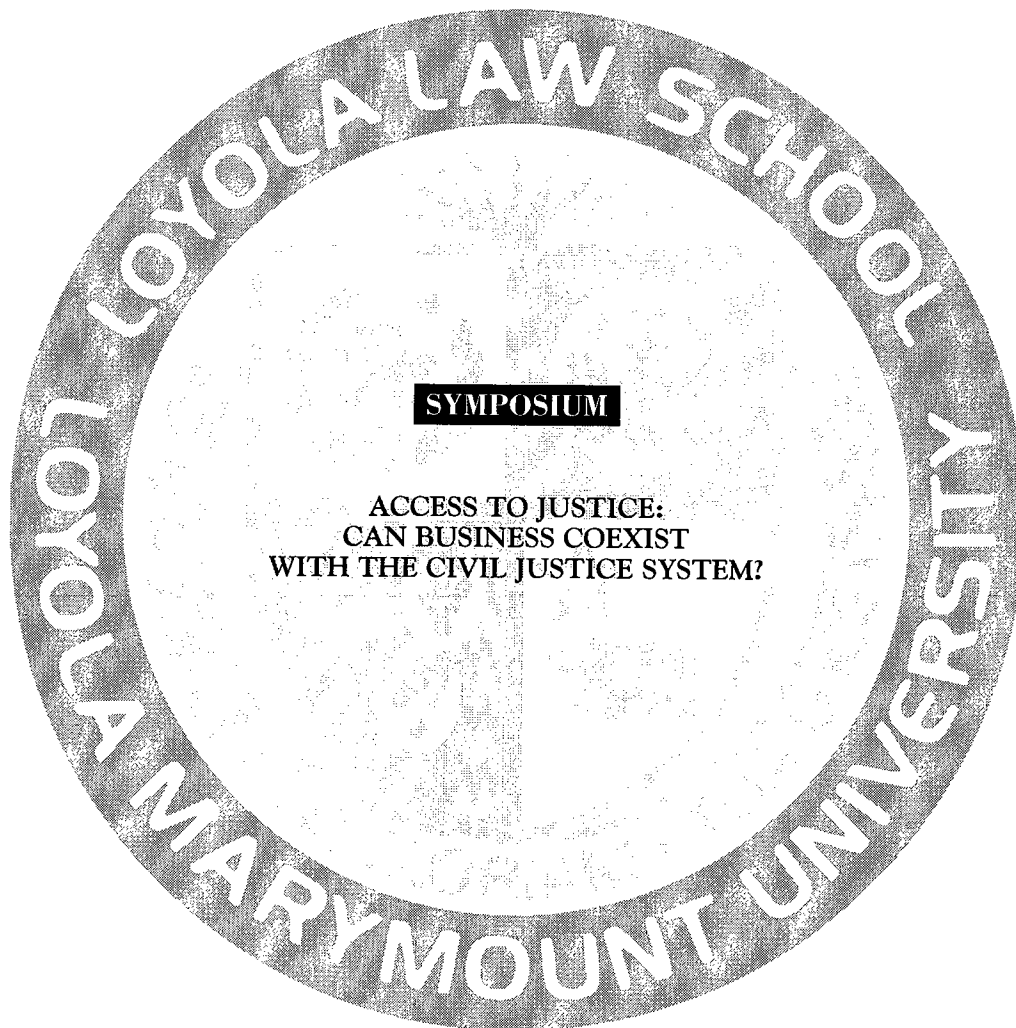

LOYOLA

LAW REVIEW

O F L O S A N G E L E S



SPRING 2005

VOLUME 38

NUMBER 3

IS THE “CRISIS” IN THE CIVIL JUSTICE SYSTEM REAL OR IMAGINED?

*Steven B. Hantler**

*Mark A. Behrens***

*Leah Lorber****

Over the past two decades, the American civil justice system has become increasingly inefficient, unfair, and unpredictable. Coupled with the litigation culture spurred by these breakdowns, the nation’s courts, on the whole, are losing their ability to administer justice. In recent years, anecdotes of verdicts that shock the collective conscience have become part of civil justice lore: a \$4 million verdict for a bad paint job on a doctor’s luxury car¹ or a nearly \$3

* Assistant General Counsel for government and regulation at the DaimlerChrysler Corporation (director of the Company’s litigation communications function, as well as the Class Action Group, Consumer Litigation Group; and legal reform activities); J.D., Wayne State University of Michigan. Senior fellow at the Pacific Research Institute. Mr. Hantler has written extensively on the tactics employed by plaintiffs’ lawyers in suing large corporations and in targeting certain industries. Recently, he published *The Change in How We Deal with Crisis: The Seven Myths of Highly Effective Plaintiffs’ Lawyers*, VITAL SPEECHES OF THE DAY, Oct. 1, 2003, at 761. He also has a quarterly column on litigation issues published in *Litigation Management Magazine*. He is widely quoted on television and in business magazines and newspapers about high profile litigation.

** Partner in the Public Policy Group of Shook, Hardy & Bacon L.L.P. in Washington, D.C. B.A., 1987, Economics; University of Wisconsin-Madison; J.D., 1990, Vanderbilt University. Mr. Behrens served as Associate Articles Editor of the *Vanderbilt Law Review*.

*** Counsel in the Public Policy Group of Shook, Hardy & Bacon L.L.P. in Washington, D.C. B.A., Journalism, and English, Indiana University; J.D., *magna cum laude* from Indiana University. Ms. Lorber was a member of the Order of the Coif at Indiana University and served as Articles Editor of the *Indiana Law Journal*.

1. *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994) (ordering remittitur of \$2 million of \$4 million punitive award, where compensatory damages were \$4,000), *rev’d*, 517 U.S. 559 (1996) (ruling \$2 million punitive

million verdict for a woman who spilled a cup of McDonald's coffee when she removed the lid after leaving a drive-through window.² These cases represent just the tip of the iceberg. In many cases, the civil justice system simply breaks down because the end result of a lawsuit tends to be driven more by business concerns than the appropriate legal outcome.

Frustration with the civil justice system is widespread. Doctors are choosing where to practice based on liability laws and insurance rates, companies are offsetting their increased liability costs by raising prices and cutting jobs, and, when people need to use the civil justice system themselves, they are finding it overburdened with unnecessary claims. As the 2004 election has shown, the public is becoming more aware of how a failure in the civil justice system affects their own lives. In response to the public's concerns, both major party presidential candidates endorsed certain civil justice reforms, and a number of state ballot initiatives favoring civil justice reform passed.³

award was grossly excessive so as to violate constitutional due process and setting forth guidelines for future review of punitive awards).

2. *Liebeck v. McDonald's Rests., P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Aug. 18, 1999) (\$2.7 million punitive award and \$160,000 compensatory award); see Andrea Gerlin, *A Matter of Degree: How a Jury Decided that One Coffee Spill Is Worth \$2.9 Million*, WALL ST. J. EUR., Sept. 2, 1994, at 1.

3. For example, California Proposition 64, an initiative narrowing the scope of California Business and Professions Code Section 17200, the "unfair competition" law, passed 59% to 41%. See *Votes For and Against Statewide Ballot Measures*, Nov. 2, 2004, at http://www.ss.ca.gov/elections/sov/2004_general/contents.htm; see also Florida Department of State Division of Elections, Official Results, Constitutional Amendment (Florida's Amendment No. 3, the Medical Liability Claimant's Compensation Amendment, a measure limiting lawyers' contingency fees in medical malpractice cases, passed 63.6% to 36.4%), at [http://sos.state.nv.us/nvelection/2004General/ElectionSummary.htm](http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/2/04&DATAMODE=''>http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/2/04&DATAMODE=''; State of Nevada, 2004 Official General Election Results, Nov. 2, 2004 (Nevada's Question 3, a measure limiting noneconomic damages in medical malpractice cases, passed 59.34% to 40.59%; Nevada's Question 4, a trial lawyer-backed measure undercutting medical liability reform through insurance regulation, failed 34.71% to 65.22% and Nevada Question 5, a measure forbidding legislative reductions of liability, failed 37.16% to 62.78%), at <a href=)"; Statewide Candidates' Abstract—Official Wyoming General Election Results—Nov. 2, 2004 [hereinafter Wyoming Election Results] (Wyoming Amendment C, passed 124,178 to 110,169, and authorizes the legislature to set up a panel to review

As policy makers around the country take their cues from these trends and look for ways to enhance the ability of the courts to administer justice, it is important to start with a baseline understanding of what the American civil justice system is intended to achieve. The American civil justice system has two purposes: to compensate people for injuries caused by others, and to deter future misconduct of the type that caused those injuries.⁴ This Article explores some of the ways in which the civil justice system is falling short of these twin purposes, the impact that these failings have on the economy and the democratic process, and the trends that, if left unimpeded, will knock the scales of justice further out of balance. Finally, the Article suggests ways the civil justice system can be fixed to remove the incentive for abuse.

I. FAILURES OF THE CIVIL JUSTICE SYSTEM

The American civil justice system is a "transfer mechanism": It transfers compensation from those who cause injuries to those who sustain injuries for which the law provides relief.⁵ Effective and reliable transfer mechanisms tend to have four attributes: They are

medical malpractice cases before they go to court), at <http://soswy.state.wy.us/election/2004/results/04-gsum.htm>; Colorado Cumulative Report Official Results, Nov. 23, 2004 (Colorado Amendment 34, a trial lawyer-backed initiative to significantly expand ability to sue builders over alleged construction defects, defeated 23.45% to 76.55%), at <http://www.sos.state.co.us/pubs/elections/general/COLORADO-CUMULATIVE.htm>. *But see* Oregon's November 2, 2004, General Election Abstract of Votes, State Measure No. 35, at <http://www.sos.state.or.us/elections/nov22004/g04abstract.html> (Oregon's medical malpractice reform defeated 869,054 to 896,857); Wyoming Election Results, *supra* (Wyoming Amendment D, a measure to authorize legislature to limit non-economic damages for medical malpractice, defeated 115,981 to 117,602). Under an unusual Wyoming rule, ballots uncast for referendum measures are counted as "no" votes. *See* WYO. CONST. art III, § 52(f).

4. *E.g.*, Daniel P. Kessler, *The Economic Effects of the Liability System*, HOOVER INST., at <http://www-hoover.stanford.edu/publications/epp/91/91a.html> (last visited June 17, 2005).

5. *See id.*; MARK GEISTFELD, ECONOMIC ANALYSIS IN A UNIFIED CONCEPTION OF TORT LAW 22 (Boalt Working Papers in Pub. Law, Paper No. 33, 2003) ("Any tort rule can be conceptualized as a transfer mechanism between the right-holder and duty-holder, which in turn poses the economic question of whether a fair tort rule satisfies the efficiency-equity criterion."), at <http://repositories.cdlib.org/boaltwp/33>.

efficiency, timeliness, predictability and fairness.⁶ At present, the U.S. tort system, as a whole, is losing ground in all of these areas.

A. Costs of the United States Tort System

The United States tort system is far and away the most expensive in the world; “our dispute-driven system requires troubling amounts of resources, such as the time of claimants, attorneys, judges, and juries.”⁷ In 2002, the President’s Council of Economic Advisors compared the U.S. civil justice system with tort systems in other countries and found that the U.S. system is more than twice as expensive as the average cost of other major industrialized nations.⁸

In 2003, the U.S. tort system cost \$246 billion.⁹ This is more than the amount of federal revenue collected from the corporate income tax.¹⁰ It also is “far more than enough money to solve Social Security’s long-term financing crisis”¹¹ and could pay for all the following government programs *combined*: “Education, training, and employment; general science; space and technology; conservation and land management; pollution control and abatement; disaster relief and insurance; community development; Federal law enforcement and administration of justice; and unemployment compensation.”¹² In 2003, this aggregate cost translated to \$809 per

6. Steven B. Hantler, Remarks at General Motors Roadshow, After the \$4.9 Billion GM Verdict: Is Silicon Valley the Next GM? (Sept. 23, 1999) (“an economist would also say the indicators of a well-functioning transfer mechanism are, in the case of compensation transfer, that it be done fairly, predictably, timely and cost-effectively”) (transcript available at <http://www.fed-soc.org/Publications/Transcripts/gmsiliconvalley.htm>).

7. Steven Garber, *Should We Give Up On Medical Product Liability?*, RAND REV., Summer 2004, at <http://www.rand.org/publications/randreview/issues/summer2004/38.html>.

8. COUNCIL OF ECONOMIC ADVISERS, WHO PAYS FOR TORT LIABILITY CLAIMS? AN ECONOMIC ANALYSIS OF THE U.S. TORT LIABILITY SYSTEM 1–2 (2002) [hereinafter CEA REP.] (citing TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2000, TRENDS AND FINDINGS ON THE COSTS OF THE U.S. TORT SYSTEM (2002)), available at http://www.whitehouse.gov/cea/tortliabilitysystem_apr02.pdf.

9. TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2004 UPDATE, TRENDS AND FINDINGS ON THE COST OF THE U.S. TORT SYSTEM 2 2004 [hereinafter U.S. TORT COSTS: 2004 UPDATE], available at http://www.towersperrin.com/tillinghast/publications/reports/Tort_2004.pdf.

10. CEA REP., *supra* note 8, at 17.

11. *Id.*

12. *Id.*

U.S. citizen, which was the equivalent of over a 5% tax on wages for each wage earner.¹³ In 2004, the aggregate cost increased to \$845 per U.S. citizen.¹⁴ In real life terms, the U.S. tort system is costing three months of groceries, or six months of utility payments, for average income American families.¹⁵

Further, tort costs are growing increasingly faster and at a disproportionate rate. From 1984 through 2003, the costs of the tort system increased by 367%, from \$67 billion¹⁶ to \$246 billion.¹⁷ Tort costs represented only 0.6% of America's gross domestic product ("GDP") in 1950, 1.3% of GDP in 1970,¹⁸ and more than 2% of GDP by 2001.¹⁹

B. Ability to Compensate Claimants

The U.S. tort system is inefficient, slow, and unpredictable. Plaintiffs are now receiving less than 50% of the money spent on litigation, and their recovery for actual economic loss amounts to only 22% of those costs.²⁰ Moreover, their claims take a long time to resolve. Product liability cases (excluding asbestos cases) take an average of nearly three years from filing to verdict or judgment.²¹

13. TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2003 UPDATE 1 (2003) [hereinafter U.S. TORT COSTS: 2003 UPDATE], available at http://www.towersperrin.com/tillinghast/publications/reports/2003_Torts_Costs_Update/Tort_Costs_Trends_2003_Update.pdf.

14. U.S. TORT COSTS: 2004 UPDATE, *supra* note 9, at 2.

15. Steven B. Hantler, *The Seven Myths of Highly Effective Trial Lawyers*, No. 42 CIV. JUST. FORUM 6 (Center for Legal Pol'y, Manhattan Inst. Apr. 2004).

16. TILLINGHAST-TOWERS PERRIN, TORT COST TRENDS: AN INTERNATIONAL PERSPECTIVE (1995) (costs were \$67 billion in 1984).

17. U.S. TORT COSTS: 2004 UPDATE, *supra* note 9, at 2 (showing the average annual increase in tort systems cost).

18. *Id.* at 2.

19. Press Release, Tillinghast-Towers Perrin, U.S. Tort Costs Climbed to \$205 Billion in 2001 (Feb. 11, 2003), at http://www.towersperrin.com/tillinghast/press/2003_press/pr02112003.htm.

20. *See id.* at 2-3. A 1986 study by the RAND Institute for Civil Justice found that for a variety of tort cases, including product liability, it took between \$16 million to \$19 million in resources to deliver between \$14 billion to \$16 billion in compensation to plaintiffs. *See* JAMES S. KAKALIK & NICHOLAS M. PACE, RAND INST. FOR CIVIL JUSTICE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 69 (1986).

21. *See* Thomas H. Cohen & Steven K. Smith, *Bureau of Justice Statistics Bulletin: Civil Trial Cases and Verdicts in Large Counties, 2001*, 8 (Apr.

Medical malpractice cases take nearly as long.²² On average, tort trials reach a verdict or judgment in a little more than two years.²³

In addition, the amount of compensation plaintiffs receive tends to be arbitrary and unpredictable; it does not reflect the plaintiffs' actual loss. Harvard Law Professor W. Kip Viscusi, who studied this issue, observed that "[l]arge loss claims tend to be undercompensated, and lower loss claims tend to be overcompensated."²⁴ Some plaintiffs may receive windfall verdicts while other plaintiffs with similar claims receive little or nothing. Steven Garber, senior economist at the RAND Institute for Civil Justice, explained that "[t]he disparities stem from several factors: difficulties in determining causes of injuries; differences in skill and charisma among attorneys and expert witnesses; varying attitudes of individual judges and juries; and somewhat infrequent, but sometimes enormous, punitive damage awards."²⁵

C. Ability to Deter Misconduct

It also is questionable whether the tort system achieves its second goal: to make goods and services safer by deterring undesirable business practices. The tort system is supposed to create incentives for parties most able to prevent and reduce risks to do so. But that can only happen when the responsible parties are aware of the potential for tort liability and can take corrective steps. The deterrent aspect of the civil justice system does not work when liability is applied haphazardly. For example, in one case, a party

2004) (survey of state courts of general jurisdiction in nation's seventy-five largest counties found that non-asbestos products liability cases take 35.1 months to resolve, compared with 25.6 months for all tort cases, 21.7 months for real property cases, and 21.5 months for contract cases), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mmtv1c01.pdf>.

22. *See id.* (listing 33.2 months as the average length for a medical malpractice case).

23. *See id.*

24. W. KIP VISCUSI, REFORMING PRODUCTS LIABILITY 52 (1991).

25. Garber, *supra* note 7, at <http://www.rand.org/publications/randreview/issues/summer2004/38.html>; *see also* Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237, 291 n.138 ("Whether a plaintiff receives any compensation at all in a product liability case depends on various matters of chance such as the relative skills of the attorneys on each side, the composition of the jury, and the timing of case resolution relative to the timing of information about injury causation coming to light.").

who made a defective product can escape responsibility, while in another case, liability is imposed regardless of whether the product was defective or whether the product caused the harm.

Yale University law professor George Priest studied this nexus between liability and safety and found little evidence that the expansion of liability law enhances safety.²⁶ His analysis showed that although the annual numbers of tort suits and liability insurance premiums rose sharply during the 1980s, injury rates for consumers and workers, death rates from medical procedures, and aviation accident rates declined no faster than they had been declining in the 1970s, when premium costs and the volume of tort suits were much lower.²⁷ He concluded that "the basic doctrines of modern law largely neglect the most effective methods of accident control."²⁸

Another study published several years later reached a similar conclusion. This study found that while low and modest damage awards can enhance safety, high damage awards can produce a negative effect.²⁹ The problem the authors uncovered was that in response to high liability costs that make a new product more expensive to produce, companies would decrease research and development on innovative safety methods rather than assume the risk of high levels of liability that come with novel products.³⁰ When

26. See George L. Priest, *Products Liability Law and the Accident Rate*, in *LIABILITY: PERSPECTIVES AND POLICY* 184 (Robert E. Litan & Clifford Winston eds., 1988).

27. *Id.* at 187-93.

28. *Id.* at 222.

29. See W. Kip Viscusi & Michael J. Moore, *Product Liability, Research and Development, and Innovation*, 101 *J. POL. ECON.* 161, 174-75 (1993).

30. See *id.* at 175. For example, prior to the enactment of the General Aviation Revitalization Act in 1994, the products liability system added costs of "\$70,000 to \$100,000 per [light airplane] built and shipped," while the cost of U.S. automobiles increased by "hundreds of dollars per car sold." See THE BROOKINGS INSTITUTION, *THE LIABILITY MAZE* 18-19 (Peter W. Huber & Robert E. Litan eds., 1991). In the late 1980s, approximately 15% of the costs of American-made machine tools was attributed to products liability costs. See *Bill To Amend The Federal Aviation Act of 1958 Relating To General Aviation Accidents: Hearings on H.R. 2238 Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong. 47 (1987) (testimony of Robert M. Malott, Chairman and Chief Executive Officer, FMC Corporation). Similarly, as a result of liability costs, the costs of a single dose of DPT vaccine rose from 12 cents in 1980 to about \$12 dollars in 1987. See *id.* at 49.

damages became excessively high, companies would either stagnate or withdraw from the market altogether.³¹

Finally, Dr. Viscusi of Harvard Law School released a study a few years ago that considered whether risky behavior is deterred in states that allow punitive damages compared with those that do not.³² He reviewed an “extremely wide range of risk measures—toxic chemical accidents, toxic chemical accidents causing injury or death, toxic chemical discharges, surface water discharges, total toxic releases, medical misadventure mortality rates, total accidental mortality rates, and a variety of liability insurance premium measures.”³³ Dr. Viscusi concluded that “[s]tates with punitive damages exhibit no safer risk performance than states without punitive damages.”³⁴ In fact, he found no overall difference with regard to safety and environmental performance, and “there is no deterrence benefit that justifies the chaos and economic disruption inflicted by punitive damages.”³⁵

In his analysis of these results, Dr. Viscusi observed that while

31. For example, due to unwarranted products liability litigation, Merrell Dow Pharmaceuticals withdrew its anti-nausea morning sickness drug, Bendectin, from the market in 1983. *High Court Hears Views on Bendectin*, CHEM. MKTG. REP., Apr. 5, 1993, at 13. The drug had been approved by the U.S. Food and Drug Administration and was widely acclaimed by health care professionals, but Merrell Dow's legal defense costs were far in excess of the amount received in annual sales of Bendectin. *Id.* For similar reasons, G.D. Searle & Co. (a subsidiary of Monsanto) withdrew the Copper-7 intrauterine device from the market in 1986, even though the product had been approved by the FDA and used for many years. *See* Betsy Morris, *Monsanto Unit Stops Marketing Its IUDs in U.S.*, WALL ST. J., Feb. 3, 1986. Two of three companies manufacturing the DPT vaccine stopped producing it in 1984 in light of rising products liability costs. S. REP. NO. 105-32, at 10 (1997). The Centers for Disease Control and Prevention subsequently asked doctors to stop vaccinating children over age 1 to conserve the limited supply of the vaccine. *Id.* While these provide a few examples, the problem is widespread. A 1988 survey by the Conference Board of more than 2,000 chief executive officers found that 36% of the companies had discontinued product lines as a result of actual liability experience and that 11% of the companies had done so based on anticipated liability problems. *Id.* at 8.

32. W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 298 (1998).

33. W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 GEO. L.J. 381, 381 (1998).

34. Viscusi, *supra* note 32, at 298.

35. *Id.* at 287.

the potential for punitive damages adds to the costs of risks, thereby making safety precautions more attractive, juries award punitive damages in such a capricious manner that there is no linkage between the expected punitive damages and the firm's risk actions: "[W]hen firms look forward, the prospect of punitive damages is so uncertain that there is no deterrent effect."³⁶ He also found that there is no need to augment the safety incentives provided by the market, government regulation, and compensatory damages.³⁷ Rather, the increased costs of paying punitive damages "lead to higher prices and other adverse economic effects."³⁸

II. TRENDS TOWARDS LESS EFFICIENCY, PREDICTABILITY, TIMELINESS AND FAIRNESS

The delicate balance between costs and benefits is being pushed further off-kilter by several national trends in civil litigation. These trends include: (1) the skyrocketing costs of litigation, (2) the growing disconnect between costs and fault, (3) the use of the civil justice system for non-compensatory purposes, (4) the relaxation of the traditional elements needed to file a tort claim, (5) the deprivation of reliable and important information provided to juries, and (6) the creation of "judicial hellholes."³⁹ This section of the Article discusses the way each of these developments contributes to creating a legal system that is less efficient, predictable, timely, and fair.

A. Trend 1: The Skyrocketing Costs of Litigation

1. Windfall Damages

Windfall compensatory awards—namely pain and suffering damages—are quickly approaching arbitrary punitive damages awards as a major contributor to the crisis in the civil justice system.⁴⁰ Arbitrary punitive damages awards have long been

36. Viscusi, *supra* note 33, at 383.

37. *Id.*; see also Viscusi, *Social Costs*, *supra* note 32, at 310–11, 317.

38. Viscusi, *supra* note 32, at 311.

39. The American Tort Reform Association, a client of Shook, Hardy & Bacon L.L.P., has a trademark claim to the term "judicial hellholes."

40. See Hon. Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 VA. L. REV. 1401 (2004); Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment"*, 54 S.C. L. REV. 47

criticized as contributing to the crisis in the civil justice system, as the opportunity to obtain “jackpot justice” tends to encourage the filing of meritless lawsuits.⁴¹

This trend toward excessive pain and suffering awards appears to be in response to efforts by the Supreme Court of the United States to rein in “grossly excessive”⁴² punitive awards.⁴³ Since the 1990s, recognizing that the arbitrary nature of punitive damages awards threatens constitutional due process guarantees, the Court has developed legal rules governing both the amount and procedures for their assessment.⁴⁴

(2002).

41. The problem of arbitrary punitive damages awards spurring meritless litigation has been identified in numerous areas of the law, not just tort litigation. See Paul J. Siegel, *Cutting-Edge Developments in Compliance: Labor & Employment Law Issues*, 1230 PRAC. L. INST. 487, 531 (2001) (lowering the threshold for punitive damages would promote the filing of meritless or avoidable litigation in employment law); Michael A. Berch & Rebecca White Berch, *An Essay Regarding Gasperini v. Center for Humanities, Inc. and the Demise of the Uniform Application of the Federal Rules of Civil Procedure*, 69 MISS. L.J. 715, 727 n.49 (1999) (observing that the “right to be free from a punitive damages claim affords the party opposing such a claim protection from the expense of having to litigate meritless claims and the concomitant increase in the settlement value of a case once a claim for punitive damages is added”); Note, “*Common Sense*” *Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1774 (1996) (stating that punitive damages in tort litigation lead to the situation where “plaintiffs bring[] meritless suits and receiving a windfall to which they are not entitled”); Richard M. Phillips & Christine E. Plaza, *Reforming Securities Litigation*, BUS. L. TODAY, July–Aug. 1995, at 27 (in securities litigation, the award of “punitive damages unrelated to any economic loss creates enormous exposure for defendants that in turn generates immense pressure on these defendants to settle even meritless claims”); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1156 (1984) (writing that “[a] byproduct of the continued success that plaintiffs have experienced in obtaining large punitive damage awards is the now universal practice of plaintiffs alleging and demanding punitive damages in an effort to increase the ultimate recovery from juries, and to compel defendants to settle meritless cases because of the fear that a jury will return an outrageous punitive damage award”).

42. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 n.10 (1991).

43. *Id.* at 21–22. The Court noted in 1974 that few objective guidelines existed for measuring punitive damages and that “[c]onsequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

44. The court requires sufficient checks on the unlimited use of jury

Unfortunately, pain and suffering damages are starting to supplement punitive damages awards as a source of "jackpot justice" damages for plaintiffs. The issue, which somewhat mirrors the punitive damages debate, is that there is no objective formula for valuing pain and suffering awards.⁴⁵ It is difficult to assess another person's pain and suffering and then translate it into its financial equivalent; "[j]uries are left with nothing but their consciences to guide them."⁴⁶ Because pain and suffering awards are inherently subjective, courts generally uphold them absent a finding that the award "shocks the conscience."⁴⁷ Therefore, juries can be inappropriately swayed to increase the plaintiff's pain and suffering award by evidence that is directed away from the plaintiff and toward the wrongdoing of the defendant. This misuse of "guilt evidence" upends the fundamental purpose of pain and suffering awards—which is to compensate the plaintiff.

Through this technique, the defendant is "punished," but the award is not subject to the extensive legal controls that help assure

discretion in the procedures governing the award and review of punitive damages. See *Gertz*, 418 U.S. at 350; *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994). The court has also established substantive limits on the amount of punitive awards. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993). Additionally, there is a three-pronged constitutional test that considers the reprehensibility of the misconduct, the relationship between the penalty and the harm to the plaintiff, and the civil and criminal penalties for comparable misbehavior. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575–85 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424–25 (2003) (refining the *Gore* test). Lastly, appeals courts may take a "thorough, independent review" of the constitutionality of an award, rather than deferring to the trial court's decision making. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 441 (2001). See generally Victor E. Schwartz, Mark A. Behrens & Joseph P. Mastrosimone, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003 (2000) (discussing punitive damages reform approaches).

45. As one commentator noted, "Courts have usually been content to say that pain and suffering damages should amount to 'fair compensation' or a 'reasonable amount,' without any more definite guide." Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 NW. U. L. REV. 908, 912 (1989).

46. Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 778 (1985).

47. Victor E. Schwartz & Cary Silverman, *Hedonic Damages: The Rapidly Bubbling Cauldron*, 69 BROOK. L. REV. 1037, 1052, 1068 n.148 (2004).

that real punitive awards do not cross the constitutional line.⁴⁸ These inflated compensatory damage awards also, in turn, can be used to justify higher punitive damages than otherwise would be constitutionally permissible.⁴⁹ As one federal appeals court judge wrote: “Without rational criteria for measuring damages for pain and suffering, awarding such damages undermines the tort law’s rationality and predictability—two essential values of the rule of law.”⁵⁰ The inefficiency and unfairness of the current system snowball when these inflated compensatory damage awards, in turn, are used to further justify higher punitive damages in the same trial.⁵¹

48. Examples abound. The Mississippi Supreme Court in May 2004 overturned a \$48 billion compensatory award against Janssen Pharmaceutica; the original award in this pharmaceutical products liability case was \$100 billion, \$10 billion for each of six plaintiffs regardless of their actual damages, injuries, ages, medical histories and other individual factors. The court explained: “Essentially, Plaintiffs’ counsel was making a punitive damages argument for intentional fraud when the only issue before the jury was a compensatory damages claim for negligent failure to warn. Such statements made by counsel were intended to inflame and prejudice the jury. In awarding each Plaintiff \$10 million across the board, the jury responded to this inflammatory and improper argument.” *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 62 (Miss. 2004). For a more extensive discussion of this case, see Victor E. Schwartz, Leah Lorber & Rochelle M. Tedesco, *Taking a Stand Against Lawlessness in American Courts: How Trial Court Judges and Appellate Justices Can Protect Their Courts From Becoming Judicial Hellholes*, 27 AM. J. OF TRIAL ADVOC. 215 (2003). Similarly, in April 2004, a Jefferson County, Texas state court jury rendered a \$1 billion verdict against Wyeth Pharmaceuticals in a wrongful death fen-phen case. The verdict included \$100 million in damages for pain and suffering, in addition to approximately \$1.6 million in economic damages and a \$900 million punitive award. The \$100 million pain and suffering verdict was clearly the result of evidence of the defendant’s alleged wrongdoing. The trial court allowed the plaintiffs to argue that the company committed a felony in its dealings with the federal Food & Drug Administration, rendering the Texas statutory limits on punitive damages inapplicable; the punitive award of nine times the compensatory damages was built on this figure. *Coffey v. Wyeth*, No. E-167-334 (Jefferson Cty. Dist. Ct. Apr. 27, 2004).

49. In *State Farm*, the U.S. Supreme Court recognized that “few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process,” and that a ratio of four to one is “close to the line of constitutional impropriety.” 538 U.S. at 425. If the underlying compensatory damages award results from an inflated pain and suffering award, the resulting punitive award would be a multiple of the already overstated compensatory damages.

50. Niemeyer, *supra* note 40, at 1401.

51. *See supra* note 47.

2. Multiple Penalties for the Same Misconduct

Problems of inefficiency and unfairness are multiplied when defendants are repeatedly assessed punitive damages for the same misconduct. Punitive damages are "intended to punish the defendant and to deter future wrongdoing."⁵² They have nothing to do with compensating plaintiffs for their injuries.⁵³ Each individual plaintiff can be made whole through compensatory damages, which provide payment for economic losses (such as lost wages and medical expenses) and noneconomic injuries (such as pain and suffering awards). Subjecting a company to multiple punitive damage awards for the same act or course of conduct is the civil law equivalent of double jeopardy, and, in mass tort litigation, a company can be assessed punitive damages literally hundreds or thousands of times.⁵⁴

Multiple punitive damages serve neither a compensatory nor a deterrence function. Certainly, a responsible defendant should provide *compensation* to each individual plaintiff when numerous plaintiffs are injured because of a single wrongful act by the defendant. Once the plaintiffs are made whole, however, it is not logical to *punish* the defendant over and over for the same wrongful act.⁵⁵ With multiple punitive damages awards, individual plaintiffs

52. *Cooper Indus., Inc.*, 532 U.S. at 432. See also *Gertz*, 418 U.S. at 350 (noting that punitive damages "are not compensation for injury . . . [but] are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) (explaining that punitive damages are awarded to punish the defendant, to teach the defendant not to "do it again," and to deter others from similar behavior).

53. See PROSSER, WADE & SCHWARTZ'S TORTS 549-50 (Victor E. Schwartz et al., eds., 10th ed. 2000).

54. As one commentator wrote, "[A] single design error, inadequate warning or recurrent manufacturing mistake can permeate an entire product line, resulting in tens, hundreds or thousands of personal injury lawsuits with accompanying punitive damages claims. Individual awards that appear reasonable can aggregate to threaten the very survival of a business entity." John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986); see also Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 51 (1983).

55. See, e.g., Victor E. Schwartz & Leah Lorber, *Death by a Thousand Cuts: How to Stop Multiple Imposition of Punitive Damages*, BRIEFLY, Dec. 2003, at 1 (explaining that although common sense informs a parent's decision to "not punish a child more than once for the same wrong-doing," the U.S. "civil justice system has strayed from common sense and basic fairness").

receive and the defendant is assigned disproportionate costs. Thus, multiple punishment significantly skews the transfer mechanism of the civil justice system.

Assessing multiple punitive damages also is an inefficient way to deter future misconduct. First, there is the very real possibility of over-deterrence. Faced with the potential onslaught of numerous multi million- or billion-dollar punitive awards arising from, for example, a single error in a product design, companies may just as readily avoid engaging in beneficial behavior as in misconduct. As long ago as 1967, the distinguished Judge Henry Friendly of the United States Court of Appeals for the Second Circuit observed the likelihood of “over-severe admonition”⁵⁶ inherent in repetitive punitive awards: “We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.”⁵⁷

This (over)deterrence also comes at a cost, both to the judicial system and the economy. Repetitive lawsuits for punitive damages use up a great amount of judicial resources, tying up court time and personnel. Corporate defendants may also be forced to allocate a disproportionate amount of financial resources to legal defense and liability costs instead of to research and development. Further, as one federal judge observed, the availability of multiple punitive damages against the same defendant is “the major obstacle to settlement of mass tort litigation and . . . the prompt resolution of the damage claims of many thousands of injured plaintiffs.”⁵⁸ In addition to delaying settlement, the perception that earlier awards against the defendant may be matched or topped drives up settlement

56. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 n.7 (2d Cir. 1967).

57. *Id.* at 839 (addressing availability of multiple punitive damages awards in products liability cases).

58. Hon. William W. Schwarzer, *Punishment Ad Absurdum*, CAL. LAW. Oct. 1991, at 116. The Third Circuit Court of Appeals has also cited Judge Schwarzer, noting his conclusion that “the potential for punitive awards is a weighty factor in settlement negotiations and inevitably results in a larger settlement agreement than would ordinarily be obtained.” *Dunn v. Hovic*, 1 F.3d 1371, 1398 (3d Cir. 1993) (en banc) (Weis, J., dissenting) (citing *Asbestos Litigation Crisis in Federal and State Court: Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 102d Cong. 132–133 (1992) (statement of Hon. William W. Schwarzer)), *modified*, 13 F.3d 58 (3d Cir. 1993).

costs.⁵⁹

Multiple punitive damages are unfair to both plaintiffs and defendants. The problem for plaintiffs can be readily seen in the mass tort context, where multiple punitive damage awards effectively transform the judicial system into a legal lottery. The repeated award of windfall punitive damages to earlier-filing plaintiffs "imperils [a defendant's] ability to pay compensatory claims [to future claimants] and its corporate existence."⁶⁰ When companies are forced into bankruptcy by multiple punitive awards, individual future plaintiffs receive less or no compensation, and entire communities are affected.⁶¹ As for defendants, courts and

59. For example, consider reactions to the \$1 billion-plus verdict in the first primary pulmonary hypertension ("PPH") case to go to trial in the fen-phen litigation. *Coffey v. Wyeth*, No. E-167-334 (Jefferson County Dist. Ct. Apr. 27, 2004). The award included \$900 million in punitive damages and was handed down by a Jefferson County, Texas jury in April 2004. (The case is currently on appeal.) Peter Kraus, a lawyer at Waters & Kraus in Dallas, stated "There's no question that [the \$1.013 billion award] will have an impact on what plaintiffs' lawyers are willing to take, and it's going to embolden more plaintiffs' lawyers to try more of those cases." Reed Abelson & Jonathan D. Glater, *A Texas Jury Rules Against A Diet Drug*, N.Y. TIMES, Apr. 28, 2004, at C1. Tommy Fibich, a Houston plaintiffs' lawyer, echoed that sentiment: "I've got . . . a PPH case and clearly this verdict has made me think it was worth more than it was yesterday." Brenda Sapino Jeffrey, *\$1.01 Bil. Fen-Phen Verdict Faces Cap*, LEGAL INTELLIGENCER, May 4, 2004, at 4.

60. *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151, 1155 (5th Cir. 1990); see also *Bishop v. Gen. Motors Corp.*, 925 F. Supp. 294, 298 (D.N.J. 1996) ("Indeed, one of the many cogent criticisms of punitive damages is that multiple punitive liability can both bankrupt a defendant and preclude recovery for tardy plaintiffs.").

61. As of Jan. 11, 2005, at least 74 companies had sought Chapter 11 protection as a result of asbestos litigation. *The Fairness in Asbestos Injury Resolution Act: Hearing Before the Sen. Comm. on the Judiciary* (2005) (statement of Mr. Craig Berrington, General Counsel, American Insurance Association), 2005 WL 61512. The impact of these bankruptcies is well-documented. The National Economic Research Associates found that workers, communities, and taxpayers will bear as much as \$2 billion in additional costs due to indirect and induced impacts of company closings related to asbestos. See JESSE DAVID, *THE SECONDARY IMPACTS OF ASBESTOS LIABILITIES* (U.S. Chamber of Comm. ed., 1993), at <http://www.nera.com/image/5832.pdf> (last visited June 10, 2005). Additional costs that were brought upon workers and communities include up to \$76 million in worker retraining, \$30 million in increased healthcare costs, and \$80 million in payment of unemployment benefits. *Id.* Moreover, for every ten jobs lost at a company from an asbestos bankruptcy, the community can lose eight from the "spillover effect." Jerry A.

commentators have acknowledged for years that the assessment of multiple punitive damages at some point becomes fundamentally unfair and raises serious due process concerns.⁶²

The bottom line is that for the questionable benefit to society that multiple punitive damages offer, their adverse impact on our civil justice system is simply too high.

Hodge, Editorial, *Leveling the Playing Field Comprehensive Solution to Asbestos Cases Needed*, CHARLESTON GAZETTE, May 31, 2004, at 5A, 2004 WLNR 1199487.

62. See *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1064 (D.N.J. 1989) (“[T]he court holds that due process places a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct. Regardless of whether a sanction is labelled [sic] ‘civil’ or ‘criminal’ in nature, it cannot be tolerated under the requirements of due process if it amounts to unrestricted punishment”), *vacated in part*, 718 F. Supp. 1233 (D.N.J. 1989), *rev’d on other grounds sub. nom. Juzwin v. Asbestos Corp.*, 900 F.2d 686 (3d Cir. 1990); *In re N. Dist. of Cal. “Dalkon Shield” IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981) (explaining that “[a] defendant has a due process right to be protected against unlimited multiple punishment for the same act”), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982); *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) (stating that “the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle”); *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir.) (Heaney, J., dissenting) (asserting that unlimited punishment for one course of conduct “would violate the sense of ‘fundamental fairness’ that is essential to constitutional due process”); *Magallanes v. Super. Ct.*, 167 Cal. App. 3d 878, 889 (1985) (explaining that “[i]t is also fair to ask whether a defendant who has been punished with punitive damages when the first case is tried should be punished again when the second, or the tenth, or the hundredth case is tried”); *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1031 (stating that “a strong arguable basis exists for applying the due process clause . . . to a jury’s award of punitive damages in a mass tort context”); *McBride v. Gen. Motors Corp.*, 737 F. Supp. 1563, 1570 (M.D. Ga. 1990) (explaining that “due process may place a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct”); David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 394 (1994) (observing that the issue of multiple punitive damage awards “is a problem of enormous complexity which requires much analysis and ingenuity”); Victor E. Schwartz & Liberty Magarian, *Multiple Punitive Damage Awards in Mass Disaster and Product Liability Litigation: An Assault on Due Process*, 8 ADELPHI L. J. 101 (1992); Dennis Neil Jones, S. Brett Sutton & Barbara D. Greenwald, *Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 ALA. L. REV. 1 (1991); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986).

3. Class Actions

In 2001, The Washington Post termed class actions the "mess[iest]" part of the U.S. civil justice system.⁶³ Class actions were intended to promote efficiency by allowing courts and defendants to focus their energies on resolving all similar claims in one lawsuit.⁶⁴ Over time, class actions have become the equivalent of high-stakes litigation poker. The potential costs of losing often force companies to fold their hands and settle rather than call the plaintiffs' lawyer's bluff.

Class actions flooded the courts in the 1990s.⁶⁵ A survey of Fortune 500 companies found that from 1988 to 1998, the number of class action filings against them increased by 338% in federal courts.⁶⁶ During that same period, that number increased by more than 1,000% in state courts, reflecting the belief that plaintiffs are more likely to obtain and prevail on questionable class actions in state courts.⁶⁷ This trend was fueled in part by the availability of

63. Editorial, *Actions Without Class*, WASH. POST., Aug. 27, 2001, at A14 ("No portion of the American civil justice system is more of a mess than the world of class actions."). Shortly before this Article went to press, Congress enacted the Class Action Fairness Act of 2005 to reform class action abuse. Pub. L. 109-2, 114 Stat. 4 (2005) (codified at 28 U.S.C. §§ 1711-1715). The Act is discussed *infra* in text accompanying notes 78-82.

64. See, e.g., Victor E. Schwartz, Mark A. Behrens & Rochelle Tedesco, *Addressing the "Elephant Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Deter Claims by the Non-Sick*, 31 PEPP. L. REV. 271, 280-81 (2004) (discussing the history of consolidating asbestos cases to promote efficiency).

65. See Federalist Soc'y, *Analysis: Class Action Litigation—A Federalist Society Survey*, 1 CLASS ACTION WATCH, at <http://www.fed-soc.org/Publications/classactionwatch/volume1issue1.htm> (last visited Jan. 25, 2005); DEBORAH HENSLER ET AL., PRELIMINARY RESULTS OF THE RAND STUDY OF CLASS ACTION LITIGATION 15 (1997).

66. See Federalist Soc'y, *supra* note 65.

67. See *id.*; see also John Beisner & Jessica Davidson Miller, *The Class Action Fairness Act: Cleaning Up the Class Action Mess*, 6 CLASS ACTION LITIG. REP. 104, 108 (2005) [hereinafter Beisner & Miller] (noting "the embarrassing state of class action litigation in this country and the growth of magnet state courts that rubber stamp anti-consumer class action settlements"); *Class Action Lawsuits: Hearing Before the Sen. Comm. on the Judiciary* (2003) (statement of Assistant Attorney General Viet Dinh of the Office of Legal Policy of the U.S. Justice Department) (acknowledging "the sort of local biases that have resulted from State court class actions that often award higher settlements to in-State victims and award excessive damages against out-of-State defendants.") available at 2003 WL 21130259.

large contingency fees and a change in court rules that now automatically includes people in a class action unless they affirmatively opt out.⁶⁸ The latter allows potentially thousands of plaintiffs to be conscripted into class actions unknowingly.⁶⁹

Granting class certification can unfairly skew the outcome of a case. Class action filings attract litigants in staggering numbers,⁷⁰ and evidence indicates that the aggregation of claims increases both the likelihood that a defendant will be found liable and the size of any damages award that may result.⁷¹ Even where an adverse verdict is improbable, “the risk of participating in a single trial [of all claims] and facing a once and for all verdict is ordinarily intolerable” to defendants.⁷² As Judge Richard Posner of the Seventh Circuit Court of Appeals observed, certification of a class action forces defendants “to stake their companies on the outcome of a single jury trial, or be forced by the fear of bankruptcy to settle even if they have

68. See, e.g., FED. R. CIV. P. 23(c)(2); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure(I)*, 81 HARV. L. REV. 356, 382–386, 393 (1967) (discussing practice of intervention by individual interested parties in actions under former Rule 23, and explaining that new “opt out” provision of 23(c)(2) in 1966 amendments “makes clear that the judgment in any class action maintained as such extends to the class (excluding opters-out in (b)(3) cases), whether or not favorable to the class. . . . It is implicit in what has been said that the anomaly of a class action covering only the particular parties does not survive under the new rule.”).

69. Trial Judge W. Douglas Baird, who serves in Pinellas County, Florida, commented that an action in which attorneys recover fees, and plaintiffs recover nothing is “the class litigation equivalent of the ‘squeegee boys’ who used to frequent major urban intersections and who would run up to a stopped car, splash soapy water on its perfectly clean windshield and expect payment for the uninvited service of wiping it off.” Jason Hoppin, *Florida Judge Compares Milberg Weiss Action to Squeegee Boy*, THE RECORDER, Apr. 16, 2002, <http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZU1WV940D> (last visited June 17, 2005).

70. See, e.g., *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) (stating that “[t]he drum-beating that accompanies a well-publicized class action . . . may well attract excessive numbers of plaintiffs with weak to fanciful cases”).

71. Barry F. McNeil & Beth L. Fancsali, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 491 (1996); Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22 (1989).

72. McNeil & Fancsali, *supra* note 71, at 490.

no legal liability."⁷³ Other courts have characterized these settlements as "judicial blackmail"⁷⁴ and legalized blackmail."⁷⁵

Class certification also can lead to unfair treatment of plaintiffs. Class counsel, not their clients, call the shots; class members with more serious and complex claims may be simply "lumped into" the class and not given the individualized attention needed to fully adjudicate their claims.⁷⁶ Until recently, the legitimacy of class actions and the merits of class action settlements were rarely scrutinized. Class actions widely resulted in "coupon settlements," in which the plaintiffs received coupons for products or services rather than cash awards while their lawyers received cash fees, often in the millions of dollars.⁷⁷

73. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995). Judge Posner also characterized the resulting settlements as the consequence of "intense pressure to settle," that is, defendants would rather settle outstanding claims than roll the dice and risk billions of dollars in liability. *Id.* at 1298. Judge Posner noted that the federal appeals Judge Henry Friendly, "who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action "blackmail settlements." *Id.* (quoting HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973)).

74. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

75. *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995).

76. See *The Class Action Fairness Act of 1999: Hearing on S. 353 Before the Subcomm. on Admin. Oversight and the Courts of the Sen. Comm. on the Judiciary*, 106th Cong. 10 (1999) (testimony of John H. Beisner, Esq.), available at 1999 WL 27320.

77. See e.g., Ameet Sachdev, *Coupon Awards Reward Whom? Class-Action Settlements That Pay Lawyers Millions of Dollars and Give Plaintiffs Coupons that are Sometimes Useless Are Drawing Ire in Congress and Some Courts*, CHI. TRIB., Feb. 29, 2004 (discussing a lawsuit against the maker of Cheerios cereal that netted lawyers \$1.75 million in fees while consumers received coupons for a free box of Cheerios, but only if they kept their grocery receipt to prove their previous purchase), 2004 WLNR 17854235; Marguerite Higgins, *Class Members Get Little in Suits*, WASH. TIMES, July 2, 2004 (discussing a lawsuit against Poland Spring for sales of allegedly impure bottle water netted lawyers \$1.35 million and consumers coupons for more of the bottled water), 2004 WLNR 811926; Jim Burke, *Carnival Settles Lawsuit*, BOSTON HERALD, Apr. 1, 2001 (class counsel to receive up to \$5 million for work in lawsuit alleging inflated port charges while class members will receive coupons worth \$25 to \$55 off a future cruise), 2001 WLNR 280506; see also Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. LEGIS. 483 (2000) (detailing abuse of coupon settlement class action suits).

Congress and President George W. Bush acted in February 2005 to curb coupon settlements and other class action abuses by enacting the Class Action Fairness Act of 2005 ("CAFA"). President Bush signed the CAFA into law on February 18, 2005. The Act has two main parts. First, it sets forth a Consumer Class Action Bill of Rights to protect class members from abusive settlements in class actions that were filed in or have been removed to federal court.⁷⁸ Under this provision, contingency fees in coupon settlements are to be based on the value of coupons actually redeemed, rather than, as has been common, the total value of the coupons awarded.⁷⁹ In other words, if the settlement provided for \$5 million in coupons but only 20% of class members actually redeemed the coupons, the lawyers' fees would be based on a recovery of \$1 million, not \$5 million.⁸⁰ Otherwise, the attorneys' fees must be based on the amount of time class counsel spent working on the lawsuit.⁸¹ Second, the Act expands federal diversity-of-citizenship jurisdiction over class actions to allow federal courts to hear large, interstate class actions.⁸²

4. Contingency Fees

Contingency fees are intended to help plaintiffs with legitimate claims obtain legal counsel when they cannot afford to do so otherwise.⁸³ Such fees also are intended to protect the integrity of the civil justice system by ensuring that lawyers only take credible cases with a chance of success and diminish potential conflicts of interest between plaintiffs and their lawyers.⁸⁴ In practice, however,

78. Class Action Fairness Act of 2005, Pub. L. No. 109-2 § 3, 114 Stat. 4 (2005) (codified at 28 U.S.C. §§ 1711–15).

79. *Id.* (discussing attorneys' fees in coupon settlement cases).

80. Beisner & Miller, *supra* note 67, at 104.

81. Class Action Fairness Act of 2005.

82. *Id.* at § 4 (amending 28 U.S.C. §§ 1332, 1335(a)(1), 1603(b)(3)) & § 5 (codified at 28 U.S.C. § 1453); Beisner & Miller, *supra* note 67, at 108.

83. *See, e.g.*, CTR. FOR LEGAL POLICY AT THE MANHATTAN INST., EXCESSIVE LEGAL FEES: PROTECTING UNSOPHISTICATED CONSUMERS, CLASS ACTION MEMBERS, AND TAXPAYERS 4 (2000) (quoting Benjamin N. Cardozo Law School Professor Lester Brickman as stating that in some cases, "[t]he financial incentive for bringing contingency fee claims overwhelms all fiduciary, ethical, and public policy considerations").

84. *See* Lance M. Sears, *Contingency Fees Allow Greater Access to Courts*, ROCKY MTN. NEWS, Aug. 7, 1989 (explaining that "[t]he more the lawyer can obtain, either by settlement or verdict, the more the client receives"), available at <http://www.searsswanson.com/CONTINGENCYFEESALLOW.shtml> (last

contingency fees have done the opposite.⁸⁵ The seductive nature of gargantuan contingency fees contributes to the legal system's inefficiency, delay, and unfairness.

First, contingency fees provide plaintiffs' lawyers with a perverse incentive to file speculative claims specifically to obtain quick settlements, either "nuisance settlements" with small businesses who can little afford to pay for a protracted legal fight, or "blackmail settlements" with large companies facing onerous and expensive litigation. Similarly, the contingency fee system encourages efforts to obtain huge punitive damages and pain and suffering awards. Next, contingency fees encourage plaintiffs' lawyers to file claims that go far beyond existing theories of law—a phenomenon dubbed "regulation through litigation" by former Clinton Administration Labor Secretary Robert Reich, because the suits use the threat of high-stakes litigation to force industries to change their practices.⁸⁶

Plaintiffs' lawyers suggest that large contingency fee arrangements—from 30% to 50% of all recoveries plus costs—are necessary because the lawyers heavily invest their own resources up front despite the risk that they may lose the litigation and recover nothing.⁸⁷ This is a myth. It is well-documented that trial lawyers and special-interest groups use cost-sharing techniques, such as sharing complaints, pleadings, discovery documents, and settlement agreements to lower the costs of taking on individual cases.⁸⁸ For example, *Business Week* reported that for \$145, contingency fee attorneys can buy a 689-page litigation packet that includes step-by-step instructions for tire tread separation litigation—including

visited June 17, 2005).

85. See Victor E. Schwartz et al., *Consumer Protection in the Legal Marketplace: A Legal Consumer's Bill of Rights is Needed*, 15 LOY. CONSUMER L. REV. 1 (2002).

86. Robert B. Reich, *Regulation is Out, Litigation is In*, USA TODAY, Feb. 11, 1999.

87. The standard fee is one-third of the settlement or verdict, and plaintiffs additionally reimburse their counsel for legal costs. See Herbert Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 285–86 (1998). Contingency fees in some states, such as Oklahoma, may constitute as much as 50% of the net recovery. OKLA. STAT. ANN. tit. 5, § 7 (West 2001).

88. Mike France, *The Litigation Machine*, BUS. WEEK, Jan. 29, 2001, <http://www.businessweek.com/archives/2001/b3717001.arc.htm>.

previously filed complaints and a list of documents to request from the defendants.⁸⁹ Comparable litigation packets are available for products ranging from handguns to pharmaceuticals.⁹⁰

Similarly, the *American Bar Association Journal* has reported that high-profile plaintiffs' lawyers structure tort litigation like a "joint venture," allocating work to different plaintiffs' firms around the country to lower the upfront costs per firm and avoid "duplication of effort."⁹¹ The judge presiding over the 1990s Dalkon Shield litigation noted that "fees, in many instances, exceed \$100,000.00 per claim" and some counsel with hundreds of cases receive "several million dollars per attorney or law firm."⁹² What's more, as the judge observed, "[g]enerally, the sole efforts related to such compensation consist of garnering medical records and advising a client whether to accept a non-negotiable settlement offer."⁹³

Moreover, it is questionable why clients with strong cases should subsidize those with weak cases. Many attorneys charge the same percentage fee for all of their cases, regardless of the "contingency" involved or the amount of time that will be spent on the case.⁹⁴ As former Harvard President and Law School Dean Derek Bok observed, "rare [are] the lawyer[s] who will inform [their clients] (and agree to a lower percentage of the take) when they happen to have an extremely high probability of winning."⁹⁵ Legal ethicist Lester Brickman, a professor at Benjamin N. Cardozo School of Law, put it this way:

Lawyers have erected toll booths across the courthouse steps, exacting not a fee for passage but a percentage of all business transacted upon traversal. . . . Contingent fee

89. *Id.*

90. *Id.*; Ass'n of Trial Lawyers of Am., *New and Updated Litigation Packets* (listing examples of litigation packets available), at <http://www.atlanet.org/LegalResearchServices/Tier3/LitigationPackets.aspx> (last visited June 10, 2005).

91. Steven Keeva, *No Deficit of Attention Here: Ritalin Class Action Suits Are Making Some Drug Companies Hyper*, A.B.A. J., June 2001, at 28, 30.

92. *In re A.H. Robins Co.*, 182 B.R. 128, 137 n.10 (E.D. Va.), *aff'd*, 86 F.3d 364 (4th Cir. 1995).

93. *Id.*

94. See Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 74 (1989).

95. DEREK BOK, *THE COST OF TALENT: HOW EXECUTIVES AND PROFESSIONALS ARE PAID AND HOW IT AFFECTS AMERICA* 140 (1993).

setting today operates in a milieu substantially devoid of fiduciary oversight. Overcharging clients is routine and typically unquestioned, especially when the client is unaware of the degree to which it has occurred. So pervasive are these abuses that one may legitimately describe the current regulatory scheme as rotten.⁹⁶

According to one New York attorney, "[s]o engrained and unexamined is the notion of the one-third contingency fee that it has taken on the character of natural law."⁹⁷

Part of the problem is that most personal injury victims and their families lack the background and experience to decide whether the fee arrangement presented to them is fair and reasonable under the circumstances. In addition, they are likely preoccupied with other issues, such as the need to cover hospital bills or lost wages, or the emotional and physical effects of injuries to themselves or family members.⁹⁸ This creates unequal bargaining power between clients

96. Brickman, *supra* note 94, at 127–28.

97. Harold Reynolds, *Rot at the Bottom*, N.Y. L. J., Oct. 25, 1999, at 2.

98. *E.g.*, Rohan v. Rosenblatt, No. CV 930116887S, 1999 WL 643501, at *1 (Conn. Super. Ct. 1999) (finding that a lawyer had pressured a client into entering a one-third contingency fee agreement while the plaintiff "was distraught over his wife's death and under the care of a psychologist [and] worried about paying the funeral bill and saving his house from foreclosure"); John Masson, *Lawyer's Troll for Accident Reports Raises Brows*, INDIANAPOLIS STAR, June 4, 2001, at A1 (reporting that a personal injury lawyer in Bloomington, Indiana wrote to every police and sheriff's department in the state, asking them to begin automatically faxing him copies of each and every traffic accident report so that he could immediately solicit potential clients), available at LEXIS, News Library, Indyst file; Bruce Schultz, "Runners" Fill Legal Coffers, Negative Image of Lawyers, BATON ROUGE ADVOC., Nov. 20, 2000, at 1A (reporting that some law firms use paid "runners" to recruit new clients, some of whom have received payments totaling over \$450,000 per year), available at LEXIS, News Library, Advoc file; Garry Mitchell, *Bar Scrutinizing Lawyer Ads, Solicitations*, MOBILE REG. (Ala.), Dec. 18, 1993, at A1 (reporting that after a passenger train derailment in Alabama, a Louisiana attorney signed up a Mexican train passenger, who spoke no English, at his hospital bedside); Robert Stowe England, *Congress, Nader, and the Ambulance Chasers*, AM. SPECTATOR, Sept. 1990, at 18 (reporting reported "hordes of lawyers bidding on clients offering grief-stricken families trailers, vans, and new homes if they would sign contingency fee contracts" after the worst school bus accident in Texas history); William Grady, Bill Crawford & John O'Brien, *Injury Lawyer's Ad Stirs Ire in Indiana*, CHI. TRIB., Jan. 26, 1993 (stating that witnesses reported seeing lawyers' business cards being passed around and the injured being videotaped as they

and their lawyers.⁹⁹ Reforms to protect legal consumers have been discussed and should be enacted.¹⁰⁰

United States Supreme Court Justice Sandra Day O'Connor perhaps summed it up best when she said that contingency fees "have made more overnight millionaires than almost any other businesses and the perverse incentives and the untoward consequences they are creating within our profession are many."¹⁰¹

were removed on stretchers after a two commuter trains collided in Gary, Indiana), available at LEXIS, News Library, Chtrib file.

99. See, e.g., *In re Shaw*, 775 A.2d 1123 (D.C. 2001) (per curiam) (recognizing a violation of the District of Columbia's ethical rules when an attorney took \$800 of a \$2,500 uncontested insurance personal injury protection payment); *Rohan*, 1999 WL 643501 (finding that an attorney who wanted to remodel his office misled the client into believing that his claim would require "horrendous" litigation and charged a one-third contingency fee on a \$100,000 uncontested settlement when the attorney did no more than twenty-five hours of work); Iowa Super. Ct. Bd. of Prof'l Ethics & Conduct v. Hoffman, 572 N.W.2d 904, 908-09 (Iowa 1997) (suspending an attorney for six months after he attempted to assess a 33% fee on his client's workers' compensation recovery, which amounted to over \$37,000 for only twenty hours of work on a recovery that did not reflect the attorney's efforts); White v. McBride, 937 S.W.2d 796, 799 (Tenn. 1996) (finding that a one-third contingency fee charged by an attorney in a probate matter was clearly excessive when "the only genuine contingency involved was how large a disbursement [the client] would ultimately receive by operation of law"); Att'y Grievance Comm'n v. Korotki, 569 A.2d 1224, 1226-29 (Md. 1990) (suspending an attorney who pressured firefighters severely injured in the line of duty to sign contingency fee contracts reaching 75% of recovery); Att'y Grievance Comm'n v. Kemp, 496 A.2d 672, 675 (Md. 1985) (ruling that an attorney may not charge more than a minimal fee for processing an uncontested personal injury protection claim). One particularly disgraceful example occurred in 1996 when a medical malpractice settlement did not leave the comatose client's estate with enough money to pay for her funeral. Meanwhile, her lawyers walked away with \$2.4 million in fees. See Tricia Renaud, *Bar Goes After Savannah Duo's Fee and Maybe Their Licenses*, FULTON CTY. DAILY REP., Jan. 5, 1998, at 1, available at LEXIS, News Library, Fulton file.

100. See *infra* Part III.B.1.

101. Fox News, *O'Connor, in Speech, Blasts Death Penalty, Lawyer Fees and Zero Tolerance* (July 3, 2001) (also quoting Justice O'Connor as stating that some lawyers act as "business partners of plaintiffs in seeking large-dollar recoveries rather than act as objective servants of the law."), <http://www.foxnews.com/story/0,2933,28675,00.html> (last visited June 10, 2005).

*B. Trend 2: The Growing Disconnect Between
Liability Costs and Fault*

When the cost to a defendant is not related to the alleged misconduct, the transfer mechanism of the tort system fails. Often, innocent sellers are named as defendants simply to provide a vehicle for suing others with deeper pockets. The plaintiff never intends to enforce a judgment against that seller. Nevertheless, the defendant must bear the cost of a legal defense and the fallout from litigation. Furthermore, under the laws in many states, a defendant that is only minimally at fault for an incident can be forced to pay a share of compensation that is significantly disproportionate to its fault.

1. Innocent Sellers

Under the common law in most states, all members of the chain of distribution of a defective product may be held responsible for resulting injuries, even non-manufacturing sellers who know nothing about the design or manufacture of a product, have no way to identify the problem, and have no way of curing any defects that may exist.¹⁰² The rationale for the rule "is that between an innocent manufacturer and an injured consumer, public policy functions against placing the burden on a consumer who might not otherwise receive compensation for his or her injury."¹⁰³ Imposing liability against such sellers is reasonable in certain circumstances, such as

102. See Robert A. Sachs, *Product Liability Reform and Seller Liability: A Proposal for Change*, 55 BAYLOR L. REV. 1031, 1032 (2003); see RESTATEMENT OF TORTS, THIRD: PRODUCTS LIABILITY § 1 (1998) (stating that "[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."). Liability for product defects under the RESTATEMENT, THIRD applies to "all commercial sellers and distributors of products, including nonmanufacturing sellers and distributors such as wholesalers and retailers" and exists "even when such nonmanufacturing sellers or distributors do not themselves render the products defective and regardless of whether they are in a position to prevent defects from occurring." *Id.* cmt. e.; see also RESTATEMENT (SECOND) OF TORTS § 402A (1965) (imposing liability on "one who sells any product in a defective condition" if the seller was engaged in the business of selling such a product and the product was expected to, and did, reach the user or consumer without substantial change).

103. David W. Clark, *Life in Lawsuit Central: An Overview of the Unique Aspects of Mississippi's Civil Justice System*, 71 MISS. L. J. 359, 390 (2001).

when the manufacturer is insolvent or otherwise cannot provide compensation to the plaintiff,¹⁰⁴ but a blanket rule is extremely unfair to innocent sellers and provides opportunities for abuse of the civil justice system.¹⁰⁵ Plaintiffs' lawyers frequently manipulate this rule to defeat federal diversity-of-citizenship jurisdiction over claims that should be heard in federal court and allow the case to be heard in a venue of their choosing.¹⁰⁶

As a result, small business owners may be subject to numerous lawsuits and thousands of dollars in legal costs even though these innocent sellers bore no responsibility for the injury, but simply participated in the stream of commerce by selling a product that became the subject of a lawsuit. In fact, local retailers rarely pay damages; the product manufacturer is held responsible for the harm in more than 95% of cases where liability is present.¹⁰⁷ "Even though sellers may ultimately receive indemnification, involving the seller in litigation generates substantial and unnecessary legal costs, which are ultimately passed on to . . . consumers in the form of a "tort tax."¹⁰⁸

One small business, the Bankston Drug Store in Jefferson County, Mississippi, which was the only pharmacy in that county, became known as "ground zero" in pharmaceutical litigation because it was named as a defendant in numerous lawsuits targeting out-of-state pharmaceutical companies.¹⁰⁹ The owner of the store, pharmacist Traci Swilley, has said: "My lawyers tell me that we're only sued because they want to stay in Jefferson County because the verdicts are so high."¹¹⁰ In response to these problems, the

104. Sachs, *supra* note 102, at 1105–11 (discussing situations in which holding a seller liable may be justified).

105. See Clark, *supra* note 103, at 390–91.

106. *Id.* at 391.

107. *Id.* at 390.

108. *Id.* at 391.

109. See Jerry Mitchell, *Jefferson County Ground Zero for Cases*, CLARION-LEDGER (Miss.), June 17, 2001, at A1, available at LEXIS, News Library, Clledg file.

110. Mark Ballard, *Mississippi Becomes a Mecca for Tort Suits*, NAT'L L.J., Apr. 30, 2001, at A1, available at LEXIS, News Library, Ntlawj file. The former owner of the store, Hilda Bankston, explained the adverse impact the litigation had on her business:

I've searched record after record and made copy after copy for use against me. . . . I've had to hire personnel to watch the store while I

Mississippi Legislature¹¹¹ joined twenty-three other states in enacting innocent seller statutes that limit the imposition of liability on non-manufacturing sellers.¹¹²

2. Joint and Several Liability

Joint liability, also known as joint and several liability, provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant may be liable for the total amount of damages.¹¹³ The idea is that each defendant's wrongful conduct contributed to the plaintiff's injury, so the plaintiff should be fully compensated and should not suffer if one defendant is absent from the jurisdiction or insolvent. Over the past two decades, the shortcomings of joint liability rules have become increasingly apparent: A defendant only minimally at fault bears a disproportionate and unfair burden.

The plaintiffs' lawyer strategy for litigation, then, is to find a large corporation, hospital, or other "deep pocket" defendant that

was dragged into court on numerous occasions to testify. I have endured the whispers and questions of my customers and neighbors wondering what we did to end up in court so often. And I have spent many sleepless nights wondering if my business would survive the tidal wave of lawsuits cresting over it.

Class Action Litigation: Hearing Before the S. Comm. on the Judiciary, 107th Cong. (July 31, 2002) (statement of Hilda Bankston).

111. H.B. 13, 1st Spec. Sess. (Miss. 2004) (signed by Gov. Barbour on June 16, 2004).

112. See COLO. REV. STAT. § 13-21-402 (amended 2003); DEL. CODE ANN. tit. 18, § 7001 (2004); GA. CODE ANN. § 51-1-11.1 (West 2004); IDAHO CODE § 6-1407 (Michie 2004); 735 ILL. COMP. STAT. ANN. 5/2-621 (West 2004); IND. CODE ANN § 34-20-3-1 (2004); IOWA CODE ANN. § 613.18 (West 2004); KAN. STAT. ANN. § 60-3306 (2004); KY. REV. STAT. ANN. § 411.340 (Michie 2004); LA. REV. STAT. ANN. § 9:2800.52-.53 (West 2004); MD. CODE ANN., CTS. & JUD. PROC. § 5-405 (2004); MICH. COMP. LAWS § 600.2947(6) (2004); MINN. STAT. ANN. § 544.41 (West 2003); MISS. CODE ANN. § 11-1-63 (Supp. 2004); MO. ANN. STAT. § 537.762 (West Supp. 2004); NEB. REV. STAT. ANN. § 25-21,181 (Lexis 2004); N.J. STAT. ANN. § 2A:58C-9 (West 200 & Supp. 2004); N.C. GEN. STAT. ANN. § 99B-2 (Lexis 2003); N.D. CENT. CODE ANN. § 28-01.3-04, 05 (Michie Supp. 2003); OHIO REV. CODE ANN. § 2307.78 (Anderson 2001); S.D. CODIFIED LAWS § 20-9-9 (Michie 1995); TENN. CODE ANN. § 29-28-106 (Vernon 2000); TEX. CIV. PRAC. & REM. CODE § 82.003 (Vernon Supp. 2004-2005); WASH. REV. CODE ANN. § 7.72.040 (West 2001).

113. See, e.g., *Coney v. J.L.G. Indus., Inc.*, 454 N.E.2d 197, 204 (Ill. 1983) (describing the traditional common law doctrine of joint and several liability).

arguably can be joined in an action. Further, the jury rarely is informed of the effects of joint liability.¹¹⁴ As a result, the jury may believe a “defendant will only be liable for a small contribution to the total damage award and the main defendant will be liable for the remainder.”¹¹⁵ What the unsuspecting jury does not realize is that “[i]n reality, this deep pocket defendant may be liable for the entire award, with little hope of contribution from the party that is mainly at fault.”¹¹⁶

For this reason, a majority of states have abolished or modified the traditional doctrine of joint liability.¹¹⁷ Eighteen states have abolished joint liability and replaced it with pure several liability, under which each defendant is liable for its proportionate share of fault for the harm.¹¹⁸ Four states have eliminated joint liability for

114. Often, courts do not inform juries that holding a minor defendant even 1% at fault could result in that defendant becoming responsible for 100% of the judgment. *See* *Luna v. Shockey Sheet Metal & Welding Co.*, 743 P.2d 61, 64 (Idaho 1987); *see also, e.g., Kaeo v. Davis*, 719 P.2d 387, 395–96 (Haw. 1986) (holding that the trial court should inform the jury of the possible legal consequences of joint and several liability); *Reese v. Werts Corp.*, 379 N.W.2d 1 (Iowa 1985) (holding that the trial court should have instructed the jury on the effects of its verdict on the plaintiff’s recovery); *DeCelles v. State*, 795 P.2d 419, 421 (Mont. 1990) (stating “[w]e think Montana juries can and should be trusted with the information about the consequences of their verdict”); *Coryell v. Town of Pinedale*, 745 P.2d 883, 884, 886 (Wyo. 1987) (holding that a state statute provided that the court must “inform the jury of the consequences of its verdict”); *see generally* Jordan H. Leibman, Robert B. Bennett, Jr. & Richard Fetter, *The Effects of Lifting the Blindfold from Civil Juries Charged with Apportioning Damages in Modified Comparative Fault Cases: An Empirical Study of the Alternatives*, 35 AM. BUS. L.J. 349, 350–55 (1998) (comparing “blindfold rules” with “sunshine rules”). There are, however, a number of courts with “sunshine rules” that believe that “answer[ing] ‘factual’ questions . . . in ignorance of the answers’ consequences can produce arbitrary, inequitable, and unintended results.” *Id.* at 350. These courts put their faith in a jury’s ability to act responsibly and understand the way the law operates. *See id.* at 566–70.

115. Julie K. Weaver, *Jury Instructions on Joint and Several Liability in Washington State*, 67 WASH. L. REV. 457, 471 (1992).

116. *Id.*

117. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 cmt. a (2000) (surveying state joint liability laws).

118. ALASKA STAT. § 09.17.080 (Michie 2004); ARIZ. REV. STAT. ANN. § 12-2506 (West 2003); ARK. CODE ANN. § 16-55-201 (Michie Supp. 2003); COLO. REV. STAT. § 13-21-111.5 (2003); GA. CODE ANN. § 51-12-33 (as modified by 5.B.3, signed by Gov. Perdue on Feb. 17, 2005); IDAHO CODE § 6-803 (Michie 2004); IND. CODE ANN. § 34-51-2-8 (Michie 1998); *Brown v.*

noneconomic damages.¹¹⁹ Fourteen states have abolished joint liability in cases where the defendant's comparative responsibility is below some threshold level.¹²⁰ Some states provide other limits on

Keill, 580 P.2d 867, 868 (Kan. 1978) (holding that "the concept of joint and several liability between joint tortfeasors . . . no longer applies in comparative negligence actions"); KY. REV. STAT. ANN. § 411.182 (Michie 1992 & Supp. 2004); LA. CIV. CODE ANN. art. 1804 (West 1987); LA. CIV. CODE ANN. arts. 2323-2324 (West 1997); MICH. COMP. LAWS §§ 600.6304(4), 600.6312 (2001) (exempting certain medical malpractice claims and criminal conduct involving gross negligence or the use of alcohol or drugs); MISS. CODE ANN. § 85-5-7 (1972 & Supp. 2004); N.M. STAT. ANN. § 41-3A-1 (Michie 1996) (exempting strict liability cases, cases involving vicarious liability, or "situations not covered by any of the foregoing and having a sound basis in public policy"); N.D. CENT. CODE § 32-03.2-02 (1996); *Anderson v. O'Donohue*, 677 P.2d 648 (Okla. 1983) (joint liability abolished if the plaintiff was at fault); OR. REV. STAT. § 31.610(6)(a) (2003) (exempting cases resulting from violation of federal or state statute regarding spill, release, or disposal of hazardous waste); *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992) (rendering the doctrine of joint and several liability obsolete); UTAH CODE ANN. § 78-27-40 (1953); WYO. STAT. ANN. § 1-1-109 (Michie 2003).

119. CAL. CIV. CODE § 1431.2 (Deering 1994); IOWA CODE ANN. § 668.4 (West 1998 & Supp. 2004); NEB. REV. STAT. ANN. § 25-21,185.10 (Lexis 2004) (abolishing joint liability for noneconomic damages in all cases except conspiracy); OHIO REV. CODE ANN. § 2307.22 (Anderson 2001 & Supp. 2004); *cf.* N.Y. C.P.L.R. 1601-1602 (McKinney 1997) (abolishing joint liability for noneconomic damages for defendants less than 50% at fault, except where defendant acted with reckless disregard for the safety of others in cases of unlawfully released hazardous substances; and in product liability actions where the manufacturer of the product is not a party to the action, where jurisdiction over the manufacturer could not be obtained, and when liability would have been imposed on the manufacturer through strict liability, among other statutorily defined exemptions).

120. *See, e.g.*, FLA. STAT. ANN. § 768.81 (West 1997 & Supp. 2005) (setting forth schedule for application of joint liability based on fault of defendant and amount of economic damages; joint liability does not apply to any defendant less at fault than plaintiff); 735 ILL. COMP. STAT. ANN. 5/2-1117 (West 2003) (no joint liability in Illinois where defendants are less than 25% at fault); 735 ILL. COMP. STAT. ANN. 5/2 1118 (West 2003) (stating that defendants are jointly liable for medical expenses); IOWA CODE ANN. § 668.4 (West 1998 & Supp. 2004) (abolishing joint liability for economic damages for defendants less than 50% at fault); MINN. STAT. ANN. § 604.02, Subd. 1 (West 2000 & Supp. 2005) (abolishing joint liability for defendants less than 50% at fault); MO. STAT. § 537.067.3 (as modified by H.B. 393, signed by Gov. Blunt on Mar. 28, 2005) (joint liability abolished for any defendant less than 51% at fault); MONT. CODE ANN. § 27-1-705(7) (2003) (abolishing joint liability for defendants less than 50% at fault, except in cases involving an act or omission that violates a state environmental law governing hazardous or deleterious substances); NEV. REV. STAT. ANN. § 41.141 (Michie 2002) (abolishing joint

joint liability.¹²¹ Nine states and the District of Columbia have yet to generally abolish or modify their joint liability rules.¹²²

and several liability for defendants with less fault than plaintiff, except for certain actions including those sounding in products liability and strict liability); N.H. REV. STAT. ANN. § 507:7-e (1997) (abolishing joint liability for defendants less than 50% at fault); N.J. STAT. ANN. § 2A:15-5.3 (West 2000) (in general, joint liability has been abolished for defendants less than 60% at fault; defendants may be held jointly and severally liable for compensatory damages if fault cannot be apportioned, or a nonsettling tortfeasor is insolvent); OHIO REV. CODE ANN. § 2307.22 (Anderson 2001 & Supp. 2004) (abolishing joint liability for economic damages for defendants less than 50% at fault); 42 PA. CONS. STAT. ANN. § 7102 (West 1998 & Supp. 2004) (abolishing joint liability for defendants found to be less than 60% at fault); S.C. CODE ANN. § 15-38-15 (as modified by H.B. 3008, signed by Gov. Sanford on Mar. 21, 2005, and as further modified by S.B. 83, signed by Gov. Sanford on Apr. 4, 2005) (abolishing joint liability for defendants less than 50% at fault); TEX. CIV. PRAC. & REM. CODE ANN. § 33.013 (Vernon Supp. 2005); (abolishing joint liability for defendants found to be less than 50% at fault); WIS. STAT. ANN. § 895.045(1) (West 1997) (abolishing joint liability for defendants found to be less than 51% at fault).

121. *E.g.*, CONN. GEN. STAT. § 52-572h (Supp. 2004) (stating that defendants in negligence actions generally are liable only for their percentage of fault); HAW. REV. STAT. § 663-10.9 (Supp. 2003) (abolishing joint and several liability except for economic damages in personal injury and wrongful death actions and noneconomic and economic damages in intentional torts, strict and products liability torts, cases involving environmental contamination, toxic torts, and others), MASS. GEN. LAWS ch. 231B, §§ 1-2 (2000) (stating that each defendant is liable to the extent of that defendant's pro rata share of the entire common liability; thus in a two-defendant case, a defendant who is found to be negligent can be compelled to pay up to 50% of the judgment); N.Y. C.P.L.R. 1601, 1602 (McKinney 1997) (abolishing joint liability for noneconomic damages in certain cases for defendants less than 50% at fault); S.D. CODIFIED LAWS §§ 15-8-15.1 (Michie 2001) (limiting joint liability to two times defendant's percentage of fault for any defendant found to be less than 50% at fault); WASH. REV. CODE ANN. § 4.22.070 (West 1988 & Supp. 2005) (joint liability abolished except where plaintiff is faultless, where defendant conspired to commit tortious activity or is the agent of another, and in cases involving fungible product or hazardous or solid waste); W.VA. CODE ANN. § 55-7B-9 (2004) (abolishing joint liability in medical malpractice actions).

122. The following states generally employ full joint and several liability: Alabama, *H.R.H. Metals, Inc. v. Miller ex rel. Miller*, 833 So. 2d 18, 28-29 (Ala. 2002) (Houston, J., concurring specially); Delaware, DEL. CODE ANN. tit. 10, § 6301 (1999); District of Columbia, *Berg v. Footer*, 673 A.2d 1244, 1247-48 (D.C. 1996); Maine, *Peerless Ins. Co. v. Progressive Ins. Co.*, 822 A.2d 1125, 1128 (Me. 2003); Maryland, MD. CODE ANN. CTS. & JUD. PROC. § 3-1401 (2002); North Carolina, N.C. GEN. STAT. ANN. § 1B-1 (Lexis 2003); Rhode Island, R.I. GEN. LAWS § 10-6-2 (1997); Vermont, *State v. Therrien*,

3. Peripheral Defendants

Litigation over exposure to asbestos has become the quintessential example of the plaintiffs' lawyers' strategy of naming defendants with little responsibility for a particular harm—the so-called "peripheral defendants."¹²³ After roughly thirty years of lawsuits, virtually all former manufacturers of asbestos-containing products have been forced into bankruptcy.¹²⁴ Now, a new generation of defendants is becoming ensnarled in the litigation to make up for the "traditional defendants" that are no longer around to pay their full share.¹²⁵

These "peripheral defendants" have only an attenuated connection to asbestos, but are now named in asbestos litigation because of their "deep pockets"; "the net has spread . . . to companies far removed from the scene of any putative wrongdoing."¹²⁶ There were 300 asbestos defendants in 1982;¹²⁷ now there are more than 8,500.¹²⁸ Asbestos litigation now touches firms in industries engaged

830 A.2d 28, 37 (Vt. 2003) (following joint liability doctrine but finding that specific case does not meet requirement that "to be a joint tortfeasor, one must be a tortfeasor in relation to the injured party"); Virginia, *Sam Finley, Inc. v. Waddell*, 151 S.E.2d 347, 353 (Va. 1966); West Virginia, *Strahin v. Cleavenger*, 603 S.E.2d 197, 210–11 (W. Va. 2004).

123. *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 747–48 (E.D.N.Y. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992).

124. See *The Fairness in Asbestos Injury Resolution Act: Hearing Before the Sen. Comm. on the Judiciary* (2005) (testimony of Craig Berrington, Esq.) (stating at least 74 companies had filed for bankruptcy), available at 2005 WL 61512.

125. *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. at 747–48; see also Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, WALL ST. J., Mar. 5, 2001, at A1.

126. Editorial, *Lawyers Torch the Economy*, WALL ST. J., Apr. 6, 2001; see also Susan Warren, *Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, WALL ST. J., Jan. 27, 2003, at B1; Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, WALL ST. J., Apr. 12, 2000, at B1; 'Medical Monitoring and Asbestos Litigation'—*A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 MEALEY'S LITIG. REP.: ASBESTOS 39 (Mar. 1, 2002) (noting a remark from Mr. Scruggs that the litigation has turned into an "endless search for a solvent bystander") [hereinafter *Medical Monitoring*].

127. JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 5 (1984).

128. Deborah R. Hensler, *California Asbestos Litigation—The Big Picture*, COLUMNS, Aug. 2004, at 5.

in almost every form of economic activity that takes place in the economy.¹²⁹ Senior U.S. District Court Judge Jack Weinstein has said “it is not impossible that every company with even a remote connection to asbestos may be driven into bankruptcy.”¹³⁰ In fact, the process has already accelerated due to the general “piling on” nature of asbestos liability.¹³¹ Former U.S. Attorney General Griffin Bell predicts that half of the companies in the Dow Jones Index may soon be affected.¹³²

There is something unfair about our civil justice system when it allows peripheral defendants to be subjected to lawsuits and force them to settle or face crushing legal liability for personal injuries simply because the primary defendants are bankrupt and peripheral defendants have funds available. If the current course continues, asbestos-related bankruptcies will increase both in number and in frequency, because many peripheral defendants will be forced to turn to the bankruptcy courts to resolve their asbestos litigation problems.¹³³

C. Trend 3: Litigation for Non-compensatory Purposes

As discussed above, the transfer mechanism of the tort system is to compensate individuals, or make them whole, for injuries caused by others.¹³⁴ Other types of suits, termed “regulation through litigation” and “follow-on” lawsuits, are not designed to compensate actual plaintiffs, but rather to use the litigation system to achieve legislative or regulatory goals.¹³⁵ These claims are inefficient and

129. STEPHEN CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION, at xxv (2005).

130. Hon. Jack Weinstein, Remarks at a Symposium of the Bar Association of the City of New York, *Asbestos: What Went Wrong?* (Oct. 21, 2002).

131. See generally Mark D. Plevin & Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies?*, MEALEY'S LITIG. REP.: ASBESTOS, Apr. 20, 2001, at 20.

132. See Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, BRIEFLY, June 2002, at 24.

133. In 2003, more than 100,000 claims were filed, “the most in a single year.” Editorial, *The Asbestos Blob, Cont.*, WALL ST. J., Apr. 6, 2004, at A16.

134. See *supra* Part I.

135. For example, Mississippi trial lawyer Richard Scruggs, who filed massive coordinated lawsuits against health maintenance organizations in 1999, explained that the “millions of men, women and children who were sold a bill of goods at the expense of their health . . . have asked us to change this

unpredictable. Additionally, they unnecessarily duplicate regulatory actions, can create contrary results, and tie up court resources.

Part of the public policy behind tort law is to let people know which parties are responsible for preventing or insuring against potential loss. A predictable civil justice system would allow companies to shape their conduct according to governing law, put them on notice as to how much liability they should expect, and prevent windfall recoveries that push this system out of balance. In the last couple of decades, the U.S. tort system has become highly unpredictable, due to inventive trial lawyers and judges who facilitate "regulation through litigation" and windfall damages awards.¹³⁶

1. "Regulation Through Litigation"

The regulation of business involves public policy judgments that are assigned to the legislature and sometimes delegated to executive branch agencies. These agencies can then develop the highly technical expertise needed to make sensitive risk-benefit decisions that best serve the public. Regulation through litigation takes place when public prosecutors, private plaintiffs' attorneys, or alliances between these two groups seek to use mass litigation to impose their beliefs about appropriate business behavior on businesses that are operating in a lawful industry.¹³⁷ By forcing industry-wide behavioral changes through "blackmail settlements"¹³⁸ or multi-million or billion dollar jury verdicts, a handful of public and private lawyers can overrule the public policy and regulatory decisions of Congress, state legislatures, and executive branch regulatory agencies.

A key problem with regulation through litigation is that the process of judicial decisionmaking was designed to settle disputes between parties under traditional tort law, not to set national public policy agendas. Courts are backward-looking, not forward-looking.

unconscionable system through the courts and that is what we will do." Eddie Curran, *A Class Action Prescription*, MOBILE REG. (Ala.), Dec. 30, 1999, at A1.

136. See generally Victor E. Schwartz & Leah Lorber, *Regulation Through Litigation Has Just Begun: What You Can Do To Stop It*, BRIEFLY, Nov. 1999.

137. *Id.* at 9-16.

138. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

They make law retroactively, and these changes are supposed to be incremental.¹³⁹ If courts make broad, sweeping changes in the law retroactively, individuals and businesses cannot provide input into these changes, do not have notice of these changes, and cannot shape their behavior to comply with the new law until it is too late.

This type of litigation gained notoriety in the late 1990s during the state attorneys general lawsuits against the tobacco industry.¹⁴⁰ In their pleadings, the attorneys general sought to recover state Medicaid costs for treating illnesses allegedly caused by smoking.¹⁴¹ Under the fundamental principles of tort law, the right of states to recover for such costs could not be greater than the right of an individual smoker to sue for his or her own injury.¹⁴² Nevertheless, some courts believed that the legislative branch had failed to adequately regulate tobacco and that they were the only public officials who could make the tobacco industry change its marketing practices.¹⁴³

These judges altered core tort principles to give states greater rights to sue than individual smokers. First, companies could not raise defenses based on smoker choice in the state actions.¹⁴⁴ Second, states would not have to connect an individual's smoking with an individual's injury.¹⁴⁵ General and often questionable data would supply that link. Third, states would not have to identify

139. Other problems with the court system's suitability to "regulate" include the fact that courts have no mechanism to hold public hearings, gather information from the public at large, or balance the varied interests of all affected persons, most of whom are not before the court. Courts receive only limited information submitted by the individual litigants in an attempt to resolve a narrow dispute. See Schwartz & Lorber, *supra* note 136, at 1-2. Also, little public light is shed on court decision making and, in many states, judges are appointed, not elected. The public has no voice in and must accept judicial will without recourse at the polls. In those states where judges are elected, the public is generally unaware of the legal opinions these judges have written or the impact of their decisions on society. *Id.* at 2.

140. *Id.* at 9-12.

141. *Id.* at 10-12.

142. *Id.* at 10.

143. *Id.* at 9-12.

144. See, e.g., Agency for Health Care Admin. v. Assoc. Indus., 678 So. 2d 1239, 1250 (Fla. 1996).

145. See, e.g., *id.* at 1256 (upholding the validity of Florida's Medicaid Third-Party Liability Act, Fla. Stat. Ann. § 409.910, which allows the State to use statistical information to present its case).

which particular manufacturer caused which particular injury.¹⁴⁶ Faced with "bet the industry" litigation facilitated by these changes in fundamental tort law, tobacco companies settled.¹⁴⁷ As a result, the judges made substantive changes in the way tobacco could be marketed.

Since the tobacco suits were brought in the 1990s, other industries have been targets of the regulation through litigation craze, including firearms manufacturers,¹⁴⁸ companies manufacturing or selling gasoline with methyl tertiary butyl ether ("MTBE"),¹⁴⁹ pharmaceutical companies,¹⁵⁰ automobile insurance companies,¹⁵¹

146. See, e.g., FLA. STAT. ANN. § 409.910(9)(b) (1995). But see Agency for Health Care Admin., 678 So. 2d at 1255-56 (ruling unconstitutional a provision that allows the simultaneous use of market-share liability and joint and several liability). Section 409.910(9)(a) & (b) was repealed in 1998. See 1998 Fla. Sess. Law Serv. Ch. 98-411 (H.B. 3007) (West).

147. The tobacco industry agreed to pay more than \$206 billion to the states over 25 years, revise its advertising and marketing practices, change how it places products in stores, and fund smoking cessation programs. See Joy Johnson Wilson, *Summary of the Attorneys General Master Tobacco Settlement Agreement, Tobacco Syllabus*, at <http://academic.udayton.edu/health/syllabi/tobacco/summary.htm#Glance> (last visited June 10, 2005).

148. See, e.g., *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999); *City of Chicago v. Beretta U.S.A. Corp.*, No. 98-CH-15596 (Ill. Cir. Ct. Cook County, filed Nov. 12, 1998); *Morial v. Smith & Wesson Corp.*, No. 98-18578 (La. Civ. Dist. Ct. Orleans Parish filed Oct. 30, 1998); *City of Boston v. Smith & Wesson Corp.*, No. 99-2590 (Mass. Super. Ct. Suffolk County filed June 3, 1999); *City of Cincinnati v. Beretta U.S.A. Corp.*, No. A-9902369 (Ohio Ct. C.P. Hamilton County filed Apr. 28, 1999), *dismissed*, No. A9902369, 1999 WL 809838 (Ohio Misc. Oct. 7, 1999).

149. See Announcement of Request from Richard Blumenthal, Conn. Atty. Gen., for Proposals: Litigation services involving compensatory and punitive damages and injunctive relief against manufacturers, designers, refiners, distributors, and sellers of methyl tertiary butyl ether ("MTBE") for pollution and contamination of the waters of the State of Connecticut, RFP No. 04-01 (MTBE) (Feb. 25, 2004), <http://www.cslib.org/attygen/hottopics/mtbe%20rfp.pdf>.

150. See Announcement of Request from Richard Blumenthal, Conn. Atty. Gen., for Proposals: Litigation services involving claims for restitution, injunctive relief and any other relief authorized by law with respect to unfair and deceptive sales and marketing practices by pharmaceutical companies with respect to the sale, marketing and reporting of the Average Wholesale Price of their drugs and which conduct has caused harm to the State of Connecticut and to consumers, RFP No. 04-02 (Dec. 20, 2004), <http://www.cslib.org/attygen/hottopics/drugpricinglitigationrfp.pdf>; William Hathaway, *State Sues Drug Companies, Claiming Price Gouging*, HARTFORD COURANT, Mar. 14, 2003, at B7.

and former manufacturers of lead pigments and lead-based paint.¹⁵²

For example, the State of Rhode Island hired private contingency fee lawyers to pursue a lawsuit against former lead pigment manufacturers.¹⁵³ The suit sought to force them to pay the abatement costs in all buildings where lead paint is found throughout the state, regardless of whether the paint is flaking and peeling, encapsulated or covered over.¹⁵⁴ The suit's goal directly contravenes legislative decision making about the best way to handle properties with lead-based paint. In 1991, the Rhode Island General Assembly enacted the Lead Poisoning Prevention Act, which requires owners

151. In 1999, an Illinois state court effectively set a new nationwide standard for the insurance industry to meet when repairing automobiles by imposing a \$1.2 billion judgment against State Farm for authorizing the use of generic crash parts instead of more expensive original equipment manufacturer parts. *Avery v. State Farm Mut. Auto Ins. Co.*, No. 97-L-114, 1999 WL 1022134, *4 (Ill. Cir. Ct. Oct. 8, 1999) (unpublished) (disgorgement damages of \$130 million reversed, but affirmed in all other respects, by 746 N.E.2d 1242, 1261–62 (Ill. App. 2001)). This practice was fully disclosed to policyholders and permitted in all jurisdictions at issue; some states even “required the availability of generic auto parts to keep costs down.” See Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215, 1217 (2001). State Farm could not have anticipated or taken steps to avoid this verdict, but to guard against a similar verdict, many insurers only offer their insureds original manufacturer parts. Joseph B. Treaster, *Generic Car Parts Makers Fighting Back*, N.Y. TIMES, July 31, 2000, at 8C (after the *Avery* decision came down, “[s]everal other big auto insurers, facing their own lawsuits, followed State Farm’s lead [of using only OEM parts].”). While the merits of generic parts are debatable, this should either be a matter of contract between private parties, or, if safety issues are involved, a matter for regulatory agencies, not judges.

152. See, e.g., *State v. Lead Indus. Ass’n*, No. 99-5226, 2001 WL 345830 (R.I. Super. Ct. Apr. 2, 2001) (unpublished) (addressing defendants’ motions to dismiss claims including causes of action for public nuisance, unfair trade practices, strict liability, product liability and fraud); *Smith v. Lead Indus.*, 157 Md. App. 713 (May 24, 2004) (No. 2368, Sept. 2002 Term) (unpublished) (appeal considering whether plaintiffs must establish reliance on representations by former manufacturers of lead products).

153. At the time this Article was written, the Supreme Court of Rhode Island was considering whether the State violated federal and state constitutional protections when it entered into a contingency fee contract with private personal-injury lawyers to pursue public nuisance claims against the former manufacturers of lead pigments and lead-based paints. *State v. Lead Indus. Ass’n*, No. 2004-63-M.P. (R.I. cert. granted Dec. 22, 2004).

154. *State v. Lead Indus. Ass’n*, No. 99-5226, 2001 WL 345830 (R.I. Super. Ct. Apr. 2, 2001) (unpublished).

of older buildings to maintain them in a "lead-safe" condition. For example, owners must keep painted surfaces intact so lead paint does not become a hazard.¹⁵⁵ The Rhode Island Department of Health, in agreement with relevant federal regulatory agencies, asserted that the removal of well-maintained lead paint creates risks of poisoning children that otherwise would not exist.¹⁵⁶ Maryland trial lawyer Peter Angelos has brought a similar lawsuit on behalf of private plaintiffs, despite the Maryland Legislature's preference for the "lead-safe" approach.¹⁵⁷

The newest frontier for "regulation through litigation" appears to be the use of tort lawsuits to address the obesity problem in the United States.¹⁵⁸ This is a radical departure from the laws governing the sales of food. Traditionally, sellers of food were among the first product sellers to be subject to strict liability.¹⁵⁹ As a result, if food

155. R.I. GEN. LAWS § 23-24.6-26 (2005) (legislature's preferred approach is to keep paint in "lead safe" condition), § 23-24.6-4(15) (effective until July 1, 2008) & 23-24.6-4(12) (2005) (effective July 1, 2008) ("lead-safe" includes encapsulation and covering of lead-based paint).

156. Rhode Island Dep't of Health, *Expanding Childhood Lead Poisoning in Rhode Island* 8xxxii-8xxxiii (Apr. 22, 1994) ("[E]xperience has revealed that complete lead source removal can be very difficult to achieve in such a way that significant lead dust exposures are not created. In many cases, the home environment is made more dangerous by de-leading."); see also Centers for Disease Control, *Managing Elevated Blood Lead Levels Among Young Children: Recommendations from the Advisory Committee on Childhood Lead Poisoning Prevention* (Mar. 2002) at 21, (reporting on one study of children that found "on-site paint removal, resulted in increases in children's [blood lead levels] . . . despite a protocol for safe work practices"), http://www.cdc.gov/nceh/lead/CaseManagement/caseManage_main.htm; *id.* at 15 (instructing to "Keep to a minimum on-site removal of intact leaded paint"); see also Lead; Identification of Dangerous Levels of Lead: Final Rule, 66 Fed. Reg. 1206, 1213 (Jan. 5, 2001) ("Not all lead-based paint is a hazard, only that paint which EPA determines 'would result' in adverse health effects.").

157. See, e.g., MD. CODE ANN., ENVIR. §§ 6-815, 6-801(m)(4) (2004) (describing hazard reduction standard that does not require that all lead paint be removed and characterizing units in compliance with that standard as "lead safe").

158. See *Personal Responsibility in Food Consumption Act: Hearing Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 108th Cong. 32-33 (2003) (testimony of Victor E. Schwartz, Esq.).

159. See, e.g., *Van Bracklin v. Fonda*, 12 Johns. 468 (N.Y. 1815); *Moses v. Mead*, 1 Denio 378, 387 (N.Y. 1845). For a more extensive discussion of this topic, see William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1103-10 (1960).

has a “manufacturing defect,” there were, and are, no excuses.¹⁶⁰ Under the *Restatement of Torts, Third: Products Liability*, if a reasonable consumer would not expect the food to contain the item, then the food would be considered defective, e.g., a pebble in a can of peas or a one-inch chicken bone in a chicken enchilada.¹⁶¹ Sellers of food also may be subject to liability for failure to warn, such as neglecting to label that a product has a well-known allergen like peanuts.¹⁶² Finally, sellers of food could be liable for failure to conform to applicable safety statutes, for example, by not cooking a hamburger at more than 160°F if a person was harmed by bacteria that would have been killed if the hamburger had been properly heated.¹⁶³

In recent years, however, suits have been filed against sellers of food on the premise that food eaten in significant enough quantities causes harm, particularly obesity and obesity-related health conditions.¹⁶⁴ The purported class action lawsuit *Pelman v. McDonald's Corporation*¹⁶⁵ was filed in New York by clinically obese children and their parents or guardians. The plaintiffs argued that their regular consumption of McDonald's foods was a significant or substantial factor in the development of their obesity, diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, or other adverse diseases or health effects.¹⁶⁶

Federal Judge Robert Sweet understood the dynamics involved and dismissed the claims.¹⁶⁷ First, if traditional rules are followed, the plaintiff would have to show that his or her obesity was caused

160. See RESTATEMENT OF TORTS, THIRD: PRODUCTS LIABILITY § 7 (1998).

161. *Id.* § 7 cmt. b.

162. *Id.*

163. See Victor E. Schwartz & Phil S. Goldberg, *Closing the Food Court: Why Legislative Action is Needed to Curb Obesity Lawsuits*, BRIEFLY, Aug. 2004, at 6.

164. See *Barber v. McDonald's Corp.*, Compl., No. 23145 (N.Y. Super. Ct. filed July 24, 2002) (voluntarily withdrawn); *Pelman v. McDonald's Corp.*, 2003 WL 22052778 (S.D.N.Y. Sept. 3, 2003) (dismissing amended complaint and denying plaintiffs' motion for leave to amend complaint) (*Pelman II*); *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003) (dismissing original complaint without prejudice) (*Pelman I*).

165. *Pelman II*, 237 F. Supp. 2d at 512.

166. *Id.* at 519.

167. See generally *Pelman II*, 2003 WL 22052778; *Pelman I*, 237 F. Supp. 2d. at 512.

by food, not by failure to exercise, other lifestyle choices, or genetics.¹⁶⁸ Second, the plaintiff would have to show that a particular defendant's food caused this harm—something that will be very difficult to establish considering the multiple sources of food that people consume.¹⁶⁹ Finally, there would have to be a major change in the definition of what constitutes a "product defect" for liability to ensue.¹⁷⁰

Unfortunately, on appeal, the Second Circuit Court of Appeals ruled that plaintiffs could pursue their claims that their obesity and related health problems were caused by McDonald's alleged failure to disclose its use of certain additives and food processing methods, and for its alleged failure to provide nutritional information about its food.¹⁷¹ The Second Circuit ruled that under New York's deceptive trade practices statute, the plaintiffs do not have to show that they relied on any representations made by the defendant seller.¹⁷² Disagreeing with Judge Sweet, the Second Circuit also ruled that the plaintiffs did not have to set forth at this stage of the litigation what other restaurants they patronized or disclose whether they exercised or had family health histories that could have caused their alleged injuries.¹⁷³

2. Follow-on Lawsuits

"Follow-on lawsuits" have a similar regulatory effect. They arise when state attorneys general or private plaintiffs' attorneys piggyback on regulatory activity by filing lawsuits whenever a company's practices are addressed or subject to investigation by regulatory agencies. In these instances, the regulatory agencies have taken corrective action to fix a problem. Often the plaintiffs have not suffered a real injury and the results of the litigation provide practically no benefit for consumers. As part of resulting settlements, however, the state or private lawyers can secure millions of dollars in additional fines and attorney fees. Moreover, they can

168. *Pelman II*, 237 F. Supp. 2d at 539.

169. *See id.* at 537–38.

170. *See id.* at 540.

171. *See, e.g., Pelman v. McDonald's Corp.*, 396 F.3d 508, 511–12 (2d Cir. 2005).

172. *Id.* at 511.

173. *Id.* at 511–12.

lead to contrary and confusing results that do little to promote consumer welfare.

Follow-on lawsuits have been filed against a number of businesses, including the consumer credit industry,¹⁷⁴ computer companies,¹⁷⁵ and pharmaceutical manufacturers.¹⁷⁶ For example, state attorneys general and plaintiffs' lawyers have filed suits against pharmaceutical companies after the FDA issued a letter directing an individual company to change its advertising to doctors or directly to consumers.¹⁷⁷ Direct-to-consumer ("DTC") advertising can be a

174. For example, in 1999, the San Francisco district attorney's office and the Office of the Comptroller of the Currency charged Providian with misleading, unfair, and deceptive practices. See *In re Providian Credit Card Cases*, 2003 WL 23002628 (S.F. County, Cal. 2003). In June 2000, the OCC ordered Providian to cease certain marketing activities and the company paid a \$300 million penalty in restitution to customers. See Suzanne Koudsi, *Sleazy Credit*, FORTUNE, Mar. 4, 2002, at 143, available at LEXIS, News Library, Fortun file. In settling a follow-on private class action lawsuit addressing the same behavior in December 2000, Providian agreed to pay \$105 million in additional customer restitution and attorneys' fees. See Amy Merrick, *Providian to Pay \$105 Million to Settle Lawsuits Over Some Marketing Practices*, WALL ST. J., Dec. 29, 2000, at A13. One of the law firms representing the plaintiffs noted on its web page describing the settlement: "This [class action] supplements a settlement with government entities. . . ." *Case Watch*, COHEN MILSTEIN HAUSFELD & TOLL, P.L.L.C., <http://www.cmht.com/casewatch/cases/cwprovidian2.htm> (last visited Nov. 15, 2004).

175. See *N.J. Users Join Wave of Private Lawsuits Against Microsoft*, ASSOC. PRESS, Dec. 29, 1999, WL 12/29/99 APWIRES 16:45:00 (reporting that after a federal court ruled against Microsoft in a government antitrust case, approximately sixty "copycat" class action lawsuits in twenty-one states and the District of Columbia were filed against Microsoft alleging consumers were overcharged for its Windows program); *A Victory for Trial Lawyers*, INVESTORS BUS. DAILY, Apr. 4, 2000, at A24 (as of April 2000, 115 private lawsuits had been filed), available at LEXIS, News Library, Invdly file; see also Editorial, *Actions Without Class*, WASH. POST, Dec. 2, 1999, at A38, available at LEXIS, News Library, Wpost file.

176. See, e.g., *New Jersey Citizen Action v. Schering-Plough Corp.*, 842 A.2d 174, 177 (N.J. App. 2003) (holding that regardless of the claims set forth in the DTC advertising campaign, Schering's products still were subject to "strict regulation" by the FDA and that under case law, a pharmaceutical manufacturer's compliance with FDA regulations, including those relating to DTC marketing campaigns, may shield the manufacturer in failure to warn cases.)

177. Cases are typically brought under vague and broadly worded state consumer protection laws, alleging that the companies have misrepresented their products. See, e.g., *id.* (upholding dismissal of nationwide class action

controversial practice.¹⁷⁸ Yet the FDA heavily regulates DTC advertising by pharmaceutical product companies.¹⁷⁹ If the lawsuits end in verdicts or settlement, such litigation would undermine the FDA's ability to work with companies to make sure there are clear standards for presenting risk information about pharmaceuticals. As one commentator explained:

[I]t is federal law that governs what drug information gets disclosed, to whom, and at what point in time. And for good reason. This country decided long ago that it was better to have a single agency distributing uniform drug info than to have 50 state attorneys general (and their tort-law retinue) with varied political agendas sending out conflicting safety messages.¹⁸⁰

consumer fraud claims based on alleged deceptive DTC advertising of allergy drug Claritin), *cert. denied*, 837 A.2d 1092 (N.J. 2003); *In re Paxil Litig.*, 2002 WL 1940708 (C.D. Cal. 2002) (granting preliminary injunction requiring Paxil manufacturer to withdraw television advertising that said product was "non-habit forming" despite approval of the advertisements by the FDA), *rev'd* 2002 WL 31375497 (C.D. Cal. 2002) (stating plaintiffs were unlikely to prevail on claim that advertising was misleading). See generally Linda A. Willett, *Litigation as an Alternative to Regulation: Problems Created by Follow-On Lawsuits with Multiple Outcomes*, 18 GEO. J. LEGAL ETHICS 1477 (2005).

178. See, e.g., Comments of the Staff of the Bureau of Consumer Prot., The Bureau of Econ. & The Off. of Pol'y Plan. of the FTC, *In the Matter of Request for Comments on Consumer-Directed Promotion*, Docket No. 2003N-0344, 3-4, 6 (Dec. 1, 2003) (analyzing the overall economic effects of direct-to-consumer for the FDA); *id.* at 5-15 (discussing surveys on impact of DTC advertising on consumers); *Direct to Consumer Advertising: Hearing Before the Senate Special Comm. on Aging* (July 22, 2003) (statement of Arnold S. Relman, M.D.), 2003 WL 21694495.

179. The U.S. Food and Drug Administration ("FDA"), along with the Federal Trade Commission ("FTC"), is charged with the responsibility to oversee direct-to-consumer ("DTC") advertising. See 21 C.F.R. §§ 202.1 *et seq*; Federal Trade Commission Act, 15 U.S.C. § 45 (prohibiting "unfair or deceptive act[s] or practice[s] in or affecting commerce") & § 52 (prohibiting dissemination of false advertisements regarding foods, drugs, devices, services or cosmetics). Pharmaceutical companies must comply with a detailed set of regulations governing DTC advertising and submit all such advertising for FDA review. The FDA has a wide range of enforcement powers. Companies typically respond to FDA concerns about DTC advertising by changing or withdrawing the advertisement, or, in some cases, by issuing "corrective" advertisements meant to clarify aspects of earlier advertisements. Companies can take responsive action without admitting wrongdoing, or they can challenge the FDA's concerns.

180. See Editorial, *Paxil Man*, WALL ST. J., June 21, 2004, at A16.

Injecting tort litigation into this formula would adversely affect consumers, as risk information likely would be less coordinated and less reliable. Most importantly, product risk information would no longer be determined by experts from the FDA who can study and review information through public hearings and in-depth analysis. Instead, this process would be relegated to state attorneys general and private plaintiffs' counsel, whose staff and hired experts cannot approach the breadth and depth of the FDA's technical expertise. In addition, conflicting legal requirements arising from various lawsuits would interfere with the development of new or additional regulatory schemes and increase uncertainty about the governing rules in those jurisdictions. The cost for producing and marketing pharmaceutical products to account for the peculiar requirement in each jurisdiction would increase, which would raise the price of the drugs for consumers or be subtracted from research and development budgets, thereby slowing the development of beneficial pharmaceutical products.

The fact of the matter is that "regulation through litigation" and "follow-on" actions invade the federal government's legislative and regulatory authority. While their ends may seem attractive to the general public, and to some judges, their means may actually undermine the ultimate health and safety of consumers.

D. Trend 4: The Relaxation of Traditional Tort Requirements

As with regulation through litigation suits, the ability of the judicial system to operate as a reliable transfer mechanism for tort injuries is undermined when courts alter the traditional elements of tort law, such as injury or causation.¹⁸¹ These suits produce unpredictable results, and it may take an exceedingly long time for the parties to work through pre-trial issues when they are litigating in uncharted waters. Such creative judicial lawmaking also creates significant appellate issues, which may take years to bring to

181. For a more thorough discussion of this problem, see Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline The Litigation Have Fueled More Claims*, 71 MISS. L.J. 531 (2001), and Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247 (2000).

conclusion.

1. Unimpaired Claimants in Asbestos Litigation

Recent estimates indicate that as many as 90% of new asbestos claimants have little or no physical impairment.¹⁸² As a basis for filing a lawsuit, these claimants present the court with X-rays that supposedly indicate a condition consistent with exposure to asbestos.¹⁸³ These claims should not be allowed, as "one of the fundamental principles of tort law has been that a plaintiff cannot recover without proof of a physical injury."¹⁸⁴ Lawsuits by unimpaired claimants clog court dockets and delay the adjudication of claims by persons who are actually injured, as the claims alleging actual injury get "lost in the shuffle"¹⁸⁵ or must wait their turn for

182. See AM. ACAD. OF ACTUARIES, OVERVIEW OF ASBESTOS ISSUES AND TRENDS 3 (Dec. 2001), <http://www.actuary.org/mono.htm>. (last visited Mar. 11, 2005); Roger Parloff, *Welcome to the New Asbestos Scandal*, FORTUNE, Sept. 6, 2004, at 186 ("According to estimates accepted by the most experienced federal judges in this area, two-thirds to 90% of the nonmalignants are 'unimpaired'—that is, they have slight or no physical symptoms. Indeed, many nonmalignants actually have ailments that have nothing to do with asbestos—or have nothing wrong with them at all."), available at LEXIS, News Library, Fortun file.

183. See David W. Cugell & David W. Kamp, *Asbestos and the Pleura*, CHEST, Mar. 1, 2004, at 1103 (scientifically concluding that asymptomatic asbestos pleural effusions have no specific prognostic implications for future injury); Victor E. Schwartz et al., *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Defer Claims Filed by the Non-Sick*, 31 PEPP. L. REV. 271, 277–79 (2004); *In re Asbestos Prods. Liab. Litig.* (No. VI), 1996 WL 539589, *2 n.8 (E.D. Pa. Sept. 12, 1996) (Weiner, J.) ("Pleural disease is most often an asymptomatic scarring of the pleura—a tissue thin membrane surrounding the lung It can only be discovered through x-ray and, in and of itself, does not pose a health risk or impairment."); *In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990) (recognizing that unimpaired claimants "lead active, normal lives, with no pain or suffering, no loss of the use of an organ or disfigurement due to scarring").

184. Victor E. Schwartz et al., *Medical Monitoring: Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1059 (1999).

185. *In re Asbestos Prods. Liab. Litig.*, (No. VI), No. Civ. A. MDL 875, 1996 WL 539589, *1 (Senior United States District Judge Charles Weiner, who manages the federal asbestos docket, has explained that "[o]nly a very small percentage of the cases filed have serious asbestos-related afflictions, but they are prone to be lost in the shuffle with pleural and other non-malignancy cases.").

judicial attention.¹⁸⁶ As companies increasingly file bankruptcy as a result of asbestos or other mass tort litigation, the failure to adjudicate a truly injured plaintiff's claim in a timely fashion increases the risk that the plaintiff will not receive timely or adequate compensation.¹⁸⁷

Indeed, lawyers who represent cancer victims have expressed strong concern that filings by the unimpaired are threatening payments to their clients.¹⁸⁸ The case of the Johns-Manville Company is particularly illustrative of this point. Johns-Manville filed for bankruptcy in 1982.¹⁸⁹ It took six years for the company's

186. *See id.*

187. *See id.* at *1; *see also In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000) (noting that scarce resources should go to "the sick and dying, their widows and survivors"), *cert. denied*, 532 U.S. 1066 (2001) (internal citation omitted); *Larson v. Johns-Manville Sales Corp.*, 399 N.W.2d 1, 23 (Mich. 1986) ("We believe that discouraging suits for relatively minor consequences of asbestos exposure will lead to a fairer allocation of resources to those victims who develop cancers."); Steven Hantler, *Judges Must Play Key Role in Stemming Tide of Asbestos Litigation*, 25:14 ANDREWS ASBESTOS LITIG. REP., 12 (May 22, 2003) ("The tragedy is that as plaintiffs' lawyers enroll the healthy into their lawsuits in order to line their own pockets, less money is available for those who are actually sick and dying."); Hon. Griffin Bell, *Follow Bar Association's Lead, Clean Up Asbestos Lawsuit Mess*, DETROIT FREE PRESS, Apr. 3, 2003 ("The relatively few sick plaintiffs, in desperate need but with little time, have their payments delayed and reduced due to the volume of cases and recoveries by the nonsick and their lawyers.").

188. For example, Steve Kazan of Oakland, California has testified that recoveries by the unimpaired may result in his clients being left uncompensated. *See Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong. 43 (Mar. 5, 2003) (statement of Steven Kazan, partner, Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farris). Matthew Bergman of Seattle, Washington, has stated that "[v]ictims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system. As a result of these bankruptcies, the genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims." Matthew Bergman & Jackson Schmidt, Editorial, *Change Rules on Asbestos Lawsuits*, SEATTLE POST-INTELLIGENCER, May 30, 2002, at B7, available at LEXIS, News Library, Seapin file. Victor Schwartz, co-author of the most widely used torts casebook, PROSSER, WADE & SCHWARTZ'S TORTS (10th ed. 2000), and the former Chairman of the Federal Interagency Task Force on Products Liability, has explained that "[f]looding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy." *Medical Monitoring*, *supra* note 126 (quoting Mr. Schwartz).

189. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988)

bankruptcy plan to be confirmed.¹⁹⁰ Payments to Manville Trust claimants were halted in 1990,¹⁹¹ and did not resume until 1995.¹⁹² According to those running the trust, a "disproportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever."¹⁹³ As a result, the Trust is now paying out just *five cents on the dollar* to asbestos claimants.¹⁹⁴

It should not be surprising, then, that the widow of one Washington State man who died from mesothelioma has been told that she should expect to receive only 50% of the \$1 million she might have received if her husband had filed suit before the companies he sued went bankrupt.¹⁹⁵ Similarly, the widow of a mechanic in Ohio will recover at most \$150,000 of the \$4.4 million dollar award that she received for her husband's death.¹⁹⁶

2. Medical Monitoring Suits

A developing area of law that also threatens recoveries for sick asbestos claimants and other plaintiffs with actual injuries is medical monitoring litigation brought by individuals who have no actual, present physical injuries.¹⁹⁷ In these suits, the plaintiffs allege

(discussing case history).

190. *In re Johns-Manville*, 68 B.R. 618 (S.D.N.Y. 1986) (approving confirmation of reorganization plan), *order aff'd*, *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

191. *In re Joint E. & S. Asbestos Litig.*, Bankr. Nos. 82 B 11656 (BRL) to 82 B 11 676, (BRL), 1990 WL 115761 (E.D.N.Y. July 9, 1990) (ordering temporary stay of payments to claimants). The order was modified in 1990 to allow payment of only those claims by claimants meeting certain criteria for severe health impairments or extreme financial hardship as a direct result of exposure to asbestos. *See id.*

192. *See In re Joint E. & S. Dist. Asbestos Litig.*, 878 F. Supp. 473 (S.D.N.Y. 1995) (approving settlement plan for pro rata distribution of funds to unpaid present and future claimants).

193. Quenna Sook Kim, *Asbestos Trusts Says Assets Are Reduced as the Medically Unimpaired File Claims*, WALL ST. J., Dec. 14, 2001, at B6.

194. *See id.*

195. *See* Albert B. Crenshaw, *For Asbestos Victims, Compensation Remains Elusive*, WASH. POST, Sept. 25, 2002, at E1, available at LEXIS, News Library, Wpost file.

196. *See* Stephen Hudak & John F. Hagan, *Asbestos Litigation Overwhelms Courts*, CLEVELAND (OHIO) PLAIN DEALER, Nov. 5, 2002, at A1, available at LEXIS, News Library, Clevpd file.

197. As one federal court rejecting medical monitoring noted,

exposure to a potentially hazardous substance. They do not allege that they have been physically injured. Rather, they seek to recover the future costs of periodic medical checkups, medical tests and other procedures intended to diagnose the possible future onset of an exposure-related disease.¹⁹⁸

As indicated earlier, allowing individuals to “recover” in personal injury litigation when they have no physical injury violates traditional tort law. Courts, including the United States Supreme Court, have recognized that requiring physical injury is the best filter to prevent a flood of speculative claims, to ensure that defendants are only held liable for genuine harm, and to allow the courts to focus on “reliable and serious” claims.¹⁹⁹ In rejecting medical monitoring claims under the Federal Employers’ Liability Act (“FELA”),²⁰⁰ the United States Supreme Court in *Metro-North Commuter R.R. Co. v. Buckley* said, “tens of millions of individuals may have suffered

There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants. . . . [T]here must be a realization that such defendants’ pockets or bank accounts do not contain infinite resources. Allowing today’s generation of exposed but uninjured plaintiffs to recover may lead to tomorrow’s generation of exposed and injured plaintiff’s [sic] being remediless.

Ball v. Joy Mfg. Co., 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990) (applying Virginia law), *aff’d*, 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992). Experience in Louisiana has shown this to be true since medical monitoring was recognized as a cause of action in *Bourgeois v. A.P. Green Industries, Inc.*, 716 So. 2d 355 (La. 1998). *See, e.g.*, *Dragon v. Cooper/T. Smith Stevedoring Co.*, 726 So. 2d 1006 (La. App. 1999) (permitting a class action under Louisiana law for medical monitoring for seamen exposed to asbestos); *Scott v. Am. Tobacco Co.*, 725 So. 2d 10, 18–19 (La. App. 1998) (certifying as a medical monitoring class *all Louisiana residents* who were cigarette smokers on or before May 24, 1996 provided that each claimant started smoking on or before Sept 1, 1988), *writ denied*, 731 So. 2d 189 (La. 1999).

198. *See* Arvin Maskin et al., *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law’s Most Expensive Consolation Prize?*, 27 WM. MITCHELL L. REV. 521, 522 (2000).

199. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 444 (1997).

200. *See* 45 U.S.C. §§ 51–60. FELA is a federal statute that defines rights and duties in personal injury cases brought by railroad workers against their employer railroads. FELA is the tort equivalent of workers’ compensation in the railroad field.

exposure to substances that might justify some form of substance-exposure related monitoring."²⁰¹ Nevertheless, the Court drew a line and only allowed recovery for medical monitoring costs for those with present physical impairment.²⁰²

West Virginia Justice Elliott "Spike" Maynard echoed this sentiment in his dissenting opinion in his state's seminal medical monitoring case: "[T]he practical effect of this decision is to make almost every West Virginian a potential plaintiff in a medical monitoring cause of action."²⁰³ In states like West Virginia, which allow cash recovery for medical monitoring claims even if such checkups would provide no medical benefit to the plaintiff,²⁰⁴ plaintiffs' attorneys do not have to wait for injury to file suit. The familiar advertisement, "Have you been injured?" is becoming, "Don't wait until you're hurt, call now!"²⁰⁵

In recent years, a number of states have rejected requests to make medical monitoring claims available in their states absent physical injury.²⁰⁶ First, they did not want to crowd the dockets and delay access to justice for those with present, serious, physical injuries.²⁰⁷ Second, they have expressed concern about the efficacy of medical monitoring awards.²⁰⁸ For example, would monitoring lead to earlier detection than traditional symptoms?²⁰⁹ Would early detection of the disease allow for beneficial and effective

201. *Buckley*, 521 U.S. at 442.

202. *See id.* at 436 (denying foundation for recovery at common law for emotional distress unaccompanied by symptoms of physical injury).

203. *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 435 (W. Va. 1999) (Maynard, J., dissenting).

204. *See id.* at 431.

205. *See* Victor Schwartz, *Some Lawyers Ask, Why Wait for Injury? Sue Now!*, USA TODAY, July 15, 1999, at A17.

206. *See, e.g., Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849 (Ky. 2002); *Badillo v. Am. Brands, Inc.*, 16 P.3d 435, 440 (Nev. 2001); *Hinton v. Monsanto Co.*, 813 So. 2d 827 (Ala. 2001).

207. *See Hinton*, 813 So. 2d at 831 (quoting *Buckley*, 521 U.S. at 441-43).

208. *See, e.g., Wood*, 82 S.W.3d at 857.

209. *See* W.K.C. Morgan, *Medical Monitoring with Particular Attention to Screening for Lung Cancer*, in OCCUPATIONAL LUNG DISEASE 158 (J. Bernard L. Gee et al. eds., 1984) (citing the criteria formulated by the World Health Organization ("WHO"), including "[t]here should be a recognizable latent or early symptomatic stage" and "[t]here should be a suitable screening test or examination for detecting the disease at the latent or early symptomatic stage, and this test should be acceptable to the population").

treatment?²¹⁰ How can a court assure that medical monitoring awards will be spent on medical monitoring?²¹¹ As one commentator observed, “[t]he incentive for healthy plaintiffs to carefully hoard their award, and faithfully spend it on periodic medical examinations to detect an illness they will in all likelihood never contract, seems negligible.”²¹²

E. Trend 5: Depriving Juries of Reliable, Relevant Information

In the U.S. civil justice system, juries decide most cases that go to court.²¹³ More than two-thirds of the public consider juries to be the most important part of the justice system, and more than three-quarters of the public believes that the jury system is the best way to determine guilt or innocence.²¹⁴ But juries cannot do their jobs when courts ask them to make decisions on insufficient or inaccurate

210. See *id.* at 157–58 (citing WHO criteria including “[t]here should be an acceptable form of treatment for patients with recognizable disease” and “[t]reatment at the presymptomatic, borderline stage of disease should favorably influence its course and prognosis”; and noting these criteria are “as apropos now as when they were first published”).

211. Victor E. Schwartz, Leah Lorber & Emily J. Laird, *Medical Monitoring: The Right Way and The Wrong Way*, 65 MO. L. REV. (forthcoming 2005) (manuscript on file with authors); approximately 80% of all standard medical testing is paid for by third party insurance. See AM. LAW INST., 2 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY—REPORTERS’ STUDY 379 (1991).

212. Maskin, *supra* note 198, at 540–41; see also George W.C. McCarter, *Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy In Toxic Tort Litigation*, 45 RUTGERS L. REV. 227, 283 (1993) (“[T]he potential for abuse is apparent.”); *Lilley v. Bd. of Supervisors of La. State Univ.*, 735 So. 2d 696 (La. App.), *writ denied*, 744 So. 2d 629 (La. 1999). One year after the Louisiana Supreme Court recognized medical monitoring as a cause of action, the trial court awarded \$12,000 per plaintiff for medical monitoring *despite the fact the Bourgeois court expressly declined to extend its holding to claims for lump sum damages.* *Bourgeois v. A.P. Green Indus., Inc.*, 716 So. 2d 355, 357 n.3 (La. 1998). The award was overturned on appeal. *Lilley*, 735 So. 2d at 705–06.

213. See U.S. DEP’T OF JUSTICE, *Federal Tort Trials and Verdicts*, 1996–97 in BUREAU OF JUSTICE STATISTICS BULLETIN 4, (NCJ 172855, Feb. 1999) (citing federal court statistics), <http://www.ojp.usdoj.gov/bjs/pub/pdf/ftv97.pdf>.

214. See AM. BAR ASS’N, A.B.A. PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 6–7 (1998), <http://www.abanet.org/media/perception/perceptions.pdf> (last visited June 10, 2005).

information.²¹⁵

1. Juries That Are Not Fully Informed Cannot Reach a Fair Verdict

As a matter of course, jurors are not given information involving certain facts, circumstances, or legal rules that could have a bearing on their decision making. For example, in a type of litigation that the authors have significant experience observing, thirty-two states do not allow jurors to consider a plaintiff's seatbelt use in assessing damages in an automotive product liability case.²¹⁶ Some juries may

215. For an extensive discussion of this problem, see Steven B. Hantler, Victor E. Schwartz, Cary Silverman & Emily J. Laird, *Moving Toward the Fully Informed Civil Jury*, 3 GEO. J. L. & PUB. POL. 21 (2005).

216. See Christopher Hall, *Nonuse of Seatbelt as Reducing Amount of Damages Recoverable*, 62 A.L.R.5th 537 § 3 (1998). These jurisdictions include: Alabama (Britton v. Doehring, 242 So. 2d 666, 674 (Ala. 1970)); Arkansas (ARK. CODE ANN. § 27-37-703 (Michie 1991)); Connecticut (CONN. GEN. STAT. ANN. § 14-100a(c)(4) (West 1999)); Delaware (Lipscomb v. Diamiani, 226 A.2d 914, 918 (Del. Super. Ct. 1967); *but see* Gen. Motors Corp. v. Wolhar, 686 A.2d 170, 176-77 (Del. 1996) (allowing in evidence of non-seatbelt usage as supervening cause when motorist alleges injuries from being thrown around the vehicle as a result of negligent design)); District of Columbia (McCord v. Green, 362 A.2d 720, 722 (D.C. 1976)); Georgia (GA. CODE ANN. § 40-8-76.1(d) (1993)); Idaho (Quick v. Crane, 727 P.2d 1187, 1208 (Idaho 1986)); Illinois (Clarkson v. Wright, 483 N.E.2d 268, 270 (Ill. 1985)); Indiana (State v. Ingram, 427 N.E.2d 444, 448 (Ind. 1981)); Kansas (Gardner v. Chrysler Corp., 89 F.3d 729, 733-34 (10th Cir. 1996) (applying Kansas law)); Louisiana (LA. REV. STAT. ANN. § 32:295.1(E)); Minnesota (MINN. STAT. § 139.685, subd. 4)); Mississippi (D.W. Boutwell Butane Co. v. Smith, 244 So. 2d 11, 12 (Miss. 1971)); Montana (Livingston v. Isuzu Motors, Ltd., 910 F. Supp. 1473, 1482 (D. Mont. 1995) (citing MONT. CODE ANN. § 61-13-106)); Nevada (Jeep Corp. v. Murray, 708 P.2d 297, 301 (Nev. 1985)); New Hampshire (Thibeault v. Campbell, 622 A.2d 212, 214 (N.H. 1993) (citing N.H. REV. STAT. ANN. § 265:107-a (Supp. 1992))); New Mexico (Mott v. Sun Country Garden Prods., Inc., 901 P.2d 192, 198 (N.M. Ct. App. 1995) (citing N.M. STAT. ANN. § 66-7-373 (Michie 1978)); North Carolina (Barron v. Ford Motor Co. of Canada Ltd., 965 F.2d 195, 198 (7th Cir. 1992) (applying North Carolina law)); Ohio (Vogel v. Wells, 566 N.E.2d 154, 158 (Ohio 1991)); Oklahoma (Fields v. Volkswagen of Am., Inc., 555 P.2d 48, 62 (Okla. 1976)); Pennsylvania (Vizzini v. Ford Motor Co., 569 F.2d 754, 767 (3d Cir. 1977) (applying Pennsylvania law)); Rhode Island (Swajian v. Gen. Motors Corp., 559 A.2d 1041, 1046 (R.I. 1989)); South Carolina (Jones v. Dague, 166 S.E.2d 99, 103 (S.C. 1969)); South Dakota (S.D. CODIFIED LAWS § 32-38-4)); Tennessee (TENN. CODE ANN. § 55-9-604)); Texas (Carnation Co. v. Wong, 516 S.W.2d 116, 117 (Tex. 1974)); Utah (UTAH CODE ANN. § 41-6-186 (1953)); Virginia (Freeman v. Case Corp., 924 F. Supp. 1456, 1469 (W.D. Va. 1996), *rev'd on other grounds*, 118 F.2d 1011 (4th Cir. 1997), *cert. denied*,

find this information particularly relevant, as the National Highway Traffic Safety Administration (“NHTSA”) has found that safety belts reduce death and serious injury of front seat occupants by 50%,²¹⁷ saved an estimated 14,000 motorists in 2002, and avoided “billions of dollars in costs to society annually” by “saving lives and preventing injuries.”²¹⁸ In fact, only nine states allow jurors to consider seatbelt use as evidence of contributory negligence,²¹⁹ sometimes referred to as the “seatbelt defense.”²²⁰

At the time many of these rules were made, there was some question about the efficacy of seatbelts, which has since been resolved.²²¹ Courts also were hesitant to allow a jury to deprive a plaintiff who was not wearing a seatbelt of all recovery if the plaintiff was not at fault for the accident.²²² In modern litigation, comparative fault rules in the majority of jurisdictions allow plaintiffs whose fault contributed to the accident to recover a

522 U.S. 1069 (1998) (recognizing rule)); Washington (WASH. REV. CODE § 46.61.688(6)); West Virginia (W. VA. CODE § 17C-15-49(d) (1993)); Wyoming (Dellapenta v. Dellapenta, 838 P.2d 1153, 1162 (Wyo. 1992)).

217. U.S. DEP’T OF TRANSP., NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., MAY 2003 CLICK IT OR TICKET SAFETY BELT MOBILIZATION EVALUATION FINAL REPORT (Nov. 2003), at http://www.nhtsa.dot.gov/people/injury/airbags/clickit_ticke03/ciot-report04/CIOT%20May%202003/pages/Intro.htm (last visited June 17, 2005).

218. *Id.* at http://www.nhtsa.dot.gov/people/injury/airbags/clickit_ticke03/ciot-report04/CIOT%20May%202003/pages/VDiscussion.htm (last visited June 17, 2005).

219. See Thomas R. Trenkner, *Automobile Occupant’s Failure to Use Seat Belt as Contributory Negligence*, 92 A.L.R.3d 9 § 5 (2004). These states include California (Truman v. Vargas, 80 Cal. Rptr. 373, 377 (Cal. Ct. App. 1969)); Connecticut (Tempe v. Giacco, 442 A.2d 947 (Conn. Super. 1981)); Florida (Ridley v. Safety Kleen Corp., 693 So. 2d 934, 943 (Fla. 1997)); Indiana (Mays v. Dealers Transit, Inc., 441 F.2d 1344, 1355 (7th Cir. 1971) (applying Indiana law)); *but see* Gibson v. Henninger, 350 N.E.2d 631, 632 (Ind. Ct. App. 1976)); Kentucky (Geyer v. Mankin, 984 S.W.2d 104 (Ky. Ct. App. 1998)); Maryland (Cierpisz v. Singleton, 230 A.2d 629, 635 (Md. 1967)); New Jersey (Nunez v. Schneider Nat’l Carriers, 217 F. Supp. 2d 562, 567 (D.N.J. 2002)); South Carolina (Sams v. Sams, 148 S.E.2d 154, 155 (S.C. 1966)); and Virginia (Brown v. Ford Motor Co., 67 F. Supp. 2d 581, 584–87 (E.D. Va. 1999)).

220. See Michelle R. Mangrum, *The Seat Belt Defense: Must the Reasonable Man Wear a Seat Belt?*, 50 MO. L. REV. 968, 968 (1985).

221. See *id.* at 969 n.8.

222. See, e.g., Fischer v. Moore, 517 P.2d 458, 459–60 (Colo. 1973) (en banc).

damages award that is adjusted for their own fault. Thus, there is no reason to keep such evidence from a jury.²²³

In addition to factual evidence being withheld, juries may not know that a defendant they find slightly responsible for an injury may have to pay the entire award because of joint and several liability. Juries also are generally not told that a plaintiff may have received a significant amount of compensation from an insurance policy or from defendants who settled before trial.²²⁴ The underlying rationale for not sharing this information with the jury, generally speaking, is concern that juries cannot properly evaluate the evidence and will make decisions based on bias and prejudice. This thinking is wrong.

2. Junk Science

Weakened causation requirements through the admission of "junk science" led to a flood of products litigation in the 1980s and early 1990s.²²⁵ In 1993, the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* reaffirmed the duty of federal judges to act as "gatekeepers" of scientific evidence presented in their courts.²²⁶ In 1999, the Court in *Kumho Tire Co., Ltd. v. Carmichael*²²⁷ extended this "gatekeeping" obligation to all expert

223. See generally VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (4th ed., 2002).

224. See RESTATEMENT (SECOND) OF TORTS § 920A (1979) (stating that the collateral source rule provides that in computing damages, a jury is not permitted to consider compensation the plaintiff received for the injury from sources other than the defendant, even if the payments partially or completely mitigated the plaintiff's actual monetary loss).

225. See, e.g., KENNETH R. FOSTER & PETER W. HUBER, *JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS* 257–59 (1997) (noting flood of Bendectin and breast implant lawsuits based on "specious scientific evidence"); Richard Hazelton, *Rule of Law: The Tort Monster That Ate Dow Corning*, WALL ST. J., May 17, 1995, at A21 (noting that Dow Corning, the leading breast implant manufacturer, filed for Chapter 11 protection in 1995 as a result of lawsuits spurred by faulty expert studies).

226. 509 U.S. 579, 592–93 (1993).

227. 526 U.S. 137, 148–49 (1999) ("Experts of all kinds tie observations to conclusions through the use of what Judge Learned Hand called 'general truths derived from . . . specialized experience. . . .' The trial judge's effort to assure that the specialized testimony is reliable and relevant can help the jury evaluate that foreign experience, whether the testimony reflects scientific, technical, or other specialized knowledge.") (citation omitted).

testimony in federal court. As the *Daubert* Court explained, because expert testimony can sway a case (particularly in mass tort litigation involving complex medical science), it is the obligation of the judge to ensure that scientific expert testimony is reliable and truly helpful to the jury or other trier of fact in assessing the facts.²²⁸ Subsequently, the Court in *General Electric Co. v. Joiner* concluded that district courts should scrutinize the reliability of experts' reasoning processes as well as their general methodology.²²⁹

This was a distinct departure from the "general acceptance test" that courts had followed since the 1923 decision by the United States Circuit Court of Appeals for the District of Columbia Circuit in *Frye v. United States*.²³⁰ Under *Frye*, courts generally examined "only the general acceptance of an expert's overarching methodology and not also whether that methodology was used in a particular case in a generally accepted way."²³¹ Therefore, in states where *Frye* is still in effect, scientific testimony may be scientifically unreliable and represent no more than the personal opinion of a paid expert witness.

A number of states have adopted *Daubert*, but a significant number have not. In a recent survey of state evidence law, it was found that only ten states have adopted all three holdings in the *Daubert* trilogy.²³² Six states have adopted *Daubert* and *Kumho Tire*, but not *Joiner*.²³³ Eight states have adopted *Daubert*, but not *Kumho Tire* or *Joiner*.²³⁴ Five states, while not fully adopting *Daubert*, use the *Daubert* principles in their own tests.²³⁵ Eight

228. *Daubert*, 509 U.S. at 589-92.

229. 522 U.S. 136, 146 (1997) ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.").

230. 293 F. 1013, 1014 (D.C. Cir. 1923).

231. David E. Bernstein & Jeffrey D. Jackson, *The Daubert Trilogy in the States*, 44 JURIMETRICS J. 351, 353 (2004).

232. *See id.* at 357 (naming Arkansas, Delaware, Louisiana, Massachusetts, Mississippi, Nebraska, Oklahoma, Texas and Wyoming); *see also* GA. CODE ANN. § 24-9-67.1 (effective 2005).

233. *See* Bernstein & Jackson, *supra* note 231, at 357-58 (naming Kentucky, Ohio, New Hampshire, North Carolina, Rhode Island, and South Dakota).

234. *See id.* at 358-61 (naming Alabama, Alaska, Connecticut, Montana, New Mexico, Oregon, Vermont, and West Virginia).

235. *See id.* at 361-63 (naming Colorado, Hawaii, Indiana, Iowa, and

states follow neither *Daubert* nor *Frye*.²³⁶ The remaining states still apply *Frye*.

F. Trend 6: Creation of "Judicial Hellholes"

Courts that take many of the aforementioned short cuts or relax traditional tort law requirements in ways discussed above tend to become what the American Tort Reform Association ("ATRA") calls "judicial hellholes"²³⁷ and what Mississippi plaintiffs' lawyer Richard Scruggs calls "magic jurisdictions."²³⁸ According to Mr. Scruggs, these are venues "where the judiciary is elected with verdict money" and "[t]he trial lawyers have established relationships with the judges."²³⁹ In these courts, he has said, "it's almost impossible to get a fair trial if you're a defendant"²⁴⁰ and a "lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is."²⁴¹ Rather than file cases where there might be a logical connection to the injury, the plaintiffs or the defendants, plaintiffs' lawyers seek to file their cases in the these "magic jurisdictions" because of their reputation for expedient or large settlements or verdicts.

Consider, for example, an Indiana plaintiff who had worked for decades at a U.S. Steel facility in Indiana and had no significant connection to Illinois. He filed his asbestos-related suit in Madison County, Illinois, a well-known magic jurisdiction, and obtained a \$250 million verdict in 2003.²⁴² The case later settled for an amount

Maine).

236. *See id.* at 363–66 (naming Idaho, New Jersey, Nevada, North Dakota, South Carolina, Utah, Virginia, and Wisconsin).

237. AM. TORT REFORM ASS'N, BRINGING JUSTICE TO JUDICIAL HELLHOLES (2004).

238. *See* Richard Scruggs, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), *Asbestos for Lunch*, in INDUS. COMM. (Prudential Securities, Inc., N.Y., New York), June 11, 2002, at 5. Mr. Scruggs also has described these jurisdictions as "areas where what happens in court is irrelevant because the jury will return a verdict in the favor of the plaintiff." *Medical Monitoring*, *supra* note 126, at 1, 6.

239. Scruggs, *supra* note 238, at 5.

240. *Id.*

241. *Id.*

242. *See* Brian Brueggemann, *Man Awarded \$250 Million in Cancer Case*, BELLEVILLE NEWS-DEMOCRAT, Mar. 29, 2003, at 40; Victor E. Schwartz, Mark A. Behrens & Kimberly D. Sandner, *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 WASH. U. J.L. & POL'Y 235, 245

believed to be in the millions of dollars.²⁴³ Former U.S. Attorney General Griffin Bell has explained that plaintiffs file claims in these areas because the “lack of due process will make it virtually impossible for defendants to prepare for trial and will force settlements far higher than a plaintiff could recover at home.”²⁴⁴

Further, many claims filed in these jurisdictions have little or no merit, but are filed in the hopes of reaching settlement.²⁴⁵ In Mississippi, which had been rated as having the worst legal system in the country,²⁴⁶ the state supreme court characterized this trend as a “perversion of the judicial system.”²⁴⁷ The case that sparked the Mississippi court’s comment was a consolidated asbestos-related action with 264 individual plaintiffs’ claims against 137 manufacturers for asbestos exposure allegedly occurring in approximately 600 workplaces over seventy-five years.²⁴⁸ As the court observed, the complaint provided “virtually no helpful information” for the defendants to respond to the charges.²⁴⁹ Rather, it appeared that the “plaintiffs intend[ed] to find out in discovery whether or not, and against whom, they [had] a cause of action”²⁵⁰ and both sides allowed the case to languish on the court’s docket for

(2004).

243. See Schwartz et al., note 242, at 245 n.64 and accompanying text.

244. Hon. Griffin B. Bell, *Asbestos & the Sleeping Constitution*, 31 PEPP. L. REV. 1, 8 (2003).

245. See *id.* at 1, 7–9; Robert T. Horst et al., *The Class Action Fairness Act and the Revisions to Rule 23: Fixing a Broken System— Part I*, 11 METRO. CORP. COUNS., No. 11, Nov. 2003, at 45.

246. See Tom Ramstack, *Mississippi Ranked ‘Worst Legal ‘Climate’*, THE WASHINGTON TIMES, March 10, 2004 <http://www.washingtontimes.com/functions/print.php?StoryID=20040309-091531-4584r>.

247. *Harold’s Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493, 495 (Miss. 2004). The court severed the claims and referred the individual claims to the appropriate trial court, ordering the trial court to dismiss the claims without prejudice unless the claimant provides sufficient information for the case to proceed.

248. See *id.* at 494.

249. *Id.*

250. *Id.* (holding that absent exigent circumstances, “plaintiffs’ counsel should not file a complaint until sufficient information is obtained, and plaintiffs’ counsel believes in good faith that *each plaintiff* has an appropriate cause of action to assert against a defendant in the jurisdiction where the complaint is to be filed. To do otherwise is an abuse of the system, and is sanctionable.”).

several years.²⁵¹

In St. Clair County, Illinois, 85% of medical malpractice claims resolved from 1999 to 2003 resulted in no payment to the plaintiff—an indication that many of the claims had no merit.²⁵² Yet, St. Clair County does not follow the intent of the Illinois law to safeguard against frivolous suits by requiring the complaint to be accompanied by an independent medical professional's certification that the claim is potentially valid. Rather than allow the certification to serve as a true gatekeeper, judges in St. Clair County allow the certifying doctors to remain anonymous.²⁵³ This practice prevents defense lawyers from challenging the credentials of the doctors, thus preventing defense lawyers from ensuring that the doctor has the expertise in the procedure at issue and determining whether a substantial fee was paid to the doctor for certifying the lawsuit.²⁵⁴

These are among the jurisdictions termed "judicial hellholes" by the ATRA in 2004.²⁵⁵ The filing of cases in jurisdictions that have no meaningful connection to the claim or the claimant creates judicial inefficiencies, clogs the courts for local people trying to resolve local issues, and often results in unfair procedures that raise serious due process concerns.²⁵⁶ In addition, burdens placed on these courts are unfair to the residents of those counties; local residents may be forced to wait to have their cases heard.²⁵⁷

251. See *id.* at 495 (noting that "[t]his complaint comes to us from plaintiffs who, more than three years ago, filed suit against 137 defendants; [the plaintiffs] have amended their complaint six times. . .").

252. See ILLINOIS CIVIL JUSTICE LEAGUE, *THE DIRTY LITTLE SECRET: MEDICAL MALPRACTICE LAWSUITS AGAINST METRO-EAST DOCTORS* 6 (2004) (citing ISMIE Mutual Insurance Company legal outcomes data), http://www.icjl.org/images/contentpdfs/040628_TheMedMalStudy.pdf (last visited June 17, 2005) [hereinafter BRINGING JUSTICE TO JUDICIAL HELLHOLES].

253. See Mike Fitzgerald & Patrick J. Powers, *Secrecy Adds to Malpractice Puzzle*, BELLEVILLE (ILL.) NEWS-DEMOCRAT, June 13, 2004, at A1, <http://www.Belleville.com/mld/Belleville/news/8910959/htm> (last visited Nov. 17, 2005).

254. See AM. TORT REFORM ASS'N, BRINGING JUSTICE TO JUDICIAL HELLHOLES 20 (2004).

255. See *id.*; AM. TORT REFORM ASS'N, BRINGING JUSTICE TO JUDICIAL HELLHOLES (2003); AM. TORT REFORM ASS'N, BRINGING JUSTICE TO JUDICIAL HELLHOLES (2002).

256. See *supra* note 44 and accompanying text.

257. Venue rules exist to ensure that claims are brought in the proper county

ATRA has found that when courts are overloaded, the system breaks down. Cases drag out too long, or the pre-trial process is short circuited, such that the case resolution is driven by time factors, not the facts and the law.²⁵⁸ With any transfer mechanism, there is an optimal amount of time that it should take to work through the issues and reach a resolution. Depending on the complexity of a particular case, litigation can involve extensive discovery and motions to develop the facts and narrow the legal issues. It is the responsibility of the trial judge or court-appointed magistrate to protect the integrity of this process by balancing the need for thoroughness and the timely resolution of a case to ensure that this process concludes in an appropriate amount of time. Generally, once the pre-trial issues are settled and a trial date is set, attorneys can size up their chances of success and reach settlement. In fact, on average, more than 95% of civil cases settle.²⁵⁹

III. SOLUTIONS

Mending America's civil justice system so that it can once again administer justice effectively and efficiently will take a concerted effort in legislatures and courts at both the federal and state levels.

within a state. These rules are set by statute and vary depending on the type of claim and the type of defendant. Forum non conveniens is a common law doctrine that enables a court to decline jurisdiction over a case where another court provides a more convenient and acceptable forum in which to decide a dispute between the parties. Dismissal of a case on forum non conveniens grounds rests primarily on a determination that, all things considered, the other forum has a greater connection to the controversy and in the interests of justice would be the proper venue for the parties to air their grievances. Most, but not all, state courts recognize this doctrine. In recent years, state legislatures have begun taking their courts back from out-of-state forum shoppers by passing stronger venue laws. West Virginia, Texas and Mississippi were all considered magnet jurisdictions, and in the last few years, each has enacted meaningful venue reform. See, e.g., BRINGING JUSTICE TO JUDICIAL HELLHOLES, *supra* note 254, at 21 (2003);

258. See, e.g., BRINGING JUSTICE TO JUDICIAL HELLHOLES, *supra* note 254, at 16 ("Over the last five to ten years, Judge Byron's 'rocket-docket,' where 'questions of venue, jurisdiction and liability fly out the window as trial dates are quickly set,' has become a national haven for asbestos claims."); *id.* at 28–29 (noting that national asbestos claims have clogged South Florida's courtrooms, making it nearly impossible for local claims to be heard in a timely fashion).

259. See, e.g., Robert B. McKay, *Rule 16 and Alternative Dispute Resolution*, 63 NOTRE DAME L. REV. 818, 820 (1988).

By its very nature, the judicial system is decentralized. The federal and state governments each have their own court systems. Authority to change substantive and procedural rules can come from both the legislature and the courts. Sources of liability can be grounded in common law as well as statutory law. The fixes that tend to be successful restore fairness and predictability to the legal system without restricting access to courts and legal claims.

A. Federal Solutions

Certain industries are national in nature and require federal reforms in order to achieve effective solutions to litigation issues. Congress has enacted a number of civil justice reforms during the past ten years when the need has been defined and the solution targeted. Relief has been provided in a number of areas. Some of the most instructive laws include:

- *The Class Action Fairness Act of 2005*.²⁶⁰

The Act allows defendants to remove what were formerly nondiverse state law class actions if minimal diversity exists and the aggregate amount in controversy exceeds \$5 million. This effectively will foreclose the joinder of local defendants to defeat complete diversity and prevent removal. The bill also will foreclose the tactic of pleading damages of less than \$75,000 per class member to block removal. The Act also governs certain "mass actions"—i.e., 100 or more claimants seeking monetary relief that are proposed to be tried jointly, and the claims comply with the existing federal jurisdictional requirements.

- *The Paul D. Coverdell Teacher Protection Act of 2001*.²⁶¹

This Act establishes liability protections for teachers, principals, school board members, and other school professionals for most acts committed in compliance with the law or school rules, such as enforcing discipline, grading students, or promoting safety. The Act does not provide protection against civil rights violations, state and federal sexual offenses, or intentional acts such as willful

260. Pub. L. 109-2, 109th Cong., 1st Sess. (2005). See *supra* note 78 and accompanying text.

261. Pub. L. No. 107-10, 115 Stat. 1667 (2002) (codified as amended at 20 U.S.C. § 6731 (2002)).

or criminal misconduct, gross negligence, or reckless misconduct.

- *The Air Transportation Safety and System Stabilization Act of 2001.*²⁶² This Act established an administrative fund to provide a quick, no-fault recovery to persons injured or killed in the September 11 attacks.²⁶³ The Act also provided airline carriers whose planes were involved in the attacks with civil liability protections from September 11th terrorism-related lawsuits, including limits on liability and exclusive federal jurisdiction over such claims.²⁶⁴
- *The Biomaterials Access Assurance Act of 1998.*²⁶⁵ This Act limits suppliers of raw materials and component parts used in medical devices from being included in product liability lawsuits.²⁶⁶ It helped avoid a serious public health crisis by ensuring the availability of lifesaving and life-enhancing implantable medical devices, such as pacemakers, heart valves, and hip and knee joints.²⁶⁷ Suppliers of those devices made a business judgment to exit the market in order to avoid the legal costs which accompanied their successful defense of meritless product liability claims.²⁶⁸ The Act encourages those suppliers to reenter the market by allowing them to obtain early dismissal, without extensive discovery or other legal costs, in certain tort suits involving finished medical implants.²⁶⁹
- *The General Aviation Revitalization Act of 1994.*²⁷⁰ This Act helped revive the ailing single-engine aircraft industry by providing an eighteen-year statute of repose for products liability lawsuits involving certain types of

262. Pub. L. No. 107-42, 115 Stat. 230 (codified as amended at 49 U.S.C. § 40101 (2000)).

263. §§ 403–406, 115 Stat. at 237–41.

264. § 408, 115 Stat. at 240.

265. Pub. L. No. 105-230, 112 Stat. 1519 (codified as amended at 21 U.S.C. §§ 1601–1606 (1998)).

266. § 5, 112 Stat. at 1524–26.

267. See § 2, 112 Stat. at 1519–20.

268. *Id.* at 1520.

269. § 6, 112 Stat. at 1526.

270. Pub. L. No. 103-298, 108 Stat. 1552 (codified as amended at 49 U.S.C. § 40101 (2000)).

aircraft.²⁷¹ Thousands of new jobs were created in the industry.²⁷²

Other federal liability laws passed in the last decade include the Terrorism Risk Insurance Act of 2002;²⁷³ the Aviation and Transportation Security Act of 2001;²⁷⁴ the Amtrak Reform and Accountability Act of 1997;²⁷⁵ the Volunteer Protection Act of 1997;²⁷⁶ the Bill Emerson Good Samaritan Food Donation Act;²⁷⁷ the

271. §§ 2-3, 108 Stat. at 1552-53.

272. See Victor E. Schwartz & Leah Lorber, *The General Aviation Revitalization Act: How Rational Civil Justice Reform Revitalized an Industry*, 67 J. AIR L. & COM. 1269, 1282 (2002).

273. Pub. L. No. 107-297, 116 Stat. 2322 (codified as amended at 15 U.S.C. § 6701 (1999)). This law was enacted to stabilize insurance markets after the September 11th events. *Id.* at 2323. Among other things, the law requires insurance companies to provide coverage for insured losses in all property and casualty programs, despite any pre-existing exclusion for claims arising out of an act of terrorism. *Id.* at 2327-28. In turn, the federal government is to reimburse insurance companies up to 90% of their losses above insurer deductibles. *Id.* at 2328. Congress also capped at \$100 billion the annual aggregate insured losses for which the federal government or an insurer which had met its limits would be liable and provided exclusive federal jurisdiction for claims for personal injury, property damage or death arising out of an act of terrorism. *Id.* at 2328-29.

274. Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as amended at 49 U.S.C. § 40101 (2000)). This Act provides civil liability limitations to other potential parties to September 11th-related lawsuits, including aircraft manufacturers, airport sponsors, persons with a property interest in the World Trade Center, and the City of New York. *Id.* at 646. These liability protections are not available to any person who was a knowing participant in any conspiracy to hijack an aircraft or commit a terrorist act. *Id.*

275. Pub. L. No. 105-134, 111 Stat. 2570 (codified as amended at 49 U.S.C. § 20101 (1997)). This Act creates a federal standard for punitive damage awards in tort cases brought against Amtrak by its passengers. *Id.* at 2577. This law limits Amtrak's tort liability to \$200 million for each rail accident. *Id.* The legislation provides that punitive damages may be awarded "only if the plaintiff establishes by clear and convincing evidence that the harm that is the subject of the action was the result of conduct carried out by the defendant with a conscious, flagrant indifference to the rights or safety of others." *Id.*

276. Pub. L. No. 105-19, 111 Stat. 218 (codified as amended at 42 U.S.C. § 14501 (1997)). The Act provides civil liability protections to uncompensated volunteers in various nonprofit organizations from liability arising from simple negligence, assuming that they were acting within the scope of their responsibilities to the organization. *Id.* at 219-20. The legislation does not protect against liability for intentional acts such as willful misconduct, gross negligence, or reckless misconduct. *Id.* at 220. Furthermore, the Act provides no protection against state and federal sexual offenses or civil rights violations.

Aviation Disaster Family Assistance Act of 1996;²⁷⁸ The Homeland Security Act of 2002;²⁷⁹ the Year 2000 Information and Readiness Disclosure (Y2K) Act;²⁸⁰ the Aviation Medical Assistance Act of 1998;²⁸¹ the Securities Litigation Uniform Standards Act of 1998;²⁸² and the Private Securities Litigation Reform Act of 1995.²⁸³

Id. at 221.

277. Pub. L. No. 101-610, 104 Stat. 3183 (1990) (codified at 42 U.S.C. § 1791 (2005)). This legislation encourages retailers, farmers, restaurants, and nonprofit feeding programs to donate safe food and grocery products to food banks or soup kitchens. Other than harm arising from gross negligence or intentional misconduct, the law states that donating groups will not be subject to civil or criminal liability arising from the “nature, age, packaging, or condition of apparently wholesome food or an apparently fit grocery product. . . .” *Id.* at 3184.

278. Pub. L. No. 104-264, 110 Stat. 3213, 3264 (codified as amended at 49 U.S.C. § 40101 (2000)). This law limits unsolicited contacts by lawyers and insurance company representatives with airline crash victims and their families within 30 days following the incident, so that the families can act when they are no longer under extreme duress and, therefore, are more capable of making fully informed decisions. *See id.* at 3266.

279. Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. § 101 (2003)). This law affords air security companies the same civil liability protections from terrorism-related lawsuits that were extended to the airline industry and others immediately after the September 11, 2001 terrorist activity against the United States. *Id.* at 2312–13. The Support Anti-terrorism by Fostering Effective Technologies Act of 2002 also provides civil liability protections for manufacturers and suppliers of certain anti-terrorism products. Pub. L. No. 107-296, 116 Stat. 2238, 2240–41 (codified at 6 U.S.C. § 441 (2003)).

280. Pub. L. No. 105-271, 112 Stat. 2386 (1998) (codified as amended at 15 U.S.C. § 1 (2004)). This Act limits the liability of companies that failed to fix their problems relating potential breakdowns of computers upon the arrival of the Year 2000 and deters unwarranted Y2K lawsuits. *See id.*

281. Pub. L. No. 105-170, 112 Stat. 47 (codified as amended at 49 U.S.C. § 44701 (2000)). This law provides that an individual will not be liable for damages when providing or attempting to provide assistance during an in-flight medical emergency, except in cases of gross negligence or willful misconduct. *Id.* at 49. The law also protects air carriers from liability in such cases. *Id.* at 48–49.

282. Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended at 15 U.S.C. § 78a (1998)). This Act requires securities class actions involving nationally traded securities based on false or misleading statements to be brought exclusively in federal court under federal law. *Id.* at 3228. The passage of this legislation negated efforts by plaintiffs’ attorneys who attempted to end-run provisions under the 1995 “Private Securities Litigation Reform Act” by filing securities class actions in state courts. *See id.* at 3227.

283. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in 15 U.S.C.

Congress is currently considering legislation that would serve equally valid goals. The legislation includes bills proposing solutions to the frivolous lawsuit problem, asbestos litigation, forum shopping, medical liability, and obesity-related lawsuits. As discussed earlier in this article, these issues are among those at the heart of the excessive litigation problem in the United States.

1. Asbestos Litigation

Congress has considered two different approaches to addressing what the United States Supreme Court has called an "asbestos-litigation crisis."²⁸⁴ One approach is to preempt tort law claims related to the health effects of exposure to asbestos, instead making compensation available through an administrative program run by the federal government.²⁸⁵ This approach calls for a multi-billion dollar "trust fund", which defendant companies, insurance companies, and the existing private trust funds of already-bankrupt businesses would fund.²⁸⁶

The benefits of this approach would include potential savings of litigation costs on issues relating to product identification and proving "fault," and the hope for finality in asbestos litigation. If a trust fund approach fulfilled all of its goals, then members who contributed to the fund could

§ 78a and scattered sections). This law provides civil justice reform measures for public companies and accounting firms.

284. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997); *see also* Jan Amundson, *How A Congressional Answer to Asbestos Litigation Would Help Litigants, Courts, and the American Economy*, 44 S. TEX. L. REV. 925, 925-28 (2003).

285. *See, e.g.*, The Fairness in Asbestos Injury Resolution Act of 2003, S. 1125, 108th Cong. (2003), and The Fairness in Asbestos Injury Resolution Act of 2004, S. 2290, 108th Cong. (2004), developed by former Senate Judiciary Committee Chairman Orrin G. Hatch (R-UT) and Senate Majority Leader Bill Frist (R-TN), respectively.

286. The FAIR Act of 2005 would establish a trust fund of a minimum of \$3 billion a year, financed by defendant companies based on their historic asbestos-related liability, insurance companies at amounts allocated by an insurers commission, and the existing private trust funds of businesses that have filed for Chapter 11 bankruptcy protection. *See* Fairness in Asbestos Injury Resolution Act of 2005, S. 852, tit. II, subtit. A. The Act provides medical criteria establishing ten levels of injury for which claimants are eligible for compensation. *See id.*, tit. III, subtit. B. A schedule included in the bill sets award amounts for each level. *See id.*, tit. III, subtit. B.

advise Wall Street analysts that they have complete closure on their asbestos liability exposure.²⁸⁷

The version of the “trust fund” approach under discussion in 2005 requires that the trust fund be evaluated annually to ensure it has enough monies to compensate claimants.²⁸⁸ There is a controversial “sunset” provision that would allow claims to resume in the tort system if the trust fund were to become insolvent, subject to venue restrictions.²⁸⁹ This provision has been criticized as rendering the trust fund approach ineffective, because plaintiffs’ lawyers could drain the trust fund and then revert to the tort system.²⁹⁰ Plaintiffs’ lawyers and union representatives argue there must be recourse in the tort system for those claimants.²⁹¹ S. 852 provides that the federal government would not have any obligations to pay asbestos claims under this approach.

The second approach would require that asbestos claimants demonstrate that they have an asbestos-related impairment under objective “medical criteria” before their claims could move forward

287. Victor E. Schwartz, Mark A. Behrens & Rochelle Tedesco, *Congress Should Act to Resolve the National Asbestos Crisis: The Basis in Law and Public Policy For Meaningful Progress*, 44 S. TEX. L. REV. 839, 879 (2003).

288. *Id.*, tit. IV, § 405.

289. *Id.*, tit. IV, § 405(f) & (g).

290. Past experience with trust funds that have bypasses to the tort system have not had sanguine results. For example, a \$4.2 billion trust that was established for so-called “victims” in breast implant litigation with a bypass to the tort system ultimately went broke. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1404–10 (1995). As common sense would suggest, the weaker claims went to the trust and the stronger claims went back into the tort system. Similar results have occurred in early attempts to have an automobile no-fault system, with escape valves into the tort system. See Victor E. Schwartz et al., PROSSER, WADE AND SCHWARTZ’S TORTS 1243 (10th ed. 2000).

291. See, e.g., *Hearing on The Fairness in Asbestos Injury Resolution Act Before the Sen. Comm. on the Judiciary*, 109th Cong. (Jan. 11, 2005) (statement of Michael Forsey, Esq., on behalf of the Association of Trial Lawyers of America); *Hearing on Asbestos Litigation Before the Sen. Comm. on the Judiciary*, 107th Cong. (Sept. 25, 2002) (statement of Frederick Baron, partner, Baron & Budd, former president of the Association of Trial Lawyers of America, presenting ATLA’s views on asbestos litigation); *Hearing on the Asbestos Litigation Crisis Continues—It is Time for Congress to Act Before the Sen. Comm. on the Judiciary*, 107th Cong. (Mar. 5, 2003) (statement of Jonathan Hiatt, General Counsel, American Federation of Labor and Congress of Industrial Organizations); *Hearing on Asbestos Litigation Before the Sen. Comm. on the Judiciary*, 107th Cong. (Sept. 25, 2002) (statement of Mr. Hiatt).

in court.²⁹² Statutes of limitations would be tolled so that exposed persons who are unimpaired would have their claims preserved so they could file a claim in the future should they develop an impairing condition. Claimants suffering from an asbestos-related impairment would have their cases tried in the ordinary tort system.²⁹³ This approach would substantially relieve courts of claims initiated by the non-sick. It would help preserve assets needed to compensate the truly sick.²⁹⁴

Additional ways to address asbestos litigation could include limiting or abolishing punitive damages in asbestos cases. Asbestos has not been manufactured for years and the conduct that allegedly caused the injury occurred decades ago; repeated punishments are not necessary and there is no existing wrongful activity to deter.²⁹⁵ Plaintiffs also should be required to present more rigorous scientific or epidemiological evidence that a particular defendant's product caused the plaintiff's alleged injuries, whether this requirement is set by the courts through *Daubert* hearings or by the legislature.²⁹⁶

2. The Lawsuit Abuse Reduction Act

The Lawsuit Abuse Reduction Act of 2004 ("LARA"),²⁹⁷ has two components. First, it seeks to reinstitute mandatory sanctions for frivolous lawsuits by reforming Rule 11 of the Federal Rules of Civil Procedure.²⁹⁸ The Act would reverse certain changes made to Rule 11 in 1993, which rendered sanctions discretionary rather than

292. See The Asbestos Claims Criteria and Compensation Act of 2003, S. 413, 108th Cong. §§ 2(a)(7), 4 (2003), WL 2003 CONG US S 413, introduced by Sen. Nickles (R-OK); Asbestos Compensation Fairness Act of 2005, H.R. 1957, 109th Cong. § 3, WL 2005 CONG US HR 1957, introduced by Rep. Cannon (R-UT).

293. *Id.* at § 4.

294. See Schwartz, Behrens & Tedesco *supra* note 287, at 872.

295. See Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 TEX. REV. L. & POL. 137 (2001).

296. See David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 PEPP. L. REV. 11 (2003).

297. H.R. 4571, 108th Cong. (2d Sess. 2004) (introduced by Rep. Lamar Smith (R.-Tex.)).

298. *Id.* at § 2(1)(A); *Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 401, 421 (1993).

mandatory.²⁹⁹ Unfortunately, the 1993 amendments allowed judges to ignore or forget sanctions.³⁰⁰ For that reason, irresponsible personal injury lawyers could game the legal system.³⁰¹

The second component addresses rampant nationwide forum shopping. Forum shopping occurs when what some call “litigation tourists” are guided by their attorneys into bringing claims in so-called “judicial hellholes.”³⁰² As documented by the ATRA, these jurisdictions have become a powerful magnet for out-of-state plaintiffs who have no logical connection with the forum. The plaintiffs were not injured in the jurisdiction, never lived in the jurisdiction and do not work in the jurisdiction.³⁰³ Litigation tourists do not help the states that they visit. They pay no taxes, only burdening the courts of that state that are paid for by local taxpayers. They delay justice to those who live there. The litigation tourist is only there to sue. LARA helps shut down these “judicial hellholes” with equity and fairness. The Act allows a plaintiff to file a case only where he or she resides at the time of filing, resided at the time of the alleged injury, or the place where circumstances giving rise to the injury occurred, or in the state of the defendant’s principal place of business.³⁰⁴

299. *Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 401, 508 (1993).

300. *See id.*

301. When the 1993 amendments weakening Rule 11 were approved, Justice Scalia dissented from the process, noting that,

[i]n my view, those who file frivolous suits and pleadings should have no ‘safe harbor.’ The Rules should be solicitous of the abused (the courts and the opposing party), and not of the abuser. Under the revised Rule [11], parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: If objection is raised, they can retreat without penalty.

Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 508 (1993).

302. *See* BRINGING JUSTICE TO JUDICIAL HELLHOLES, *supra* note 254, at 41.

303. *See, e.g., id.* at 21 (noting that in Hampton County, South Carolina “[n]o regard is paid to the site of the claimed injury, the plaintiff’s home, and the fact that a defendant’s headquarters may be hundreds of miles away.”).

304. H.R. 4571, 108th Cong. § 4 (2d Sess. 2004).

3. The Multiple Punitive Damages Fairness Act

The Multiple Punitive Damages Fairness Act of 1997³⁰⁵ is not currently before Congress, but it should be given new consideration. The Act was designed to bring some modicum of fairness to punitive damages awards.³⁰⁶ The Act was developed by Republican Senator Orrin Hatch, former Republican Senator John Danforth, and Democrat Senator Joseph Lieberman. The Act would establish the general rule that punitive damages may only be awarded once for harms based on a single act or course of conduct.³⁰⁷ An additional punitive award may be permitted when the court determines in a pretrial hearing that there is new and substantial evidence of additional wrongful behavior by the defendant, other than injury to the claimant.³⁰⁸

The Act would not affect the type of damages that compensate plaintiffs for their harm. Both economic and noneconomic harm are taken care of through compensatory damage awards.³⁰⁹ Punitive damages are permitted only in order to deter the wrongdoer from repeating the wrongful act and to deter others from taking similar actions.³¹⁰ Thus, the legislation would not adversely impact the rights of plaintiffs to be fully and fairly compensated for any and all harms. In fact, this legislation would protect the right of future plaintiffs to collect for actual damages by preventing defendants' assets from being needlessly depleted through windfall awards to earlier-filing claimants.³¹¹

With the exception of those lawyers who reap potentially millions of dollars in fees from repeat punitive damages, nobody seriously argues that repeatedly punishing the same company for one act is fair or benefits society. To the contrary, out of control punitive awards have had a debilitating effect on many vital industries.³¹² What's more, awarding punitive damages over and over without

305. S. 78, 105th Cong. (1st Sess. 1997).

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *See supra* note 52 and accompanying text; Viscusi, *supra* note 36, at 383.

311. S. 78, 105th Cong. § 3(a) (1st Sess. 1997).

312. *See, e.g.,* Jeffries, *supra* note 62 at 142, and accompanying text.

limits for cases arising out of a single act or course of conduct is arbitrary and fundamentally unfair and threatens constitutional due process guarantees.³¹³

Federal action is needed to provide a nationwide solution to the problem. The Multiple Punitive Damages Fairness Act would uniformly and effectively protect claimants from the risk that corporate defendants will be unfairly stripped of their ability to pay compensatory damages.³¹⁴ At the same time, the legislation would address legitimate due process concerns that arise when a business is punished repeatedly and without limit for a single act or course of conduct.³¹⁵

B. State Solutions

States have been much more aggressive in solving litigation problems within their own borders. Just since 2004, a number of important reforms have been enacted. For example, the most wide ranging reform occurred in Mississippi, where the state legislature enacted a comprehensive civil justice reform bill, H.B. 13, in June 2004.³¹⁶ The law promises to help Mississippi shed its reputation for housing “judicial hellholes.” Among other things, the law eliminates opportunities for the abuse of venue and joinder rules,³¹⁷ limits recovery of noneconomic damages against defendants (other than a health care liability defendant) to \$1 million, while keeping in place a \$500,000 limit on noneconomic damages in medical liability actions,³¹⁸ puts tighter limits on punitive damages that may be awarded against medium and small businesses,³¹⁹ eliminates joint and several liability for all defendants,³²⁰ and provides greater protections to innocent, non-manufacturer sellers of a product.³²¹

313. *See supra* note 44 and accompanying text.

314. S. 78, 105th Cong. § 3 (1st Sess. 1997).

315. *Id.*

316. H.B. 13, 2004 Leg., 2d Ex. Sess. (Miss. 2004).

317. *Id.* at § 1.

318. *Id.* at § 2.

319. *Id.* at § 4(3)(a).

320. *Id.* at § 6 (Except those defendants “who consciously and deliberately pursue a common plan or design to commit a tortious act, or actively take part in it.”).

321. *Id.* at § 3.

In addition, Ohio became the first state to enact legislation setting minimum medical requirements for asbestos and silica/mixed dust claims, establishing rules for premises liability actions and prescribing requirements for shareholder liability for asbestos claims under the doctrine of piercing the corporate veil.³²² Ohio also passed comprehensive civil justice reform legislation in 2004,³²³ and Georgia did so in 2005.³²⁴ Ten states enacted legislation in 2004 to curb frivolous regulation through litigation lawsuits against the restaurant and fast food industry.³²⁵ At least six states enacted legislation to limit the amount of appeals bonds and otherwise make appeals more available to companies sued in "bet the industry" lawsuits.³²⁶ In 2005, Texas, Georgia, and Florida followed Ohio's lead in requiring asbestos and silica to demonstrate functional impairment in order to bring a claim.³²⁷

Voters in the November 2004 election also approved civil justice reform ballot initiatives in four states. Shakedown lawsuits

322. See H.B. 292, 125th Gen. Assem. (Ohio 2004); H.B. 342, 125th Gen. Assem. (Ohio 2004). The bills are groundbreaking in a number of respects.

First, the asbestos bill[, H.B. 292,] marks the first time that medical criteria requirements have been adopted in legislation. The approach is modeled after judicially created asbestos docket management plans that exist in a number of courts. . . . Second, Ohio is the first state to adopt either a legislative or judicial plan for curbing silica suits. The legislation took a "holistic approach" in adopting the silica bill[, H.B. 342,] acting to avoid having silica filings exacerbated by lawyers who might be discouraged from bringing weak or meritless asbestos suits as a result of H.B. 292.

Mark A. Behrens & Phil S. Goldberg, *Asbestos Litigation Reform: Where Is It Headed?*, 15 PRODS. LIAB. (ABA, Sec. of Litig., Comm. on Prods. Liab. Litig.) No. 1, Spring/Summer 2004, at 1, 4.

323. S.B. 80, 125th Gen. Assem. (Ohio 2005) (approved Jan. 6, 2005).

324. S.B. 3, 2005-2006 Leg., 1st Sess. (Ga. 2005).

325. See Am. Tort Reform Ass'n, *2004 State Tort Reform Enactments* (Arizona, Colorado, Florida, Georgia, Idaho, Missouri, South Dakota, Tennessee, Utah and Washington all enacted obesity litigation reform legislation), at http://www.atra.org/files.cgi/7797_2004enactments.pdf (last visited Nov. 15, 2004).

326. See *id.* (Georgia, Iowa, Minnesota, Nebraska, South Carolina and Virginia enacted appeal bond legislation).

327. See Mark A. Behrens & Phil Goldberg, *Asbestos Litigation: Momentum Builds for State-Based Medical Criteria Solutions to Address Filings by the Non-Sick*, 20:6 MEALEY'S LIT. REP.: ASBESTOS 33 (Apr. 13, 2005).

regarding business practices³²⁸ will be a thing of the past in California.³²⁹ After voters' approval of Proposition 64 in November 2004, a lawsuit can only be filed if there is an injury or financial or property loss due to an unfair business practice.³³⁰ Nevada voters passed a law to limit attorney fees and awards in medical liability litigation.³³¹ Florida voters acted to limit attorney fees in medical liability litigation.³³² Wyoming voters approved the state legislature's ability to enact laws requiring alternative dispute resolution or medical panel review before a person can file a tort lawsuit against a health care provider.³³³

These successes demonstrate each state may have unique liability issues, but often there are broader solutions that can be modified in each state to curtail the abuses specific to those jurisdictions. To facilitate state tort reform efforts, national bipartisan legislative organizations have passed model legislation that states can adapt as needed. Some examples are explained below.

328. See Walter Olson, *The Shakedown State*, WALL ST. J., July 22, 2003, at A10. See generally Eliot G. Disner & Noah E. Jussim, *So Unfair and Foul: The Scandals Involving the Unscrupulous Application of the Private Attorney General Provision of the Unfair Competition Act Cry out for a Sensible Solution*, 26 L.A. LAW. 42, Nov. 2003 (discussing the unethical application of California's Unfair Competition Act that initiated bipartisan reform).

329. See Cal. Sec. State, Cal. Gen. Elec., Nov. 2, 2004, *State Ballot Measures*, (indicating Proposition 64 passed by 59% to 41%), at <http://vote2004.ss.ca.gov>Returns/prop/00.htm> (last visited Nov. 15, 2004).

330. See Prop. 64 (Cal. Gen. Elec., Nov. 2, 2004) (limiting California's Unfair Business Competition Laws), <http://voterguide.ss.ca.gov/propositions/prop64text.pdf> (last visited June 10, 2005).

331. See Nev. Sec. State., Nev. Gen. Elec., Nov. 2, 2004, *State Ballot Measure No. 3*, at http://sos.state.nv.us/nvelection/2004_bq/bq3.htm (last visited June 10, 2005).

332. See The Medical Liability Claimant's Compensation Amendment, Proposed Constitutional Amendment No. 3, Fla. Gen. Elect., Nov. 2, 2004, <http://election.dos.state.fl.us/initiatives/pdf/proposedamendenglish.pdf> (last visited Jan. 23, 2004); Fla. Sec. State., Fla. Gen. Elec., Nov. 2, 2004, *State Ballot Measure No. 3*, at <http://enight.dos.state.fl.us/> (last visited June 10, 2005).

333. See Wyo. Sec. State., Wyo. Gen. Elec., Nov. 2, 2004, *Const. Amend. C*, at <http://soswy.state.wy.us/election/2004/results/04-gsum.htm> (last visited Nov. 15, 2004).

1. Legal Consumer's Bill of Rights

The American Legislative Exchange Council ("ALEC") has developed the Legal Consumer's Bill of Rights Act, a model bill that would protect ordinary consumers against predatory fee practices by high pressure lawyers and their agents.³³⁴ The ALEC model bill has its genesis in a proposal developed by HALT, a national nonprofit, nonpartisan public interest group of more than 50,000 members.³³⁵

ALEC's model act protects legal consumers by requiring attorneys to provide a statement of clients' rights and lawyers' responsibilities. This would include a written explanation of the fee agreement and alternative billing options, as well as updates regarding the progress of the case, the hours of work to be expended, and all expenses that may be incurred.³³⁶ In this regard, lawyers would be required to convey the same types of information to prospective clients as funeral directors, auto mechanics, and many other service providers. This would simply require a lawyer to articulate to the client the same internal calculations the lawyer must

334. See ALEC Model Consumer's Bill of Rights, at § 2 [hereinafter *ALEC Model Bill*], <http://www.alec.org>. See generally Victor E. Schwartz et al., *Consumer Protection in the Legal Marketplace: A Legal Consumer's Bill of Rights is Needed*, 15 LOY. CONSUMER L. REV. 1 (2002) (discussing the need for legal consumers to be informed of certain basic rights). Legal Consumer's Bill of Rights legislation has been introduced in a number of states. See, e.g., Legal Consumer's Protection Act, A.B. NO. 2939, 2001-2002 Sess. (Cal. 2002); Legal Consumer's Bill of Rights Act, S.B. 994, 91st Gen. Assem., 2d Reg. Sess. (Mo. 2002); Legal Consumer's Bill of Rights, H.B. 1817, 48th Leg., 1st Sess. (Okla. 2001); Legal Consumer's Bill of Rights, H.B. 2420, 2001 Sess. (Kan. 2001).

335. See Legal Consumer Bill of Rights Proposal, at http://www.halt.org/reform_projects/consumer_rights/ (last visited June 17, 2005); see generally Michael Higgins, *Getting Out the Word: Legal Consumer Group Wants Lawyers to Distribute Client Bill of Rights*, 84 A.B.A. J. 22 (Sept. 1998) (discussing HALT's Legal Consumer Bill of Rights "that would require lawyers to provide clients with a written explanation of their rights."). At the federal level, President George W. Bush has endorsed a "Client's Bill of Rights" to allow federal courts to hear challenges to attorneys' fees, and require attorneys to disclose their ethical obligation to charge reasonable fees and the potential range of those fees. See Scott S. Greenberger, *Bush Aims at Federal Tort Reform*, AUSTIN AM.-STATESMAN, Feb. 10, 2000, at A7; Ron Hutcheson & Tish Wells, *Bush Has Four Years to Put Promises to Test*, MILWAUKEE J. SENT., Dec. 17, 2000, at 10A.

336. *ALEC Model Bill*, supra note 334, at § 2.

make when deciding to take the client's case.

In addition, the model legislation would require all attorneys to keep accurate time records and, at the conclusion of the case, provide their clients with detailed information regarding the amount of time spent on the case and any fees and expenses to be charged.³³⁷ The attorney also would need to disclose his or her actual hourly rate, calculated by dividing the total fee by the number of hours spent on the case.³³⁸ This information would enable the client or a court to determine the reasonableness of the fee.³³⁹

ALEC's model legislation also would require lawyers to inform their clients of their right to request an objective review of the reasonableness of a contingency fee.³⁴⁰ This functional equivalent of a "Legal Better Business Bureau" would provide clients who believe they have been overcharged with the information necessary to challenge the bill. The challenge would go through the current mechanism for fee disputes between lawyers and clients, such as a court or bar committee, and would be "based on factors such as whether liability was contested, whether the amount of damages was clear, and how much time the lawyer actually spent on the case."³⁴¹ Informing clients of their right to an objective review of the fee charged would provide an important safeguard to keep fees fair and ensure that more of the recovery will go to injured persons rather than to their lawyers in low-risk, easy-to-win cases.

2. Full and Fair Noneconomic Damages Act

ALEC has a proposal to curb arbitrary and excessive noneconomic damages.³⁴² ALEC's model Full and Fair Noneconomic Damages Act³⁴³ does not place hard limits on noneconomic damages. Instead, it seeks to ensure that such awards serve their true purpose, compensation.³⁴⁴ The Act would also assure noneconomic damages are subject to fair and proper post-trial and appellate review, similar to the process used to review punitive

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. A copy is attached at Appendix A.

343. ALEC Full and Fair Noneconomic Damages Act, <http://www.alec.org>.

344. *Id.* at § 2.

damages for excessiveness.³⁴⁵

The model act would begin by incorporating a basic principle of tort law. It would prohibit consideration of "guilt" evidence when determining an award for pain and suffering.³⁴⁶ Under the model act, the court would instruct jurors that the law requires them to consider only what it would take to compensate the plaintiff for pain and suffering.³⁴⁷ Jurors would be told that in determining noneconomic damages, they could not consider any alleged wrongdoing, misconduct, or guilt of the defendant, or evidence of the defendant's wealth, or any other evidence offered for the purpose of punishment.³⁴⁸

When the plaintiff requests punitive damages, the model act would require that the trial court conduct a bifurcated trial by the same jury, if requested by the defendant.³⁴⁹ In the first stage of the trial, the jury would determine whether the defendant was liable and, if so, the amount of compensatory damages necessary to make the plaintiff whole.³⁵⁰ This first stage would include determination of an award for pain and suffering.³⁵¹ Evidence of wrongdoing would be inadmissible at this phase.³⁵² If the jury found the defendant liable and awarded compensatory damages, then the jury would determine whether the defendant's conduct warranted punitive damages in a second, separate stage of the trial.³⁵³ This procedure would limit the use of guilt evidence to inappropriately boost pain and suffering awards in cases where punitive damages were sought.³⁵⁴

If the jury awards noneconomic damages, the model act would then require the trial court to scrutinize the award during the post-trial phase.³⁵⁵ Rather than undertaking a cursory review of whether the award "shocked the conscience," the trial court would analyze

345. *Id.* at § 6.

346. *Id.* at § 4.

347. *Id.* at § 3. Pain and suffering under this model Act includes not only physical pain and suffering but also other non-pecuniary losses such as mental and emotional pain or anguish and loss of consortium. *Id.*

348. *Id.* at § 4.

349. *Id.* at § 5.

350. *See id.*

351. *Id.*

352. *Id.* at § 4.

353. *Id.* at § 5.

354. *Id.* at § 2.

355. *Id.* at § 6.

several factors before entering a final judgment. First, the court would consider whether the facts of the case or the arguments of counsel inflamed the passion or prejudice of the trier of fact, or whether the jury improperly considered the wealth of the defendant or improperly considered the misconduct of the defendant so as to punish the defendant in circumvention of statutory or constitutional standards applicable to punitive damage awards.³⁵⁶ Next, the court would consider whether the noneconomic damage award was in excess of verdicts involving comparable injuries to similarly situated plaintiffs.³⁵⁷ If so, the court could uphold the award if it found extraordinary circumstances in the record to account for an award in excess of those in similar cases.³⁵⁸

Finally, the model act would require meaningful appellate review to further ensure that noneconomic awards served a compensatory, and not a punitive, purpose.³⁵⁹ It would require appellate courts to engage in a *de novo* review when considering an appeal of a noneconomic damages award on the grounds of excessiveness.³⁶⁰ This means that the appellate court would

356. *Id.*

357. *Id.* Courts have successfully used this comparative approach to incorporate an objective element into the review of non-pecuniary, noneconomic damage awards, a practice that is supported by legal scholars. See David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1134–35 (1995) (noting that the comparative approach is most widely practiced for the review of general damage awards in New York); David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 323 (1989) (“It is not enough for reviewing judges simply to ask whether the specific factual circumstances of the award justify a particularly large award. They must also ask whether the facts indicate that the plaintiff has suffered sufficiently more than similarly situated plaintiffs to justify an award larger than other juries or judges have granted.”); see also Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 777 (1995) (proposing that jurors in all cases in which non-pecuniary damages are sought receive a grid of the median, high, and low awards in similar cases in the same state during a contemporaneous time period, as a means of avoiding extraordinary awards and the need for appellate review).

358. ALEC Full and Fair Noneconomic Damages Act, *supra* note 343, at § 6.

359. *See id.*

360. *Id.*

independently consider the legality of the noneconomic damage award, rather than rely on the judgment of the trial court absent finding an abuse of discretion. This *de novo* standard would require the same type of thorough review mandated by the Supreme Court in determining whether a punitive damage award is unconstitutionally excessive.³⁶¹

IV. CONCLUSION

The U.S. civil justice system is a highly decentralized transfer mechanism. In the last couple of decades, areas of the litigation system have been skewed so that, on the whole, the tort system can no longer provide the appropriate balance between costs and benefits. Regardless of whether this imbalance is created by profit motive, some courts' abandonment of fundamental tort principles, or the inability of legal rules to meet the challenges of 21st Century litigation, the goals of efficiency, timeliness, predictability, and fairness are not being met. As a result, the compensation and deterrence functions of the judicial system are not working as they should.

Currently, several trends are pushing the litigation system further off-kilter. Tort system costs continue to rise at astronomical rates, further skewing the cost-benefit analysis. These high costs also are being disproportionately shouldered by defendants, communities, and ordinary consumers. In addition, the litigation system is being asked to process claims that have more to do with regulating industry than compensating individuals, something it is ill-equipped to do. Finally, judges are relaxing the traditional elements of the law to allow more claims into the system and depriving juries of information they need to make sound and fair decisions.

As judicial and legislative policymakers look for the right ways to fix the system, they should consider the core trends that are leading to the problem and avoid solutions that are only prophylactic in nature. Because some "judicial hellhole" jurisdictions are likely to resist change, the most effective way to restore balance to the civil

361. See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-18 (2003).

justice system is through federal and state legislation. The 2004 election showed that the American people have the will to make these changes either through their elected representatives or on their own at the ballot box.

APPENDIX: FULL & FAIR NONECONOMIC DAMAGES ACT

SUMMARY

Pain and suffering awards are intended to compensate an injured plaintiff for the pain and suffering resulting from an injury caused by the defendant.¹ They are not intended as punishment for the defendant or to deter future misconduct.²

Constitutional and statutory controls increasingly have been placed on punitive damages, but few legal guideposts exist to help jurors fix the amount of pain and suffering awards. As a result, there is an incentive for some to seek to drive up the amount of pain and suffering awards by focusing on the defendant's alleged misconduct.³ Jurors calculating the amount of these awards may be excessively influenced by the presentations of the parties at trial. Pain and suffering awards may therefore be improperly influenced by bias, passion, or prejudice. ALEC's model Full and Fair Noneconomic Damages Act would preclude the improper use of "bad act" evidence in the calculation of pain and suffering damages. It also seeks to enhance the opportunities for meaningful judicial review of such awards.

1. See RESTATEMENT (SECOND) OF TORTS § 903 (1965).

2. See Am. Law Inst., 2 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY—REPORTER'S STUDY 199-200 (1991) (observing that pain and suffering damages reflect concerns with a variety of types of non-monetary loss, including tangible physical pain suffered at the time of Injury and during recuperation, the anguish and terror felt In the face of Impending injury or death, the Immediate emotional distress and long-term loss of love and companionship resulting from the Injury or death of a close family member, and the lost pleasures of personal and social activities resulting from a permanent physical impairment).

Adopted by ALEC's Civil Justice Task Force at the Annual Meeting July 30, 2004. Approved by ALEC's Board of Directors in August, 2004.

SECTION 1. TITLE.

This Act shall be called and may be cited as the "Full and Fair Noneconomic Damages Act."

SECTION 2. FINDINGS.

- (a) The purpose of this Act is to ensure that individuals receive full and fair compensatory damages, including damages for pain and suffering.
- (b) Pain and suffering awards are intended to provide an injured person with compensation for the pain and suffering resulting from the injury at issue in a particular lawsuit.
- (c) Punitive damages are intended to punish a defendant for wrongful conduct. Punitive damages are subject to certain statutory requirements, must be based on the appropriate evidence, and must be in accordance with the constitutional jurisprudence of the Supreme Court of the United States.
- (d) Pain and suffering awards are distinct from punitive damages. Pain and suffering awards are intended to compensate a person for his or her loss. They are not intended to punish a defendant for wrongful conduct.
- (e) For that reason, evidence that juries may consider in awarding pain and suffering damages is different from evidence courts may consider for punitive damages. For example, the amount of a plaintiff's pain and suffering is not relevant to a decision on wrongdoing, and the degree of the defendant's wrongdoing is not relevant to the amount of pain and suffering.
- (f) The size of noneconomic damage awards, which includes pain and suffering, has increased dramatically in recent years. While pain and suffering awards are inherently subjective, it is believed that this inflation of noneconomic damages is partially due to the improper consideration of evidence of wrongdoing in assessing pain and suffering damages.
- (g) Inflated damage awards create an improper resolution of civil justice claims. The increased and improper costs of litigation and resulting rise in insurance premiums is passed on to the general public through higher prices for products and services.
- (h) Therefore, courts should provide juries with clear instructions about the purpose of pain and suffering damages. Courts should

instruct juries that evidence of misconduct is not to be considered in deciding compensation for noneconomic damages. Rather, it is to be considered solely for the purpose of deciding punitive damage awards.

(i) In cases in which punitive damages are requested, defendants should have the right to request bifurcation of a trial to ensure that evidence of misconduct is not inappropriately considered by the jury in its determination of liability and compensatory damages.

(j) As an additional protection, trial and appellate courts should rigorously review pain and suffering awards to ensure that they properly serve compensatory purposes and are not excessive.

SECTION 3. NONECONOMIC DAMAGES; DEFINED.

(a) Noneconomic damages which are recoverable in tort actions include damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, and all other nonpecuniary losses other than exemplary or punitive damages.

(b) Pain and suffering is one type of noneconomic damage and means the actual physical pain and suffering that is the proximate result of a physical injury sustained by a person.

(c) 'Exemplary damages' means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages are neither economic nor noneconomic damages. 'Exemplary damages' includes punitive damages.

SECTION 4. NONECONOMIC DAMAGES; DETERMINATION.

(a) In determining noneconomic damages, the fact finder may not consider:

1. Evidence of a defendant's alleged wrongdoing, misconduct, or guilt.
2. Evidence of the defendant's wealth or financial resources.
3. Any other evidence that is offered for the purpose of punishing the defendant, rather than offered for a compensatory purpose.

SECTION 5. PROCEDURE FOR TRIAL OF COMPENSATORY & PUNITIVE DAMAGES.

(a) All actions tried before a jury involving punitive damages shall, if requested by any defendant, be conducted in a bifurcated trial before the same jury.

(b) In the first stage of a bifurcated trial, the jury shall determine liability for compensatory damages and the amount of compensatory damages or nominal damages. Evidence relevant only to the issues of punitive damages shall not be admissible in this stage.

(c) Punitive damages may be awarded only if compensatory damages have been awarded in the first stage of the trial. An award of nominal damages cannot support an award of punitive damages.

(d) In the second stage of a bifurcated trial, the jury shall determine if a defendant is liable for punitive damages.

SECTION 6. REVIEW OF NONECONOMIC DAMAGE AWARDS.

(a) Upon post-judgment motion, a trial court shall perform a rigorous analysis of the evidence supporting a noneconomic damages award challenged as excessive. Such analysis shall consider the following nonexclusive factors:

(1) whether the evidence presented or the arguments of counsel resulted in one or more of the following events in the determination of a noneconomic damage award:

(i) inflamed the passion or prejudice of the trier of fact;

(ii) improper consideration of the wealth of the defendant; or

(iii) improper consideration of the misconduct of the defendant so as to punish the defendant in circumvention of [the limitation on punitive damage awards provided by REFERENCE STATE STATUTES FOR CAP/BURDEN OF PROOF, IF APPLICABLE or] constitutional standards applicable to punitive damage awards.

(2) whether the verdict is in excess of verdicts involving comparable injuries to similarly situated plaintiffs; and

- (3) whether there were any extraordinary circumstances in the record to account for an award in excess of what was granted by courts to similarly situated plaintiffs, with consideration to the injury type, severity of injury, and the plaintiff's age.
- (b) A trial court upholding a noneconomic damages award challenged as excessive shall set forth in writing its reasons for upholding the award.
- (c) A reviewing court shall use a de novo standard of review when considering an appeal of a noneconomic damages award on the grounds of excessiveness.

SECTION 7. EFFECTIVE DATE

The provisions of this Act shall take effect on the date of enactment and apply to all civil actions filed after such date.