STATE OF LIABILITY

NEW YORK'S COSTLY TORT LAWS AND HOW TO FIX THEM

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COSTLY TORT LAWS
And How to Fix Them

By

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EXECUTIVE SUMMARY

New York State laws encourage a proliferation of civil suits seeking damages for various kinds of alleged wrongful actions, known in legal terms as "torts." The resulting liability costs have been estimated at $20 billion a year[1]—or more than $2,700 per household.

New York's litigious environment isn't helping the state's image among employers. A U.S. Chamber of Commerce survey of lawyers and executives for major businesses ranked New York's legal climate 29th in the country in 2017,[2] plummeting 11 spots over the past five years to its lowest level in the survey's 15-year history.

The Empire State's tort liability system is a positive for at least one industry, however. New York's legal profession is larger than ever, with more than 177,000 lawyers actively practicing in the state. That's one lawyer for every 112 residents—the most of any state and more than twice the national average.[3] Over the past decade, the number of lawyers actively practicing in New York has climbed 20 percent,[4] fully 10 times the state's rate of population growth.

All these lawyers need to make living—and, as this report shows, the tort system provides one for those in the plaintiffs' bar. Other New Yorkers pay the price, in the form of higher auto insurance rates, higher health care costs and higher taxes, to name just three impacts. The high cost of our tort system hinders infrastructure renewal and economic growth in a state that desperately needs more of both.

As shown in this report:

- New York is one of only a dozen states that allow people to recover damages even when they are found primarily responsible for their own injuries.

- When several people or businesses share responsibility for an injury, New York law encourages plaintiffs' lawyers to target the defendant with the most money—even if it is least to blame.

- Property owners in New York must prove a negative—that they had no notice of a hazardous condition—if they want to avoid trial in a "slip and fall" lawsuit.

- New York is among a minority of states that have taken no action to reform laws governing product liability, which is especially important to manufacturers.

- New York allows unlimited noneconomic and punitive damage awards, and imposes an interest rate on judgments that significantly exceeds inflation, creating a risk of particularly high awards.

This report identifies aspects of New York's tort system that have fallen out of balance and provides solutions to fix them. It first examines New York's general liability laws, those that apply to a wide range of civil claims. In comparison to other states, New York allows significantly greater liability and lacks the types of commonsense constraints adopted by other states.

The report then closely explores specific problem areas, including:

- New York's antiquated, unique-in-the-nation "Scaffold Law" that imposes "absolute liability" on property owners and contractors for nearly any worker fall on a construction site, regardless of a worker's own culpability.

- The lack of reasonable limits on medical malpractice awards or safeguards to avoid meritless claims and hired-gun expert testimony, which ultimately pushes up health care costs and leads to provider shortages in some specialty areas.

- The state's ineffective no-fault auto insurance system, which drives up auto insurance rates.

- A court created specifically for asbestos litigation that attracts claims from across the country because of procedures and laws that put defendants at a disadvantage.

Needed liability reforms would create a more balanced legal environment, reduce costs for those who live and work in New York and improve the state's economy.[5] This report offers a blueprint for achieving these goals.

TORT LAW IMBALANCE: COMPARING NEW YORK TO OTHER STATES

From ordinary slip-and-fall cases to complex product liability lawsuits, New York lacks many of the basic, balancing constraints on civil liability found in many other states.

This is not a new problem. Some of the biggest problems discussed in this report were identified more than 30 years ago by a bipartisan commission appointed by Governor Mario M. Cuomo. Chaired by Hugh R. Jones, a former judge of the state Court of Appeals, the 25-member commission issued a two-volume report with proposals for improving New York's liability system. Only a few of those reforms were subsequently implemented, however.[6]

Back in the 1980s, the Jones Commission recognized the "increased propensity to compensate regardless of fault and the tendency to assign larger but highly variable values to non-economic injury" as key reasons why New York's civil justice system had become "more costly, less effective as a deterrent to negligence and less predictable in outcome."[7]

The Jones Commission's unfinished reform agenda represents a starting point for needed changes to tort laws that still exhibit all the shortcomings identified decades ago.

Suing while reckless

In New York, a person who is extraordinarily careless, even reckless, and is hurt can still sue and recover damages if he or she can identify someone else whose conduct contributed to the injury. Under New York's approach, a plaintiff who is 90 percent responsible for his injury can still recover damages (subject to a percentage reduction to account for that person's contribution to the harm).

That is not true in any of New York's neighboring states, or three-quarters of states nationwide.[8] In most other states, a person who is primarily responsible for his or her own injury (50 percent or more at fault) cannot recover damages. This system is known as "modified comparative fault."

In contrast, New York is one of only a dozen states that apply a "pure" form of comparative fault.[9] New York's approach encourages lawyers to file weak claims on behalf of careless clients in the hope that the individuals or businesses that are targeted will settle rather than incur legal expenses, the stress of litigation and the risk of an adverse verdict.

Liability exceeds responsibility

When several people or businesses share responsibility for an injury, New York law encourages plaintiffs' lawyers to target the defendant with the most money—even if it is least to blame.

Under the rule of "joint and several liability," a plaintiff can pick and choose to sue anyone who is partially responsible for an injury and recover the entire award from that person. This leads to the targeting of "deep pocket" defendants, even when others are more culpable. It also puts a minor player potentially on the hook for the actions of others that are insolvent, no longer in business or otherwise not subject to liability.

Based on a Jones Commission recommendation, New York took a significant step away from full joint and several liability in 1986,[10] when the Legislature provided that personal injury defendants who are less than 50 percent liable only pay their fair share of the plaintiff's noneconomic damages, such as pain and suffering.[11] Even minimally culpable defendants, however, remain jointly liable for a plaintiff's full economic damages, including medical expenses and lost income.

New York law encourages plaintiffs' lawyers to target the defendant with the most money—even if it is least to blame.

New York also has many areas where full joint liability continues to apply, such as tort claims arising from automobile accidents, work-related injuries, some environmental damages and construction accidents.[12] The limitation on joint liability also does not apply beyond personal injury cases, such as to tort claims alleging property damage. In addition, New York law lifts its limited restriction on joint liability when a jury finds that a defendant acted recklessly, knowingly, or intentionally.[13] The practical effect of these exceptions is that many civil defendants continue to be held responsible for more than their fair share of the plaintiff's damages.

Most states have moved away from full joint liability, instead imposing damages based on a defendant's degree of fault. Twenty states hold defendants liable for damages in proportion to the percentage of responsibility found by the jury. Sixteen more retain joint liability only for defendants who bear significant responsibility for a plaintiff's injury, most commonly when they are 50 percent or more at fault.

Slip, trip and fall

When hit with a common slip or trip-and-fall claim in a New York state court, supermarkets, retailers, restaurants, cities, towns and other property owners face a nearly impossible standard. Even when a plaintiff has no credible evidence that the defendant could have prevented the fall, there is little hope that a state court will dismiss the case.

Typically, in order to proceed to trial, plaintiffs are expected to produce some evidence showing that a defendant either created a dangerous condition or knew or should have known of a hazard and failed to correct it within a reasonable time. A statement from a witness can suffice. Such evidence is required in federal courts.[14]

New York state courts, however, require property owners to prove a negative to avoid the time and expense of a trial: they must affirmatively show that they

did *not* have notice of the hazardous condition and that it was not present long enough for the owner to discover and address it.[15] In order to meet this standard, a defendant must "offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell."[16] New York attorneys who specialize in retail liability have observed that a property owner "cannot rely solely on its general inspection practices and procedures or on gaps in the plaintiff's proof" to meet this requirement.[17]

Since a plaintiff has three years to file a personal injury claim in New York,[18] a defendant may no longer be in possession of records needed to defend the case by the time it learns of the lawsuit. When possible, those who are sued in slip-and-fall cases remove (transfer) the case to federal court to avoid New York's unrealistic requirements. But when they cannot do so, and lack the records necessary to support a motion for summary judgment, they have little choice but to settle the case, even when there is no evidence that they were responsible for the plaintiff's fall beyond that person's say-so.

Trip-and-fall claims pose a substantial liability risk for public and private owners of sidewalks, parks and roadways. For example, sidewalk cases are the fifth most expensive injury claim against New York City, resulting in 2,378 claims costing the city $31.8 million in settlements and judgments in 2016.[19] That was the lowest total annual payout in a decade.[20] By comparison, for similar claims, Chicago paid out about $12 million as a result of lawsuits over a *nine-year period* ending in July 2017.[21] New York City has a larger population, but its sidewalk fall liability paid by taxpayers is about 30 times higher than Chicago.[22] New York City's high payments are also despite a 2003 City Council ordinance that shifts the city's liability for falls on public sidewalks to abutting private property owners.[23] Sidewalk-related lawsuits may indicate a need for better maintenance, but also are indicative of New York's lawsuit culture.

New York state courts require property owners to prove a negative to avoid the time and expense of a trial.

New York has long recognized that property owners are not liable for "trivial" defects, such as slightly uneven pavement,[24] but the lack of a clear standard results in property owners settling meritless claims. For instance, in 2015, the state Court of Appeals considered a trio of trip-and-fall cases.[25] One involved a trip on a metal object that protruded between one-eighth of an inch and one-quarter of an inch above a public sidewalk, resulting in a lawsuit against the owner of the abutting Bronx apartment building owner. Another blamed a fall in a residential building in Brooklyn on a chip on a stair tread, the second from the bottom of five stairs in a lobby, that was a half inch in depth. The third lawsuit alleged a fall on a stairway in a residential building in Queens as a result of an uneven surface on a stair—which the plaintiff described as a "big clump." The size of this clump was not presented.

On the liability-limited side, the Court of Appeals reaffirmed the viability of the trivial defect defense, finding that "if a defect is so slight that no careful or prudent [person] would reasonably anticipate any danger from its existence, and yet an accident occurs that is traceable to the defect, there is no liability."[26] However,

the court ruled that no matter how slight the defect, courts must consider the totality of the circumstances, which often requires a trial. Applying this standard, the court ruled that the metal protrusion on the sidewalk was trivial and properly dismissed, but that the stairway cases must proceed to trial.

In the absence of a bright-line test for determining when cases can go forward, "unmeritorious claims are encouraged and sometimes elicit an unwarranted settlement simply to avoid litigation costs.[27]

Unlimited product liability

Unlike most states, New York has not adopted any reasonable constraints on product liability litigation, which is a concern to any business that makes, distributes or sells products in New York. These types of reforms, which were supported by the Jones Commission,[28] include:

A statute of repose to provide assurance to manufacturers that, at some point, their exposure to product liability lawsuits claiming a product is defective ends.

These laws recognize that many years after the initial sale of a product, any injuries are likely to stem from use of the product beyond its safe life, misuse or reasons aside from a defect. For example, Connecticut does not allow product liability claims more than ten years after a product is sold unless the product has a longer useful safe life.[29]

Limits on the liability of businesses that have sold an allegedly defective product, but played no part in designing or manufacturing it.

Generally, product liability law nationwide imposes responsibility for injuries related to a defective product on any business in the chain of distribution. For instance, a retailer that merely sold a product made by another company may be required to pay a plaintiff's damages if it turns out to have a flaw. For this reason, states have enacted laws that limit product liability lawsuits against these types of innocent sellers. For example, New Jersey relieves sellers of strict liability upon filing an affidavit certifying the manufacturer's identity, so long as the seller did not exercise control over the design or manufacturing of the product and the plaintiff can pursue a recovery from the manufacturer.[30]

A limit on damages related to products whose designs or warning labels comply with government safety standards.

Several states give weight to a product's compliance with government safety standards or the product's approval by a regulatory agency when evaluating liability. By aligning government safety regulations and the liability system, these statutes provide needed clarity, stability, and predictability in the law, treat manufacturers and product sellers with fairness and protect the public interest.

Some of these laws presume that a product's design or warnings are not defective when a government agency approved them or the product complies with safety

standards.[31] Other laws do not allow punitive damages when a product complied with the law.[32] For instance, in New Jersey, punitive damages are not awarded on a claim arising from a drug, medical device, food or food additive generally recognized as safe and effective by the U.S. Food and Drug Administration (FDA).[33]

Unlimited awards

Unlike most states, New York allows for unlimited awards for noneconomic damages, such as pain and suffering, and places no constraints on punitive damages to avoid jackpot judgments. As a result, people and businesses sued in New York are threatened with the potential of large and unpredictable awards, which may lead them to settle speculative claims at inflated values.

Noneconomic damages are often the largest part of personal injury awards.[34] They are highly subjective and fluctuate widely from case-to-case. About half of the states limit noneconomic damages in medical malpractice lawsuits because of the adverse impact excessive awards can have on doctors and patients.[35] Eleven states go further, limiting noneconomic damages in some or all personal injury claims.[36] In 1986, the Jones Commission recommended a $250,000 limit on noneconomic damages, adjusted annually for inflation, in personal injury claims against public entities.[37]

New York also does not limit punitive damages in any type of liability case. Caps on punitive damages provide greater predictability and certainty in litigation, eliminate outlier verdicts and avoid constitutionally excessive awards. These laws also help ensure that punishment is proportional to a defendant's conduct by linking the maximum amount of punitive damages to the actual harm. About half of the states that permit punitive damages have statutory limits in place.[38] For example, New Jersey limits punitive damages to the greater of five times compensatory damages or $350,000.[39] Connecticut limits punitive damages in product liability actions to two times the amount of

Benefitting lawyers, not consumers

It may come as a surprise to New Yorkers to learn that a small group of lawyers they have never met are repeatedly filing lawsuits on their behalf claiming consumers were duped at the supermarket, the drug store, or a restaurant. Any New Yorker who has bought a Lean Cuisine® frozen dinner, Ruffles potato chips, Breakstone's sour cream, Advil or flushable wipes, just for example, is or was recently a member of a class action brought on behalf of New York consumers. New York has quickly become a favorite jurisdiction for these types of lawsuits, which are brought under the state's deceptive trade practices and false advertising laws.[227]

Some firms repeatedly bring a particular type of claim, such as lawsuits targeting products advertised as "natural" or claiming a product's packaging could fit more food. They sometimes don't even look for an unsatisfied consumer—they just recruit someone to serve as a class representative, have them purchase the product, and use the same person again and again to sue. One of the most recent lawsuits, for example, claims Pret A Manger owes New Yorkers money because its sandwich wraps do not "fully occupy" the cardboard containers in which they are sold.[228]

Lawyers know that if they file ten cut-and-paste complaints, five may settle because many businesses are eager to avoid litigation expenses and liability risk. In many instances, the lawyers get paid by the defendant to "go away" while consumers get little or nothing.[229] When a case is certified, the lawyers may receive millions of dollars while consumers receive worthless labeling changes.[230]

One reason New York is an increasingly attractive place to file consumer class actions is that a state law intended to allow individuals to collect a minimum amount of damages—$50 per claim—is being misused in class actions.[231] The Legislature reserved statutory damages for individual claims to "prevent catastrophic and unfair judgments against defendants—a result to be avoided if possible."[232] Now, what might otherwise have been a $500 case has the potential for a $5 million award. [233] Other states have avoided such unfairness.[234]

compensatory damages.[40] Six states generally do not authorize punitive damages awards, including Massachusetts and New Hampshire.[41]

Punishing interest rates

There can be a considerable lag time, easily running into years, between events giving rise to a lawsuit, the filing of the lawsuit and the actual award and payment of damages resulting from the suit. For that reason, courts add interest to monetary judgments to compensate for what might have been earned if the same sum of money had been invested during the same time period.

Most states base their judgment interest rates on market rates—which are now near historic lows—with annual inflation and average U.S. Treasury bond yields both hovering around 2 percent. New York, however, still imposes a whopping 9 percent interest rate on court judgments.[42]

Basing judgment interest on market rates would save the State of New York $2.6 million annually.

This high interest rate is "illogical and unfair" and "does not reflect the changing economic reality of the cost of money," an advisory committee to the state's chief administrative judge observed.[43] An excessive judgment interest rate adds to the pressure on a defendant to settle litigation, regardless of the merits. It also weighs against appealing a questionable court decision, as interest continues to accumulate.

New York's interest rate not only penalizes private parties, but directly impacts city and county governments, which are often the targets of litigation, and, by extension, taxpayers. The New York State Conference of Mayors and Municipal Officials estimates that basing judgment interest on market rates would save the State of New York $2.6 million and New York City $1.5 million annually.[44]

Roadblock to appeals

In order to stop a plaintiff from seizing a defendant's assets while an appeal is pending, defendants in New York must post a bond covering the full amount of the judgment.[45] This appeal bond requirement stems from a time when judgments did not reach hundreds of millions or billions of dollars.

Appeal bond rules can stand as unfair roadblocks to appealing crushing verdicts and place inordinate pressure on judgment defendants to settle cases that may be reversed on appeal. More than two-thirds of states limit appeal bonds.[46] Four of New York's neighbors—Connecticut, Massachusetts, New Hampshire and Vermont—do not require any appeal bond.[47] New York is among a handful of states that require appeal bonds, but place no limit on their size.[48]

Proposed reforms

New York can bring its core liability laws into the mainstream by:

- Providing that a plaintiff who is primarily responsible for his or her own injury cannot recover damages by moving to a modified comparative fault system.
- Holding defendants liable in proportion to their level of responsibility for a plaintiff's injury by eliminating joint liability.
- Requiring a plaintiff who alleges a slip-and-fall claim to show that the property owner had actual or constructive knowledge of the dangerous condition.[49]
- Adopting common safeguards on product liability actions, such as a law giving weight to a product's compliance with safety standards or a government agency's approval of a product's design or warnings.
- Amending General Business Law § 349(h) to explicitly provide that statutory (minimum) damages are available only in individual consumer lawsuits, not class actions, as the Legislature intended.
- Placing a reasonable limit on awards for non-economic damages and tying the maximum amount of a punitive damage award to the plaintiff's injury.
- Reducing New York's judgment interest rate from 9 percent to a level indexed to the market interest rate.[50]
- Placing a reasonable limit on the amount a defendant is required to post in a bond to appeal an extraordinary award, such as $50 million.

A CLOSER LOOK: FOUR AREAS OF EXCESSIVE LIABILITY

1. Absolute liability under the Scaffold Law: The sky-high cost of building in New York

Construction projects in New York are significantly more expensive than in other states, thanks to New York's century-old "Scaffold Law."

This unique law imposes "absolute liability" on property owners and contractors whenever a worker falls on a construction site. Over the years, New York courts have broadened the reach of the statute and eliminated defenses.[51] Today, the excessive liability that results from this law has led to rising insurance rates, a doubling of deductibles, and few carriers willing to offer such coverage.[52]

New York's state Legislature first enacted the Scaffold Law in 1885 to safeguard construction workers who found themselves subject to increased danger while working on the city's skyscrapers and other projects. While the text of the Scaffold Law does not mention creating a right for workers to sue for a violation of its provisions, [53] the state Court of Appeals has interpreted the statute to impose absolute liability.[54] In fact, the court has found that the Scaffold Law imposes liability on a property owner or a general contractor "who had nothing to do with the plaintiff's accident."[55] Juries cannot consider the worker's carelessness or recklessness, which is considered irrelevant.[56] When a worker falls from a ladder while intoxicated on the job or engaged in other irresponsible behavior, the owner and general contractor remain fully liable for the damages.

Property owners and contractors named in such lawsuits can defend themselves on the basis that the worker was the *sole* proximate cause of his or her own injury,[57] but that is an extraordinarily high standard to meet.[58] An accident can be 99 percent the worker's own fault, but the owner or contractor must still pay 100 percent of the damages. Contractors who invest in safety equipment, run strong safety programs and enforce the rules are treated face the same liability under the Scaffold Law as those who cut corners and put workers at risk. The best that a defendant may hope for is to avoid a summary judgment ruling on liability, even when the worker had safety equipment that complied with all applicable state and federal law and the equipment functioned properly.[59]

More than just scaffolds

The Scaffold Law covers injuries resulting from any elevation or gravity-related risk on construction sites, including falling from a ladder or being hit by an object.[60] Sites may include a building, roof, bridge and elevated highway construction.

The law applies in situations that most people would not consider a fall stemming from an elevation-related construction risk. Did legislators who enacted the Scaffold Law soon after the opening of the Brooklyn Bridge think that law would

provide an absolute liability claim when a worker falls sixteen inches from a boulder on a *basement* floor?[61]

As courts considered Scaffold Law claims resulting from injuries during the building of the first skyscrapers in the 1890s, did judges believe that a person working on the *ground* floor of a construction site would bring a Scaffold Law claim if he slipped down the stairs when retrieving a raincoat?[62] Today's courts have even found that the law gives a florist worker a claim against a catering hall if he falls from a ladder while disassembling a chupah, a canopy for a Jewish wedding.[63]

Settle, or else

As one plaintiffs' law firm notes to potential clients on its website, since "liability is assumed" under the Scaffold Law, "[t]he sole issue to be resolved at trial will be the amount of damages."[64] Scaffold Law claims are costly. Workers' compensation provides no-fault payments for an injured workers' medical care and provides benefits based on a percentage of lost wages while a person is disabled, while limiting an employer's liability. Under the Scaffold Law, however, property owners and contractors have no such constraints on their liability. Plaintiffs may seek past and future lost wages and medical expenses as well as awards for pain and suffering that are highly subjective and unpredictable.

No other state currently has a statute comparable to the Scaffold Law.

Most Scaffold Law claims settle. Given the liability risk, it is easy to understand why. In 2016, 5 of the state's top twenty verdicts were Scaffold Law cases.[65] These five verdicts alone totaled $54.3 million, averaging just under $11 million each.[66] More than half of the top dozen reported mediated settlements and one-third of the top fifty appear to have involved Scaffold Law claims.[67]

Scaffold Law litigation is so lucrative that plaintiffs' lawyers reportedly hand out T-shirts and other materials to workers at construction sites, hoping anyone who is injured will call.[68]

An expert on New York construction law has observed, "Over the course of the last century, the court has taken a statute designed to protect workers who were unable to protect themselves from the extraordinary hazards of working at or raising materials and loads to heights, and turned it into a remedy for every injury caused by gravity that a safety device might have, in hindsight, prevented."[69]

Unique liability

No other state currently has a statute comparable to the Scaffold Law.[70]

Illinois had a similar law, but it was repealed in 1995.[71] While absolute liability is promoted as a safety measure, independent research has found that Illinois had a higher rate of construction-related injuries before the repeal, but fell to a

lower rate after the law was erased.[72] Researchers hypothesize that there are fewer injuries post-repeal in Illinois because absolute liability eliminates an incentive for employers to invest in workplace safety.[73] Absolute liability also does not encourage workers to be careful, since they can recover in a lawsuit even when they engaged in reckless behavior, such as working while under the influence of alcohol or drugs.

The cost

The Scaffold Law has made insurance coverage from construction and infrastructure projects limited in availability and expensive. Cost estimates vary, but all agree that the Scaffold Law significantly increases the cost of building in New York. According to the New York State Builders Association, the liability risk resulting from the law increases the cost of general liability insurance for construction projects between 300 percent and 600 percent.[74]

As New Yorkers become increasingly frustrated with the state's crumbling infrastructure, they might consider how the Scaffold Law makes needed improvements more costly.[75] For example:

- The New York City School Construction Authority says its insurance costs are "three to four times greater than they would be for the same construction program in New Jersey." The extra amount spent on insurance premiums due to Scaffold Law liability would be enough to build two to three more city schools a year, according to the Authority's general counsel.[76]

- The New York State School Boards Association has expressed concern that spending $200 million on higher insurance costs for school construction largely as a result of the Scaffold Law is "hurting our kids and undermining districts' ability to deliver the modern, safe, world-class facilities students need and deserve."[77]

- The Port Authority of New York and New Jersey paid more than twice as much for liability losses on the New York side of bridges spanning the two states, such as the new Goethals Bridge, according to an analysis of claims data conducted by a coalition of organizations supporting Scaffold Law reform.[78] The $4 billion price tag on the new Tappan Zee Bridge across the lower Hudson River might be $200 million lower but for Scaffold Law liability costs.[79]

A report issued by the Rockefeller Institute of Government estimated that the Scaffold Law results in approximately $785 million in additional insurance costs for public sector construction and nearly $1.5 billion in annual costs for private nonresidential construction spending in New York.[80]

The Scaffold Law also has hindered affordable housing and disaster relief efforts.[81] In the aftermath of Superstorm Sandy, the Scaffold Law was cited by several nonprofit organizations as an obstacle to their rebuilding efforts. In a letter to Governor Cuomo and legislative leadership, the groups wrote:

> After long and time-consuming searches for insurance coverage, the few policies we have found are several times the cost of coverage in any other state, including other states affected by Superstorm Sandy, like New Jersey and Connecticut. For many of our organizations, the cost of construction insurance in New York is prohibitive, and several disaster relief organizations are unable to provide relief to New York families because of the lack of insurance due to the Scaffold Law.
>
> This cost and availability crisis is exclusive to New York, as is the Scaffold Law. This is not an insurance problem; it is a New York problem. We enjoy strong and productive relationships with our insurance carriers in all other 49 states, but most of those carriers will not write policies in New York due to the presence of the Scaffold Law.[82]

"Make no mistake," the groups concluded, "the Scaffold Law has directly and significantly hindered our ability to help hundreds of New Yorkers return home after Superstorm Sandy."[83]

Proposed reforms

Amending the Scaffold Law to apply the same rule of comparative negligence that applies in most personal injury cases would allow juries to consider the responsibility of all parties involved in a construction accident—including whether the worker used safety equipment or devices provided at the job site, followed safety instructions or was impaired by drugs or alcohol. Under this system, for example, a worker who has sustained $1 million in damages, but was 40 percent at fault for his own injury, would recover $600,000, instead of the full million under current law. As New York's mayors and municipal officials have observed in supporting such legislation, this would be a more equitable approach.[84]

2. Unbounded medical liability: A poor place to practice medicine

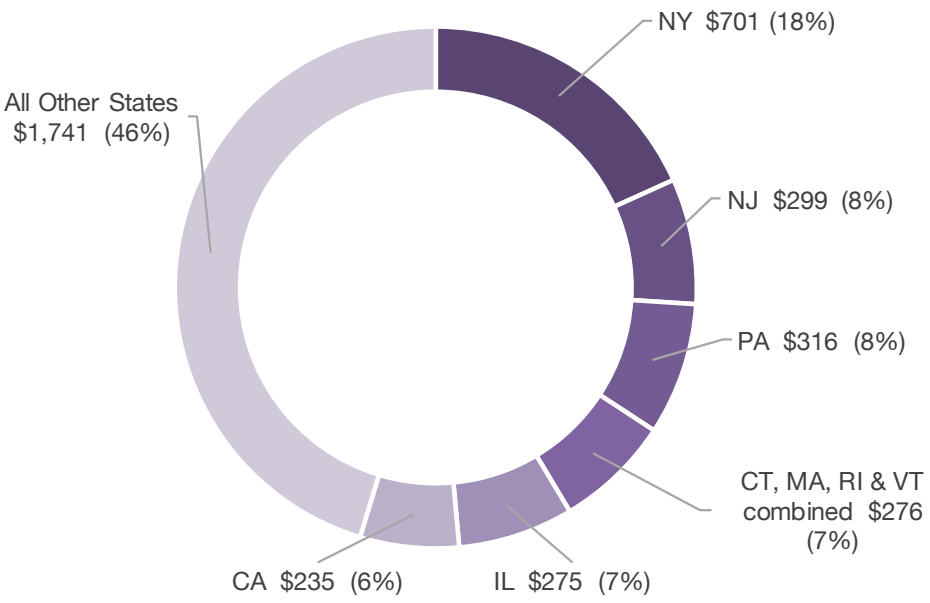
New York's medical malpractice costs are perennially the highest in the nation—and no other state even comes close.[85]

Consider:

- In 2016, medical malpractice payouts recorded by the National Practitioner Data Bank totaled $701 million in New York, as shown in Figure 1.[86]
- The Empire State's total annual payouts are more than double those in New Jersey and Pennsylvania, which have the second and third highest totals.[87]
- Nearly one-fifth of all medical liability payouts in the nation are in New York.[88]

New York's payouts have remained at national highs despite a 17 percent decrease in the number of medical malpractice lawsuits filed in the state fell between 2007 and 2014.[89] In other words, lawsuits are down, but the amount of judgments and settlements are up.

Figure 1
Total U.S. Medical Malpractice Payouts (2016), millions



Source: Diederick Healthcare, 2017 Medical Malpractice Payout Analysis

Exorbitant liability insurance premiums

Many New York physicians pay liability premiums that exceed those in any other state—but there are extreme differences between regions of New York.[90] In general, physicians downstate pay some of the highest rates in the country, while physicians upstate pay some of the lowest.[91]

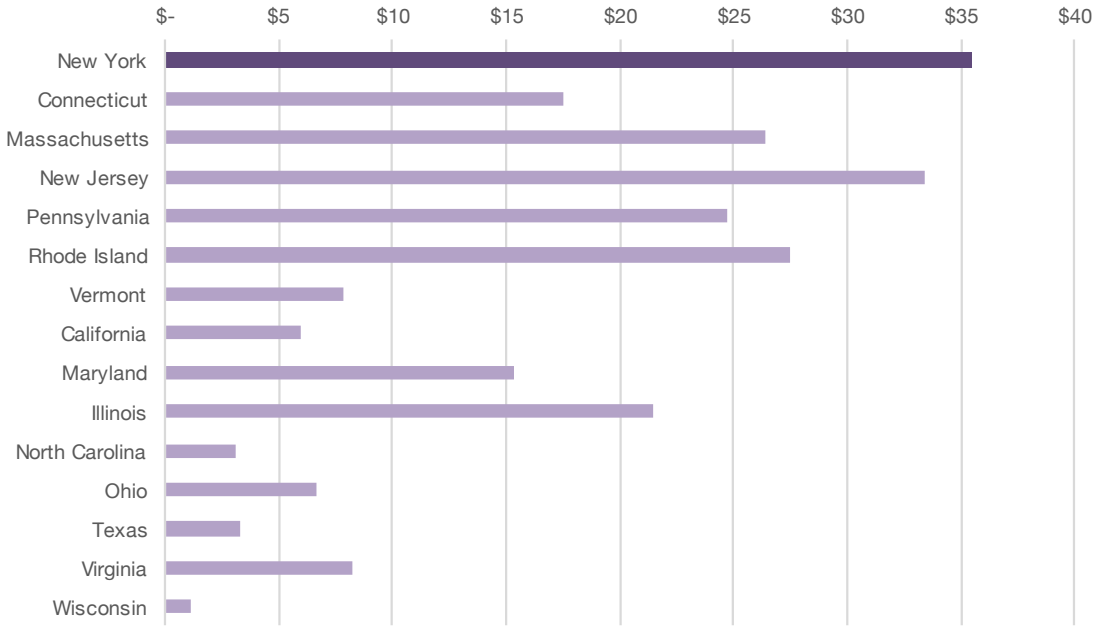
Malpractice costs are particularly high for physicians in three practice areas:

Internal Medicine: In 2015, only Florida and Illinois had counties with higher annual medical malpractice premiums for internists than the highest rates in New York, which were found in Long Island, the Bronx, and Staten Island, which ranged from $35,836 to $36,484.[92] That same year, 14 states had lower liability premiums for internists than the *lowest* premium in New York.[93]

General surgery: Only general surgeons in Miami-Dade County, Florida, faced higher liability premiums than New York's general surgeons, whose rates ranged as high as $136,398 on Long Island.[94] Conversely, a dozen states had premiums for general surgeons lower than New York's lowest premium.

Obstetrics and gynecology: New York's highest medical malpractice premiums for OB-GYNs aren't equaled in any state.[95] And this is not just a matter of high regional

Figure 2
Medical Malpractice Payouts
Per Capita (2016 select states)



Source: Diederick Healthcare, 2017 Medical Malpractice Payout Analysis

costs. For example, as of 2016, obstetricians in the Bronx and Staten Island paid an average rate of $186,630[96] while their counterparts in neighboring New Jersey paid less than half as much, $83,074,[97] and obstetricians in Massachusetts paid an average of $68,230.[98] Further afield, the liability premium for an obstetrician in Los Angeles was $49,804, less than one-third the highest New York rate.[99]

Liability premiums for New York physicians shot up 55 percent to 80 percent between 2003 and 2008, and have continued to rise steadily since then,[100] making it prohibitively expensive to practice medicine in New York. In 2015, for example, the Healthcare Association of New York tallied over a thousand unfilled physicians' positions in hospitals across the state.[101] The same year, almost 60 percent of New York hospitals and health facilities reported lacking a sufficient number of specialists.[102] That percentage jumps to 86 percent for rural areas of New York.[103]

Lack of commonsense reforms

Unlike many other states, New York's legislature has not adopted an effective system for screening out meritless medical liability lawsuits.

New York is among the one-third of states requiring plaintiffs to have a qualified physician evaluate the medical records, find a breach of the standard of care, and provide a certificate of merit before a patient files a lawsuit.[104] When properly designed, such laws deter plaintiffs from filing dubious lawsuits and encourage healthcare providers to settle claims that may have merit.

However, New York's law only requires the plaintiffs' *attorney* to submit a certificate declaring that he or she believes there is a "reasonable basis" to commence an action based on the opinion of at least one physician whom the *attorney* considers knowledgeable of relevant issues.[105] Even this lax certificate of merit requirement can be waived if the attorney makes three good faith attempts to meet with separate doctors and none agree to the consult.[106]

Other states have more stringent standards. Pennsylvania, for example, requires a plaintiff's attorney to certify that the reviewing physician meets statutory qualifications for providing expert testimony in medical liability cases[107] and that the physician has supplied a written opinion finding a reasonable probability that the healthcare provider's conduct fell outside acceptable professional standards.[108]

New Jersey goes even further. In addition to requiring the reviewing physician to meet specific standards to provide expert testimony in medical liability cases, New Jersey requires the physician, not the plaintiff's attorney, to sign the affidavit.[109] Other states have adopted laws under which a panel of medical professionals reviews claims before they are filed.[110]

Thirty-two states have codified provisions regarding qualification for expert witnesses in medical malpractice cases: New York is not one of them.[111] New York law is so deficient that, for example, a podiatrist could testify as an expert witness in a neurosurgery case.[112]

By contrast, states including Connecticut, Pennsylvania and New Jersey require the doctor who will testify on the applicable standard of care to be in the same specialty as the doctor named in the lawsuit and be actively practicing medicine.[113] These types of laws make it more difficult for plaintiffs' lawyers to rely on hired-guns in medical malpractice litigation.

And while many states follow the Federal Rules of Civil Procedure requiring full disclosure of the witness and proposed testimony, New York does not allow a party to depose an opponent's medical expert or even require advance disclosure of the expert's identity.[114] As a medical doctor who subsequently graduated from New York University Law School recognized, "While blindfolds and unprepared cross-examinations may amuse television audiences, such handicaps do not belong in front of medical malpractice juries."[115]

Given the litigation risk, physicians may be less willing to try innovative treatment plans.

Perhaps most critically, as noted above, New York lacks constraints on noneconomic damages such as "pain and suffering." The result: massive open-ended damage awards.

To cite one especially extreme example, in 2014, the City of New York was hit with a verdict awarding $172 million in a single medical malpractice case.[116] In that case, a six-person jury found that a plaintiff's brain injury could be blamed on inaction and bad advice from paramedics to await an ambulance rather than go immediately to a hospital.[117] As a result, in addition to the almost $100 million award for future medical costs, the plaintiff received an additional $65 million in noneconomic damages.[118]

Doctors on defense

The main argument against medical malpractice reform is that the threat of lawsuits gives medical practitioners a stronger incentive to improve the overall quality of care. However, independent economic research has found no causal relationship between high liability payouts and rates of medical misconduct.[119]

Obviously, some degree of risk is often inherent in receiving medical care, and not all unfortunate outcomes are the result of negligence.[120] But because New York's tort laws are not designed to focus on negligence and avoidable errors, they tend to encourage physicians to engage in defensive medicine—ordering unnecessary tests, or avoiding and refusing high-risk procedures and high-risk patients. This reduces the overall quality of care medical professionals provide and stymies growth in specialty fields that are seen as overly risky. Given the litigation risk, physicians may be less willing to try innovative treatment plans.[121]

No apologies in New York

In 2009, the state's Unified Court System joined the state Department of Public Health in a pilot project intended to reduce preventable injuries and deaths and ultimately reduce liability costs. It was one of seven demonstration projects proposed funded by the U.S. Department of Health and Human Services as part of the Affordable Care Act.

Five New York hospitals participated, implementing a disclosure and resolution program designed "to expedite the movement of malpractice cases through the claims process, increase the number of settlements and over time, lower malpractice costs and premiums."[122] Under this program, "health care professionals and institutions disclose adverse outcomes to patients and families; investigate and explain what happened; use that knowledge to improve patient safety and prevent the recurrence of such incidents; *and, when appropriate, apologize* and offer fair financial compensation."[123]

While the program had some success, New York hospitals could not fully implement it because state law does not shield apologies from being admissible in litigation as evidence of culpability.[124] By contrast, 32 states and the District of Columbia have laws allowing doctors to express sympathy for patients without fear of litigation.[125] In these jurisdictions, when there has been an error, allowing doctors to be candid with patients and apologize may be the difference between a prompt settlement and lengthy litigation.[126]

Another attempt at progress

In his 2011 State of State address, Governor Andrew Cuomo announced the establishment of a Medicaid Redesign Team, which he charged with addressing New York's bloated Medicaid program in which spending was twice the national average.[127] The Redesign Team considered liability reform among the options, recognizing that more than half of states limit noneconomic damages, that these laws slow premium growth, and that New York doctors face high and still rising premiums.[128] The Team initially proposed a $250,000 limit on noneconomic damages in all medical malpractice cases,[129] consistent with laws in California and some other states. However, in the face of opposition from the trial bar, the proposal was ultimately stripped from the budget before passage.[130]

However, one medical liability reform proposed by the Medicaid Redesign Team did survive: a Neurologically Impaired Infant Medical Indemnity Fund to compensate brain-damaged infants.[131] Such cases are often settled even if the harm did not result from a healthcare provider's negligence. They involve the highest awards and are a significant portion of all medical malpractice costs.

Under the new law, after a judgment or settlement, future healthcare expenses are paid by the Fund, relieving health care providers and their insurers of the need to pay what is often a massive upfront cash award. This avoids the potential for over- or under-estimating the unpredictable lifetime cost of medical care. Medical care is paid at usual and customary rates, or 130 percent of Medicaid or Medicare

rates, saving money. The Fund is financed by an annual appropriation that comes from surcharges imposed on health care services. Plaintiffs continue to receive an (uncapped) cash award for pain and suffering and compensation for lost earnings or other expenses from the defendants.

The law does not provide a faster way to resolve disputes outside the lengthy and expensive litigation process. Rather, it still requires a verdict or settlement before a person is eligible for compensation. Attorneys continue to receive contingency fees based on the entire award, including future health care costs that will be covered by the Fund. The minimal financial impact on plaintiffs' lawyers helps explain why this reform, in particular, was enacted.

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The law has substantially reduced medical malpractice insurance costs for hospitals in a narrow, but very expensive, subset of cases.[132] However, it does not significantly alter New York's broader medical liability environment.

Wrong direction, again

The step forward of the Neurologically Impaired Infant Medical Indemnity Fund has been followed by a big step backwards, with the passage of a law expanding the liability exposure of health care providers by extending the time period during which lawsuits can be filed.

Currently, New York's statute of limitations allows for a medical malpractice claim to be filed up to two and a half years from the time the alleged malpractice occurred.[133] A bill known as "Lavern's Law," passed by the Legislature in June 2017, alters the start of the two and a half year window to begin at the time the plaintiff discovers or should have reasonably discovered an injury, so long as the suit is brought within seven years of treatment.[134] As initially introduced, the bill would have applied to all medical malpractice claims, but it was amended to apply only to patients with cancers and malignant tumors who allege they were misdiagnosed.[135]

As of this writing, the bill has not made it to Governor Cuomo's desk. The Governor has indicated that he supports the bill in principle, despite warnings from the Medical Society of the State of New York and the Greater New York Hospital Association that it will add to the cost of practicing medicine and further discourage doctors from practicing in the state. Fear of litigation may also reduce the availability of screening services such as mammography.[136] While the "discovery rule" provided in the bill is not out of the mainstream for state malpractice laws, New York lacks the critical safeguards present in most states that create a balanced and fair system for deciding malpractice cases.

Plaintiffs' lawyers are also seeking to loosen one of the few significant tort reforms adopted by the state since the 1980s—a limit on attorney contingency fees in medical malpractice cases. Under current law, attorneys can receive up to 30 percent of the first $250,000 recovered; 25 percent of the recovery between $250,000 and $500,000; 20 percent of recovery between $500,000 and $1 million; 15 percent of the recovery between $1 million and $1.25 million; and 10 percent of any recovery above $1.25 million.[137] A plaintiffs' attorney can petition the court for a larger fee award if, in extraordinary circumstances, this schedule will not result in adequate compensation.[138] This system preserves recovery for people who are injured by medical malpractice.

A bill pending in the Legislature, however, would slide the sliding scale toward plaintiffs' lawyers, giving them 30 percent of the first $1.25 million and 25 percent of any amount above that level by the end of 2020.[139]

Proposed reforms

The Legislature can take several steps to improve the state's medical liability climate:

- Place a reasonable limit on noneconomic damage awards in medical malpractice cases.
- Adopt stronger certificate of merit requirements or provide pre-trial screening panels staffed with qualified medical experts to review malpractice claims. These steps would encourage early settlement of claims that have merit, while deterring lawyers from filing meritless claims.
- Adopt expert witness qualification standards for medical malpractice suits.
- Amend the State's Civil Practice and Law Rules to require advance disclosure of expert witnesses, which would provide more transparency in the litigation process.
- Allow medical professionals to express their condolences or apologies to patients or their families without the threat that it will be admissible in court as evidence of wrongdoing or guilt in medical malpractice cases.

3. Automobile accident liability: New York drivers' high insurance rates

The cost of automobile liability insurance in New York ranks among the nation's highest,[140] and is rising. New York drivers, on average, pay 28 percent more than they did just seven years ago.[141] Excessive liability, fraud and lawsuit abuse play a significant role.

According to a 2017 report by the National Association of Insurance Commissioners (NAIC), New York ranked third nationally, behind New Jersey and Michigan, in terms of the highest average auto insurance expenditure in 2014 (see Table 1, below).[142] New York policyholders spent an average of $1,205 for auto insurance, or nearly 40 percent more than the national average of $866.[143] On average, New Yorkers pay 50 percent more for the liability portion of their insurance coverage than drivers in other states. New York also ranked third among states in highest average auto insurance expenditure in 2011, 2012 and 2013.[144]

Table 1: Average Auto Expenditures, 2014

	State	Average Expenditure	Combined Average Premium	Liability Average Premium	Collision Average Premium	Comprehensive Average Premium
1	New Jersey	$1,263.67	$1,379.20	$881.58	$371.36	$126.26
2	Michigan	$1,227.36	$1,350.58	$811.43	$390.03	$149.11
3	**New York**	**$1,205.03**	**$1,327.82**	**$796.39**	**$366.36**	**$165.07**
4	Louisiana	$1,192.92	$1,364.17	$750.23	$402.04	$211.90
5	District of Columbia	$1,192.45	$1,324.39	$629.25	$461.49	$233.65
6	Florida	$1,140.84	$1,208.81	$837.24	$259.86	$111.71
7	Delaware	$1,125.74	$1,215.69	$795.35	$303.86	$116.49
8	Rhode Island	$1,106.08	$1,257.38	$739.85	$392.36	$125.17
9	Massachusetts	$1,035.52	$1,107.76	$598.71	$376.42	$132.64
10	Connecticut	$1,031.70	$1,132.78	$642.95	$359.03	$130.80
	National Average	$866.31	$982.27	$530.51	$308.32	$143.45

Source: National Association of Insurance Commissioners, Auto Insurance Database Report 2013/2014 (Jan. 2017)

Policyholders in New York also contend with significant volatility in the amounts they pay compared to other states. For instance, a study of auto insurance policy rates in more than 100 New York cities found that costs may differ by nearly *three times* between the most expensive and the least expensive cities.[145] A driver might see a nearly $2,000 difference for the same auto insurance coverage in the most expensive area (New York City) and the most affordable area (Corning).[146] A policyholder in Brooklyn, for example, is estimated to pay an average of more than $3,500 a year—more than double the state's overall average.[147] (See Figure 3, page 24.)

Contributing factors

New York's high auto insurance costs cannot be attributed to any single factor or cause, but the state's liability system certainly contributes. Insurance rates may vary due to numerous factors, including traffic density, the frequency of thefts or accidents where the policyholder lives or most frequently drives or the cost-of-living differences between cities, boroughs and zip codes in New York. Still, New York drivers face comparatively higher insurance costs than other states even when one considers significant positive developments such as improvements in automobile safety that have reduced auto crashes in New York over time,[148] and vehicle thefts in areas such as New York City have fallen 96 percent between 1990 and 2013.[149] What has continued to increase over time, though, regardless of where a driver lives in New York, is litigation and liability exposure.

There are fewer car accidents, but more lawsuits. In 2015, roughly 31,000 motor vehicle-related lawsuits were filed in New York.[150] That total represents a 7 percent increase in lawsuit filings since 2010.[151] Yet, the number of motor vehicle crashes in New York dropped 7 percent during that same period and the percentage of accidents involving serious or moderate injuries fell by double digits.[152] This continues a long trend in New York of lawsuits increasing even as driving has become safer.[153]

No-fault New York

New York is among a minority of states that operate a "no-fault" auto insurance liability system. The no-fault system was established in part to avoid personal injury litigation and reduce costs by ensuring a prompt recovery for injured motorists. But in New York, drivers have the option of stepping outside the no-fault system and into the tort litigation system to recover for a "serious injury."[154]

Consequently, a driver alleging personal injury damages in excess of $50,000 due to the negligence of another driver is likely to pursue a tort action notwithstanding the state's no-fault regime. A "serious injury" claim is supposed to be reserved for

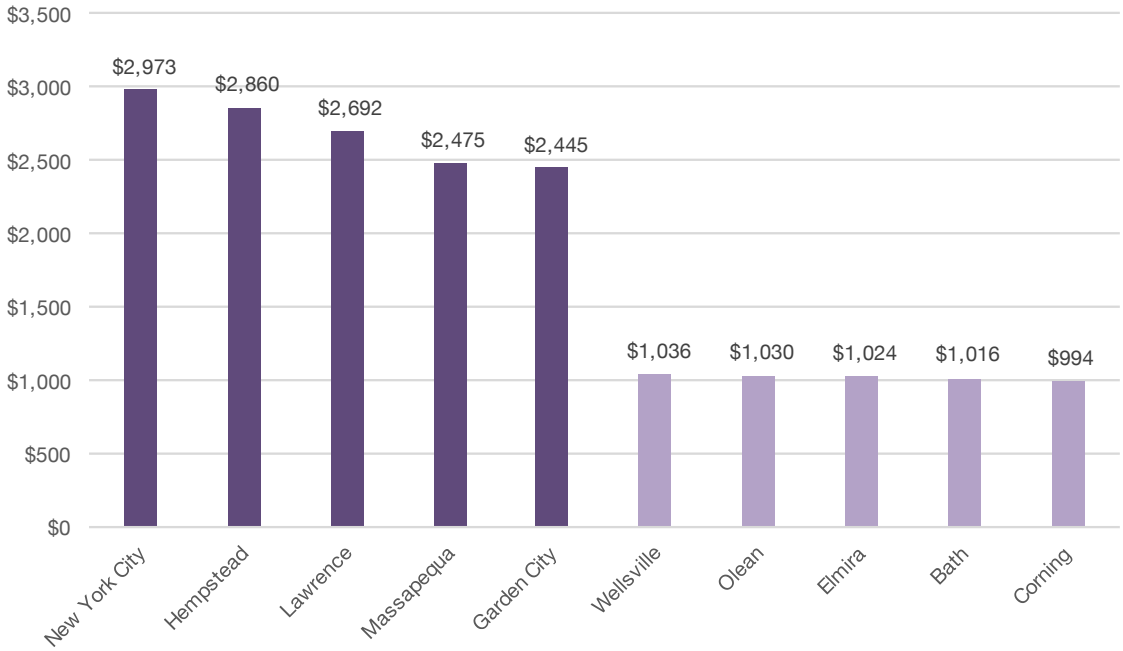
Source: Institute for Traffic Safety Management & Research, Traffic Safety Statistical Repository, Crash Reports, Statewide Crashes and Office of Court Research of the New York State Unified Court System data.

injuries such as death, dismemberment, disfigurement or other permanent loss of function,[155] but the threshold has been watered down over time to allow lawsuits outside the no-fault system for a much broader range of injuries.[156] Lawyers often find a medical professional to support "serious injury" claims based on relatively minor conditions such as headaches or dizziness[157] or numbness,[158] and get these claims in front of a jury. A court has even found that a cracked tooth, visible only on an x-ray at the dentist's office, fell within the definition of serious injury, finding it qualifies as a "fracture" under the law.[159]

In addition, a driver who sustains only property (e.g. vehicle) damage is free to pursue a tort claim outside of New York's no-fault system. These options produce higher total liability costs for insurers that are passed on to policyholders.

New York's no-fault system is supported in part by mandatory personal injury protection (PIP) coverage (often called "no-fault" coverage). In addition to this required coverage, New York requires drivers to carry uninsured motorist (UM) coverage.[160] Further, like many states, New York imposes mandatory minimums on the amount of auto liability insurance coverage a driver must obtain. This minimum is $25,000 for bodily injury and $50,000 for death for a person involved in an accident, with these amounts doubled for an accident involving two or more people.[161] A driver must also have at least $10,000 in coverage for property damage for a single accident.[162] Although these mandatory minimums are in the mainstream compared to other states,[163] the combination of these required coverages and additional PIP and UM coverages impose comparatively higher baseline costs within New York's largely optional no-fault system.

Figure 3
Areas with Highest and Lowest Average Car Insurance Rates in New York



Source: ValuePenguin, How Cities in New York Ranked Based on Car Insurance Costs

Auto insurance fraud

Another significant contributor to the high price drivers pay for coverage in New York is insurance fraud. The state Department of Financial Services (DFS) estimates that *up to 36 percent* of all auto insurance claims contain "some element of fraud, resulting in higher insurance premiums for everyone."[164]

A study of New York's no-fault auto insurance liability system conducted by the Insurance Research Council (IRC), which covered the period of 2007 through 2010, reported that fraud was prevalent, particularly in the New York City area.[165] The IRC found that around one out of every five closed no-fault claims appeared to contain some element of fraud and that as many as one in three closed claims appeared to be inflated.[166] The IRC concluded that between 2007 and 2010 the percentage of no-fault claims that were fraudulent or inflated rose from 29 percent to 35 percent.[167]

The IRC's study also found that fraud occurred in 22 percent of all New York City metropolitan area no-fault auto insurance claims during a period in 2010, and found another 14 percent of claims involved inflated damage claims.[168] By comparison, outside New York City, fraud and inflated claims were found in significantly lower levels.[169] The IRC subsequently reported additional findings showing that claimed losses for medical expenses, lost wages and other expenses from auto accidents in New York City rose 70 percent in the 10 years ending in 2010, well beyond the 49 percent increase in medical care inflation over the same period.[170]

A later study by the National Insurance Crime Bureau (NICB) reported a 29 percent spike in "questionable" insurance claims in New York between 2010 and 2012.[171] Of the types of insurance studied, the "top five" loss types for "questionable claims" were: PIP, bodily injury, collision, theft and other automobile insurance.[172]

The most recent annual report of the Financial Frauds & Consumer Protection Division of DFS indicates that fraud remains a major problem. The Division indicates that the number of reports of suspected fraudulent auto insurance claims rose 12 percent between 2012 and 2016.[173] Suspected no-fault fraud reports, while slowly falling over that five-year period,[174] accounted for more than half of all fraud reports (including all insurance products) in 2016.[175] As DFS notes, "Deceptive healthcare providers and medical mills that bill insurance companies under New York's no-fault system cost New York drivers hundreds of millions of dollars."[176]

Uncertain "bad faith" law

A significant driver of liability insurance costs nationally is litigation alleging an insurer has acted in "bad faith" in denying a claim. Lawsuits alleging "bad faith" are traditionally reserved for malicious and intentional insurer misconduct, such as purposefully refusing to pay a valid claim, but the standard for bringing litigation has been watered down to allow claims in which an insurer did not engage in any purposeful misconduct.

In some cases, plaintiffs' lawyers engage in tactics designed to "set up" insurers so that they can bring a bad faith claim against the insurer.[177] Why might a plaintiffs' lawyer do this? The answer is that a bad faith claim can expose an insurer to liability far beyond the limits of an insurance policy. This means that adding a bad faith claim to any existing claim has the potential to turn a modest coverage dispute into a multi-million dollar recovery.[178] Over the past decade, there has been significant uncertainty regarding New York law in this area.[179] Courts have reached different conclusions regarding whether claimants can bring certain bad faith claims, and, if so, what damages are recoverable.[180]

In 2008, New York's highest court ruled that policyholders can recover a broader range of out-of-pocket damages–called "consequential damages"–against insurers beyond the limits of an insurance policy, so long as these damages were reasonably foreseeable.[181] New York's lower courts have since interpreted this decision in different ways, creating significant uncertainty as to how the state's bad faith law applies.[182] At the same time, plaintiffs' lawyers eager to establish an even broader bad faith law in New York have supported legislation in recent years that would accomplish this objective.[183] The result is that New York's insurance liability landscape is marred by persistent uncertainty, which makes insurer pricing of policies challenging and increases costs for all policyholders.

New York's insurance liability landscape is marred by persistent uncertainty.

Proposed reforms

New York can address its high auto insurance costs by taking action in two areas: reducing potential for abuse of the no-fault system and providing clarity with respect to bad faith claims.

First, the Legislature and the Department of Financial Services could strengthen New York's no-fault system to combat insurance fraud and abuse. The Insurance Information Institute presents several options for consideration, such as:

- Provide insurers with an opportunity to defend against paying a claim that an insurer believes is not medically necessary or may be fraudulent when the insurer, for that reason, does not pay a no-fault claim within the statutorily required 30-day period.

- Reduce the potential for litigation and abusive practices by limiting a policyholder's assignment of no-fault benefits to unrelated third-parties.

- Require claimants to provide basic information showing that medical services were medically necessary and provided by a properly licensed practitioner.[184]

Other options include requiring certain disputes to be resolved through arbitration, requiring clinics to be owned and staffed by healthcare professionals and available for inspection and decertifying no-fault medical care providers that engage in fraudulent activities.[185]

Second, the Legislature could address the cloud of uncertainty hanging over New York's "bad faith" insurance law. It could amend existing statutes to clarify that these statutes provide the exclusive right of action and remedy for bad faith, and place reasonable limits on the scope of damages permitted. These reforms would go a long way in improving the state's liability environment and curbing unwarranted costs.

In addition, bringing New York's general liability laws into the mainstream, such as by adopting modified comparative fault, is likely to reduce automobile insurance rates.

4. New York City asbestos litigation: Plaintiff-friendly procedures, expansive liability and substantial awards

Asbestos litigation is a big-money industry in New York, with plaintiffs' lawyers competing for cases that generate lucrative fees. A special court, known as the New York City Asbestos Litigation (NYCAL) court, is devoted solely to litigating (and pushing toward settlement) asbestos claims. That court was established in 1986 to handle a crush of asbestos-related lawsuits after the state expanded the time period for filing such claims. In a recent case filing, the City of New York itself recently questioned why a special court "favor[ing] a very few plaintiffs at the expense of the rights of asbestos defendants," continues to exist when the initial surge of cases is long over.[186]

Until 2009, New York had a reputation for fairly administering its asbestos docket, based on a case management order developed through negotiations between lawyers representing plaintiffs and defendants. That changed in 2009, when Justice Sherry Klein Heitler, who had close ties to Assembly Speaker Sheldon Silver, took NYCAL's reins.

Justice Heitler altered the case management order's careful compromises to create so many advantages for plaintiffs that the court attracted more nonresident plaintiffs—"litigation tourists." Today, New York City is the third most popular jurisdiction in the country for the filing of asbestos lawsuits,[187] hosting one of every six asbestos verdicts.[188]

In recent years, two judges have succeeded Justice Heitler on NYCAL's front bench, but the balance of the case management order has not been restored.

The widening net

Asbestos lawsuits initially centered on the production and installation of thermal insulation products that, according to most scientific literature, present the highest excess exposure risk to workers.[189]

Following a wave of bankruptcies among asbestos manufacturers in the early 2000s, plaintiffs' attorneys shifted their litigation strategy towards businesses associated with making and distributing products such as gaskets, pumps, automotive friction products and residential construction products.

Since that time, as the *Wall Street Journal* found, the litigation "spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing."[190] Today, an asbestos defendant "could be a local plumbing company or a business selling a component to another entity that put that product into the marketplace," an experienced product liability litigator in Buffalo observed.[191] One plaintiffs' attorney has described the litigation as an "endless search for a solvent bystander."[192]

Silver-plated asbestos litigation

First elected to the state Assembly in 1976, rising through a series of increasingly influential positions to become Assembly speaker in 1993, Sheldon Silver was for more than two decades one of the most powerful figures in New York's state government.

During his last 13 years in office, Silver also served in an "of-counsel" role with Weitz & Luxenberg—a large personal injury firm specializing in asbestos litigation. In 2013 alone, Silver reported earning between $650,000 and $750,000 from outside legal work, although for years he had ducked questions on precisely what he did for the firm.[235]

In 2015, a federal grand jury charged that Silver collected more than $3 million in legal fees from asbestos-related cancer cases steered to his law firm through a Columbia University Medical Center oncologist, who in turn benefitted from two research grants totaling $500,000 and other official favors from the speaker. [236]

In November 2015, a jury convicted Silver of honest-services fraud, extortion and money laundering, which resulted in his automatic removal from office.[237] In May 2016, a judge sentenced the former speaker to a dozen years in prison.[238] A federal appeals court overturned his conviction in July 2017, however, based on a U.S. Supreme Court ruling in another political corruption trial involving former Virginia Governor Bob McDonnell. Silver's retrial is tentatively scheduled for April 2018.

Whatever the ultimate outcome, the Silver case highlighted the confluence of big money and political power that lies behind one what remains one of the most lucrative areas of tort litigation in New York or any state.

A nearly impossible standard

Plaintiffs' lawyers in asbestos cases commonly name dozens of companies as defendants, alleging that their client was exposed to many sources of asbestos. Businesses unjustly pulled into such litigation have a difficult time getting out.

The NYCAL court requires a defendant seeking summary judgment (dismissal after the discovery process) to show "unequivocal evidence that its product could not have contributed to plaintiff's injury."[193] It is not enough to show that a plaintiff has no evidence that he or she was exposed to the company's asbestos-containing products.[194]

As a result of this guilty-unless-proven-innocent approach, NYCAL judges routinely deny motions for summary judgment. They do so even when the plaintiff does not identify an asbestos-containing product made by the defendant or recall seeing the defendant's products when working,[195] the plaintiff's description of a product does not match a product made by the defendant[196]—even when the plaintiff believes that the product he used did not contain asbestos.[197]

For example, in a lawsuit filed in NYCAL against Utica Boilers, Inc. and Fulton Boiler Works, Inc., among others, Mack Ricci alleged that he developed mesothelioma through secondhand exposure to asbestos products brought home on his father's clothing. His father, Aldo Ricci, said in a deposition that he generally recalled observing contractors removing asbestos-containing insulation from the exterior of boilers when he worked as a draftsman engineer. But the elder Ricci did not remember observing anyone working on a Fulton or Utica boiler. Indeed, when asked whether he believed he came into contact with asbestos from a Fulton or Utica boiler, Aldo Ricci said "No." Nevertheless, the judge refused to dismiss the claims and found the father's testimony to be a credibility issue for the jury.[198]

The NYCAL court also requires defendants to submit the affidavit of a corporate representative with personal knowledge of the case in support of a motion for summary judgment. If the company cannot produce an employee whose tenure coincided with the plaintiff's employment or presence at the facility, the court will ignore the submitted affidavit.[199] A defendant's failure to submit affidavits supporting its motion may give the court a sufficient basis to deny summary judgment.[200] Given the long latency period for asbestos-related injuries, this personal knowledge requirement is often impossible for a company to meet.

Prejudicial consolidation

The NYCAL combines multiple asbestos cases that have little in common for trial, a highly prejudicial practice that raises serious due process concerns.[201]

In recent years, several jurisdictions stopped or substantially curbed the use of trial consolidations in asbestos cases.[202] The national trend is to prohibit consolidation of asbestos trials absent the consent of all parties.[203] Yet, in NYCAL, small consolidations of cases remain routine.[204] The amended NYCAL case management order issued in June 2017 provides that trial judges may join up to three cases for jury trial for plaintiffs demonstrating certain criteria.

Consolidated trials can make it hard for jurors to keep straight the "maelstrom of facts, figures, and witnesses."[205] Inflammatory facts in one case can color a jury's perception of joined cases and amount to guilt by association. Consolidation can also bolster weak claims because jurors may assume that if multiple plaintiffs allege injuries from a particular product, then the claims must have merit, even when they lack objective support. In addition, jurors may have trouble differentiating asbestos products with different fiber types and potencies, lumping them together as simply "asbestos." Other risks of prejudice arise when cases of plaintiffs with different diseases are joined for trial or when personal injury claims are joined with wrongful death claims.

Consolidated trials can make it hard for jurors to keep straight the "maelstrom of facts, figures, and witnesses."

Empirical evidence shows that consolidated trials of small groups of plaintiffs, such as those in NYCAL "significantly improve outcomes for plaintiffs."[206] In fact, recent "NYCAL data suggests that consolidated trial settings create administrative and jury biases that result in an artificially inflated frequency of plaintiff verdicts at abnormally large amounts."[207] A study of NYCAL jury awards for 2010 through 2014 found that verdicts in consolidated trials were "250% more per plaintiff than NYCAL awards in individual trial settings over that same span, and 315% more per plaintiff than the national average award."[208] Plaintiffs' lawyers say consolidation promotes efficiency, but this is not only unsupported by evidence,[209] it cannot justify unfair trials.

Disproportionate liability

As noted above, New York law generally provides that any defendant that is found to have even slightly contributed to a plaintiff's harm may be required to pay a plaintiff's full medical expenses and other economic damages, but a defendant that is less than 50 percent responsible is liable only for its "fair share" of the plaintiff's noneconomic damages, such as pain and suffering.[210] This law allows minor players to avoid liability that is out of proportion to their share of fault. However, the law makes an exception for defendants found to have acted with "reckless disregard for the safety of others."[211] This can make even a minimally at-fault defendant liable for the entire award.

The NYCAL court routinely instructs juries to find recklessness on the part of defendants in situations that fall far below the high bar set by the state Court of Appeals.[212] As a result, businesses pay awards that exceed their responsibility for the harm.[213] The threat of a disproportionate award also leads to "large settlements even where exposures to that defendant's products may be negligible."[214]

The threat of punitive damages

When asbestos cases go to trial in New York, it is not unusual to see extraordinarily large awards, primarily for noneconomic damages such as pain and suffering, "loss of consortium" or deprivation of the benefits of a family relationship. For example, a NYCAL jury awarded $75 million in a single mesothelioma case in January 2017.[215] Many of these awards are reduced,[216] but even post-reduction awards are larger than verdicts seen elsewhere.

Punitive damages serve no proper purpose in asbestos litigation.

In addition, defendants in asbestos cases in New York face a threat of punitive damages. Punitive damages serve no proper purpose in asbestos litigation since the alleged misconduct occurred decades ago, the defendants are no longer engaged in asbestos-related business activities, the primary defendants are long bankrupt and further bankruptcies will only make it more difficult for plaintiffs to recover compensatory damages.[217] For those reasons, in 1996, Justice Helen Freedman, then-presiding administrative law judge for all NYCAL cases, began deferring punitive damage claims, taking the potential for a jackpot verdict off the table and facilitating reasonable settlements.[218]

But in April 2014, Justice Heitler granted a request by plaintiffs' lawyers to lift the longstanding ban on punitive damages.[219] The Appellate Division of the state Supreme Court held that she had the authority to modify the case management order, but struck down her plan to leave defendants guessing until the close of evidence at trial as to whether punitive damages would be sought by the plaintiff, and stayed the filing of punitive damages claims. The appellate court remanded the matter to her successor, Justice Peter Moulton, to determine whether punitive damages claims should be allowed and, if so, what procedural protocols should be adopted to ensure due process rights are protected for defendants.[220] In June

2017, just before his own elevation to the appellate court, Justice Moulton issued a case management order that did not reinstate the deferral policy.[221] Thus, punitive damages are now available for cases put on the trial calendar after the order's effective date.

Tort and trust manipulation

Justice is also undermined in NYCAL because plaintiffs' lawyers claim in lawsuits that solvent companies are responsible for their client's injuries, and then later file trust claims pointing the finger at bankrupt companies as the source of their asbestos exposure.

When the most active defendants in the asbestos litigation declared bankruptcy, they established asbestos personal injury compensation trusts to pay future asbestos claims. Lawyers for some plaintiffs assert that the NYCAL case management order allows them to delay filing claims for compensation from these trusts until after a personal injury case settles or is tried to a verdict.[222]

By delaying trust claims, plaintiffs' counsel can suppress evidence of a plaintiff's trust-related exposures, effectively thwarting efforts by still-solvent defendants to apportion fault to others that may bare significant responsibility. Then, after the trial or settlement, lawyers file trust claims blaming the insolvent companies for a plaintiff's injury.[223] These tactics artificially inflate plaintiff recoveries at the expense of tort defendants and potentially at the expense of future asbestos claimants too.[224]

The June 2017 NYCAL case management order recognized these problems, but failed to adequately address them. In July 2017, Justice Lucy Billings was appointed as the new NYCAL Coordinating Judge. This provides an opportunity for revisiting the order, which defendants have challenged in the Court of Appeals, and establishing more balanced procedures.

Proposed reforms

Addressing the factors that have contributed to making New York City a hub for asbestos litigation will require a combination of legislative and judicial action.

The Legislature should:

- Abolish joint and several liability and any exception for recklessness so that solvent businesses with only a peripheral role in the litigation are not on the hook for the plaintiff's entire damage award.

- Enact the "Truth, Fairness, and Transparency in Asbestos Litigation Act,"[225] which requires plaintiffs to file all eligible asbestos trust claims soon after commencing an asbestos personal injury case.[226]

NYCAL defendants have challenged the June 2017 case management order, arguing it deprives them of statutory and due process rights without their consent. If any aspect of that order is permitted to stand, it should, at a minimum:

- Protect the future recovery of claimants by deferring punitive damage claims.
- Stop consolidation of multiple cases for trial, which confuses juries and is highly prejudicial to defendants.
- Require plaintiffs' lawyers to file all eligible asbestos trust claims early in the discovery process and specify that trust claims materials are admissible.

CONCLUSION

This report explains how New York's tort laws make the Empire State a national liability outlier, serving narrow special interests rather than the broad interests of consumers, workers and employers.

The following key reforms can be viewed as essential first steps for bringing New York's liability system closer to the national mainstream:

- Move to a modified comparative fault system, which would bar damages for plaintiffs found to have been primarily responsible for their own injuries.

- Eliminate joint liability, holding defendants liable only in proportion to their actual level of responsibility for an injury.

- Adopt reasonable constraints on product liability actions, aligning more closely with other states' laws, as recommended three decades ago by then-Governor Mario Cuomo's Jones Commission.

- Limit subjective and unpredictable awards for noneconomic damages such as pain and suffering, and tie the maximum amount of a punitive damage award to the plaintiff's injury.

- Reduce New York's judgment interest to a level tied to market interest rates.

In addition to these fundamental reforms, changes are needed to address inequities in specific areas of tort liability.

New York can reduce private and public construction costs by eliminating absolute liability under the Scaffold Law, allowing juries to fairly consider whether the worker's actions contributed to the accident.

The state can control medical malpractice costs while protecting patient interests by adopting stronger certificate of merit requirements and expert witness qualification standards, and allowing medical professionals to express their condolences or apologies to patients or their families without the threat of liability.

To lower the cost of auto insurance in New York, the state should address insurance fraud and abuse in the state's no-fault system and clarify the requirements for "bad faith" lawsuits against insurers.

Finally, New York can restore fairness in how asbestos lawsuits are decided by requiring plaintiffs' lawyers to file claims with asbestos trusts soon after commencing a personal injury case, deferring punitive damage claims and stopping consolidation of multiple cases for trial.

Adopting these and other legal reforms would create a more balanced tort system and reduce the threat of unfair liability for those who live, work and do business in New York. They would also improve the reputation of the state's liability system, providing an incentive for businesses to locate or expand in New York and bringing much-needed jobs and investment.

ENDNOTES

1 See Paul J. Hinton & David L. McKnight, "Creating Conditions for Economic Growth: The Role of the Legal Environment," NERA Economic Consulting, commissioned by the U.S. Chamber Institute for Legal Reform (2011): Appendix B: Effects of Legal Environment on State Tort Costs and Business Activity. This cost captures damages paid to third parties either as settlements or verdicts, the litigation costs associated with defending those claims and the insurers' administrative costs associated with managing these claims. It does not include the cost incurred by the court system or any indirect cost of the tort system, such as litigation avoidance. *Id*. at 5.

2 See 2017 Lawsuit Climate Survey, "Ranking the States: A Survey of the Fairness and Reasonableness of State Liability Systems 2," U.S. Chamber Institute for Legal Reform (September 2017).

3 American Bar Association, "ABA National Lawyer Population Survey, Lawyer Population by State" (2017). See also Matt Leichter, "Lawyers Per Capita by State," The Last Gen X American, https://lawschooltuitionbubble.wordpress.com/original-research-updated/lawyers-per-capita-by-state/ (accessed Oct. 18, 2017). Connecticut, Massachusetts and New Jersey also fall in the top five, but range from having one lawyer for every 157 to 215 residents. Pennsylvania has one lawyer for every 258 residents. Only the District of Columbia, a jurisdiction that is unique in its concentration of attorneys due to the presence of the federal government, exceeded New York in lawyers per capita.

4 American Bar Association, "ABA National Lawyer Population Survey: 10-Year Trend in Lawyer Population by State" (2017).

5 See Hinton & McKnight, *supra*, at 23, Appendix B (estimating that improvements to New York's legal environment could create between 74,000 and 202,000 jobs).

6 See generally "Insuring Our Future: Report of the Governor's Advisory Commission on Liability Insurance" (1986) (hereinafter "Jones Commission Report").

7 *Id*., vol. II, at 192.

8 See Conn. General Statutes Annotated § 52-572h(b); Mass. General Laws ch. 231 § 85; N.H. Revised Statutes Annotated § 507:7-d; N.J. Statutes Annotated § 2A:15-5.1; 42 Pa. Statutes § 7102(a). A few states go further, retaining a rule that completely bars recovery when a plaintiff bares any responsibility for the injury. These jurisdictions include Alabama, Maryland, North Carolina, Virginia and the District of Columbia.

9 N.Y. Civil Practice Law & Rules § 1411 ("In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages."). Other jurisdictions that apply pure comparative fault include Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Rhode Island and Washington.

10 See Jones Commission Report, *supra*, vol. I, at 129-33.

11 N.Y. Civil Practice Law & Rules § 1601. Non-parties are not counted in this calculation if they could not be joined or are immune from liability. *Id*.

12 See N.Y. Civil Practice Law & Rules § 1602(4), (6), (9).

13 See N.Y. Civil Practice Law & Rules § 1602(5), (7), (11).

14 See *Boutsis v. Home Depot*, 371 F. Appendix 142, 143 (2d Cir. 2010). See also Steven M. Christman & Adam C. Calvert, "Federal Court Notice Standard in Premises Cases," *New York Law Journal*, March 2, 2015. In federal court, the burden is on the plaintiff to show *prima facie* evidence of notice.

15 *Petersel v Good Samaritan Hosp. of Suffern*, 99 A.D.3d 880 (2d Dep't. 2012).

16 *Farren v Board of Educ. of City of NY*, 119 A.D.3d 518 (2d Dep't. 2014).

17 Christman & Calvert, *supra*.

18 N.Y. Civil Practice Law & Rules § 214.

19 See Office of the Comptroller, City of New York, "Claims Report: Fiscal Year 2016," (Feb. 2017): 12.

20 See *id*.

21 See Chris Coffey, "City Shells Out Millions to Settle Sidewalk Injury Cases," NBC Chicago, March 17, 2014. Reporting Chicago spent nearly $6 million on settlements and judgments stemming from falls on city sidewalks between 2008 and 2013.

22 See Office of the Comptroller, City of New York, "Claims Report: Fiscal Year 2016," (Feb. 2017): 12. Indicating total payouts of $350.4 million between 2008 and 2016.

23 N.Y.C. Administrative Code § 7-210.

24 See generally Meggin Bednarczyk & Annette Cordasco, "How Small is Too Small: The Trivial Doctrine in New York Law," CityLand: New York City Land Use News & Legal Research, May 23, 2016.

25 See *Hutchinson v. Sheridan Hill House Corp. v. 301 Oriental Blvd., LLC v. QPI-VIII, LLC*, 41 N.E.3d 766 (N.Y. 2015).

26 See *id*. Reaffirming *Trincere v County of Suffolk*, 688 N.E.2d 489 (N.Y. 1997).

27 Bednarczyk & Cordasco, *supra*.

28 See Jones Commission Report, *supra*, vol. II, at 116-17, 123-24. Supporting a statute of repose at a length determined by the Legislature and finding it "manifestly unjust" to hold sellers of products to the same high standard to which the manufacturer is held unless the seller either knew or should have known of the injury-causing defect.

29 Conn. General Statutes § 52-577.

30 N.J. Statutes Annotated § 2A:58C-9.

31 See, *e.g*., Colo. Revised Statutes § 13-21-403; Kan. Statutes Annotated § 60-3304; Ky. Revised Statutes Annotated § 411.310(2); Mich. Compiled Laws Annotated § 600.2946; Tenn. Code Annotated §29-28-104(a); Tex. Civil Practice & Remedies Code Annotated § 82.008; Utah Code Annotated § 78B-6-703(2).

32 See, *e.g*., Ariz. Revised Statutes §§ 12-701 (FDA-approved drugs), 12-689 (all products and services approved or in compliance with federal or state law); N.J. Statutes Annotated § 2A:58C-5(c) (FDA-approved drug, medical device or food additive); Ohio Code Annotated §§ 2307.80(C)

(FDA-approved prescription drug, over-the-counter drug or medical device), **§ 2307.80**(D) (all other products that fully comply with applicable government safety and performance standards); Or. Revised Statutes Annotated § 30.927 (FDA-approved drugs); Tenn. Code Annotated §29-39-104(b), (e) (all products in substantial compliance with applicable federal and state regulations or approved by a government agency); Utah Code § 78-18-2 (FDA-approved drugs).

33 N.J. Statutes Annotated 2A:58C-5(c).

34 See Victor E. Schwartz & Cary Silverman, "The Case in Favor of Civil Justice Reform," *Emory Law Journal Online* 65, no. 2065, (2016): 2066-67. Documenting the rise of pain and suffering damages and the factors underlying this expansion.

35 These states include Alaska, California, Colorado, Florida, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nevada, North Carolina, North Dakota, Ohio, South Carolina, Texas, Utah, West Virginia and Wisconsin. Several additional states limit total damages (economic and noneconomic) in medical liability lawsuits.

36 These states include Alaska, Colorado, Hawaii, Idaho, Kansas, Maryland, Mississippi, Ohio, Oklahoma and Tennessee. Michigan limits noneconomic damages in product liability actions.

37 Jones Commission Report, *supra*, vol. I, at 149. The Jones Commission made no recommendation on whether to limit noneconomic damages in other contexts. *Id*. vol. II, at 146.

38 These states include Alabama, Alaska, Colorado, Connecticut (product liability only), Florida, Georgia, Idaho, Indiana, Kansas, Maine (wrongful death cases only), Mississippi, Montana, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia and Wisconsin.

39 N.J. Statutes Annotated § 2A:15-5.14.

40 Conn. General Statutes Annotated § 52-240b.

41 Other states that generally do not permit punitive damage awards unless expressly authorized by statute include Louisiana, Michigan, Nebraska, and Washington.

42 N.Y. Civil Practice Law & Rules §§ 5001, 5003, 5004.

43 Report of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York (January 2014): 141.

44 See New York State Conference of Mayors and Municipal Officials, "Interest Rates on Judgments Against Municipalities," StoptheTaxShift.org.

45 See N.Y. Civil Practice Law & Rules § 5519.

46 While most states have generally applicable appeal bond limits, several states have limited the size of appeal bonds, but applied the reform only to signatories to the "Master Settlement Agreement" (tobacco companies). In a few states, an appeal bond limit applies only to the punitive damages portion of the judgment, if any.

47 See Peter Geier, "States Looking at Appeal-Bond Caps," *National Law Journal*, Mar. 26, 2007.

48 New York limits appeal bonds only for medical, dental or podiatric malpractice judgments to the greater of $1 million or the judgment debtor's insurance policy coverage limit. See N.Y. Civil Practice Law & Rules § 5519(g).

49 For example, after the Florida Supreme Court lowered the traditional requirements for slip-and-fall cases, the Florida legislature adopted a law that requires a plaintiff to show circumstantial evidence that "[t]he dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition" or "[t]he condition occurred with regularity and was therefore foreseeable." Fla. Statutes Annotated § 768.0755. See also Shelley Rossetter, "Slip-and-Fall Suits to Lose Traction in Florida," *Tampa Bay Times*, June 27, 2010.

50 See, *e.g.*, Report of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York (Jan. 2014): 141. Proposing a variable rate that would be the rate of return on one-year Treasury bills plus 3 percent.

51 See generally William J. Greagan, "Reforming New York Labor Law Section 240(1), *Albany Law Review* 78, no. 167 (2015).

52 See Bill Kenealy, "Outside of New York, General Liability Premium Increases Stay Relatively Flat," *Business Insurance*, July 6, 2014. See also Meg Green, "Mass Withdrawal of Construction Liability Writers in NY Traced Back to Scaffold Law," *A.M. Best*, October 3, 2012.

53 N.Y. Labor Law § 240 provides: "All contractors and their agents…in the erection, demolition, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the purpose of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

54 See *Rocovich v. Consolidated Edison Co.*, 583 N.E.2d 932, 934 (N.Y. 1991). *Zimmer v. Chemung County Performing Arts, Inc.*, 482 N.E.2d 898, 899 (N.Y. 1985).

55 *Dahar v. Holland Ladder & Mfg. Co.*, 964 N.E.2d 402 (N.Y. 2012). See also *Racovich*, 583 N.E.2d at 934: "[W]e have determined that the duty under section 240(1) *is nondelegable* and that an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control." (Emphasis in original.)

56 See *Blake v. Neighborhood Hous. Serv. of N.Y.C., Inc.*, 803 N.E.2d 757, 760 (N.Y. 2003).

57 *Id*.

58 Defendants can assert that the plaintiff was a "recalcitrant worker" as a defense, meaning that the plaintiff was provided with and instructed to use safety equipment, refused to do so, and this refusal was the sole cause of the accident. See *Cahill v. Triborough Bridge & Tunnel Auth.*, 823 N.E.2d 439, 441 (N.Y. 2004).

59 See *Holly v. County of Chautauqua*, 922 N.E.2d 897 (N.Y. 2010). In case involving a worker who lost his balance while installing cinderblocks on a six-foot-high scaffold and suffered a fractured heel, finding issues of fact as to whether defendants provided proper protection to plaintiff precluded summary judgment on liability for plaintiff. See also Hugh Russ, III & Ryan Cummings, "Significant Court of Appeals Victory Limits Scope of New York State's Labor Law § 240(1)," Hodgson Russ. Discussing case history and impact.

60 See, *e.g.*, *Racovich*, 78 N.Y.2d at 501. *Piccione v. 1165 Park Ave., Inc.*, 258 A.D.2d 357, 685 N.Y.S.2d 242 (1st Dep't 1999).

61 See *Amo v. Little Rapids Corp.*, 301 A.D.2d 698, 700, 754 N.Y.S.2d 685, 687 (3d Dep't 2003). Finding Scaffold Law applied to claim involving 16-inch fall from a boulder that worker was jackhammering during excavation of basement floor.

62 *O'Brien v. Port Auth. of N.Y. & N.J.*, 74 N.E.3d 307 (N.Y. 2017). Finding the plaintiff was not entitled to summary judgment on the issue of liability and remanding for trial requiring expert testimony over whether staircase provided adequate protection from fall. A commentator observes that that the worker was aware of the rainy weather conditions and had a dry interior staircase available to him, but chose to use the wet external staircase—facts that would support a finding of comparative fault if that doctrine applied to Scaffold Law claims. See George M. Heymann, "Is the Scaffold Law's 'Strict Liability' Taking a 'Step' Down," *New York Law Journal*, August 1, 2017.

63 See *McCoy v. Abigail Kirsch at Tappan Hill, Inc.*, 99 A.D.3d 13, 951 N.Y.S.2d 32 (2d Dep't 2012).

64 See "Injuries from Falls From Heights—The Scaffold Law, Labor Law 240(1)," Mark E. Seitelman Law Offices, P.C., accessed November 15, 2017.

65 See "Top Verdicts and Settlements," *New York Law Journal*, June 5, 2017, at 6 (ranked 7th, 8th, 12th, 16th, and 20th).

66 *Id.*

67 See *id.* at 61-63.

68 See Jacques DeGraff, "NY's Worst Law Helps Lawyers, Kills Construction," *New York Post*, February 9, 2014.

69 Greagan, *Albany Law Review* 78: 184.

70 *Id.* at 167.

71 See 749 Illinois Compiled Statutes § 150/0.01-9 (1996). Repealed 1995.

72 See Michael R. Hattery et al., "The Costs of Labor Law 240 on New York's Economy and Public Infrastructure," Nelson A. Rockefeller Institute (2013): 13-19 [hereinafter "Rockefeller Institute Report"].

73 See *id.* at 8.

74 See New York State Builders Association, "Scaffold Law Reform."

75 See "N.Y. Group: Scaffold Law Will Consume Billions From Public Projects Spending," *Insurance Journal*, January 25, 2016. Lawsuit Reform Alliance of New York, Press Release, "Lawsuit Reform Alliance Estimates $200m in Additional Costs for LaGuardia Airport Project Due to the 'Scaffold Law'," July 30, 2015.

76 Matt Chaban, "Builders, Insurers Stepping Up Effort to Dismantle Scaffold Law," *Crain's New York Business*, March 17, 2013. See also Daniel Geiger, "School Authority Hit With Huge Bill," *Crain's New York Business*, December 8, 2013.

77 See New York State School Boards Association, "Scaffold Law Hampering Schools Statewide," February 25, 2014.

78 See Scaffold Law Reform, "Quick Facts on Scaffold Law Reform." Analyzing claims data provided by the Port Authority of New York and New Jersey for policy years 2002 to 2012. The data also indicates that the Port Authority received twice as many claims, and was subject to more than three times as much liability for construction-related injuries on New York projects than New Jersey projects. This indicates that, as a result of the Scaffold Law, workers in New York are inclined to sue more and get more than elsewhere.

79 Matt Chaban, "Builders, Insurers Stepping Up Effort to Dismantle Scaffold Law," *Crain's New York Business*, March 17, 2013. See also "Time to Get Rid of Outdated Scaffold Law," *Observer-Dispatch* (Utica) Editorial, October 27, 2017.

80 See Rockefeller Institute Report, *supra*, at 51, 56-57.

81 See Judith Nelson, Letter to the Editor, "Scaffold Law Hinders Habitat for Humanity," *Albany Times Union*, October 27, 2017.

82 Letter from All Hands Volunteers, Friends of Rockaway, St. Bernard Project, and Stephen Siller Tunnel to Towers Foundation to Governor Cuomo, Assembly Speaker Silver, Majority Leader Skelos and Majority Leader Klein, April 22, 2014.

83 *Id.*

84 New York State Conference of Mayors and Municipal Officials, "Scaffold Law," StoptheTaxShift.org. Concerned that the Scaffold Law is siphoning taxpayer dollars from major public infrastructure projects, Congressman John Faso (R-NY), recently introduced federal legislation that would require application of a comparative fault standard in any gravity-related accident on a construction project funded with federal money. See Infrastructure Expansion Act of 2017, H.R. 3808 (introduced Sept. 21, 2017). See also John Faso, Letter to the Editor, "Scaffold Law Harms Business, Taxpayers," *Albany Times Union*, September 26, 2017.

85 "2017 Medical Malpractice Payout Analysis," Diederich Healthcare, February 27, 2017. "2016 Medical Malpractice Payout Analysis," Diederich Healthcare, April 18, 2016. "2015 Medical Malpractice Payout Analysis," Diederich Healthcare, March 10, 2015. "2014 Medical Malpractice Payout Analysis," Diederich Healthcare, February 25, 2014. "2013 Medical Malpractice Payout Analysis," Diederich Healthcare, May 2, 2013. "2012 Medical Malpractice Payout Analysis," Diederich Healthcare, March 15, 2012 ($677,866.050).

86 "2017 Medical Malpractice Payout Analysis," Diederich Healthcare, February 27, 2017.

87 *Id.* Indicating Pennsylvania had total payouts of $315.5 million and New Jersey had payouts totaling $299.2 million.

88 *Id.* New York's medical malpractice payouts are equivalent to $35.49 per resident. This is the second highest per capita payout of the states (the average per capita payout for the Northeast, which is three times greater than the next highest region, was $27.56). *Id.* In comparison, payouts in California, which has adopted liability reforms, are just $235.2 million, or $5.99 per capita.

89 According to data provided by the New York State Unified Court System, Office of Court Research, medical malpractice filings statewide decreased from 4,271 in 2007 to 3,552 in 2014.

90 Medical Society of the State of New York, 2017 Legislative Program, 2017.

91 "The Facts About New York State Medical Malpractice Coverage Premiums," Excellus Blue Cross Blue Shield, Winter 2016.

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

96 Medical Society of the State of New York, 2017 Legislative Program: 2.

97 "New Jersey Medical Malpractice Insurance Overview," Arthur J. Ghallagher & Co.

98 "Massachusetts Medical Malpractice Insurance Market Summary," Arthur J. Ghallagher & Co.

99 "Medical Liability Reform Now!" American Medical Association, 2017.

100 See Medical Society of the State of N.Y., Memorandum in Opposition to 2015 N.Y. Leg., S. 4002, June 17, 2015.

101 "Where are the Doctors? Results of HANYS' 2015 Physician Advocacy Survey," Healthcare Association of New York State, 2015.

102 *Id.*

103 *Id.*

104 See "Medial Liability/Malpractice Merit Affidavits and Expert Witnesses," National Conference of State Legislatures, June 24, 2014.

105 N.Y. Civil Practices Law & Rules § 3012-a.

106 *Id.* § 3012-a(3).

107 40 Pa. Statutes § 1303.512.

108 Pa. Rules of Civil Procedure § 1042.3.

109 N.J. Revised Statutes Annotated §§ 2A:53A-27; 2A:53A-41.

110 "Medical Liability/Malpractice ADR and Screening Panels Statutes," National Conference of State Legislatures, May 20, 2014.

111 "Medial Liability/Malpractice Merit Affidavits and Expert Witnesses," National Conference of State Legislatures, June 24, 2014.

112 "Medical Malpractice Insurance Overview in New York," Arthur J. Ghallagher & Co.

113 N.J. Revised Statutes Annotated § 2A:53A-27. Requiring board recognized or board certified specialists in the relevant field or subfield. Conn. General Statutes Annotated § 52-184c; Pa. Stat. tit. 40 § 1303.512.

114 Federal Rules Civil Procedure 26(a)(2), (b)(4). See also N.Y. Civil Practices Law & Rules § 3101(d)(1)(i).

115 Richard Basuk, "Expert Witness Discovery For Medical Malpractice Cases in the Courts of New York: Is It Time to Take the Blindfolds Off?," *N.Y.U. Law Review* 76 (2001): 1527, 1529

116 *Applewhite v. City of New York*, 2014 WL 4659187 (N.Y. Super. Ct. Bronx County May 30, 2014).

117 *Id.*

118 "Top New York Verdicts of 2014," *New York Law Journal*, April 29, 2015. See also James C. McKinley, Jr., "Jury Awards $172 Million in Verdict Against New York City," *The New York Times*, May 29, 2014.

119 See Michael Frakes & Anupam Jana, "Does Medical Malpractice Law Improve Health Care Quality?," *Journal of Public Economics* 143 (2016): 142-58. Finding that heightened medical liability payouts have no concrete connection to reducing medical errors.

120 David H. Sohn, "Negligence, Genuine Error, and Litigation," *International Journal of General Medicine* 6 (2013): 49-56. "Many adverse events occur in medicine, but relatively few are due to negligence."

121 Maurizio Catino, "Blame Culture and Defensive Medicine," *Cognition, Technology & Work* 11 (2009): 245.

122 "Longitudinal Evaluation of the Patient Safety and Medical Liability Reform Demonstration Program," Agency for Healthcare Research Quality (May 2016): 2.

123 *Id.* at 7 (emphasis added).

124 *Id.*

125 See "Medical Professional Apology Statutes," National Conference of State Legislatures, January 21, 2014.

126 See Kevin Sack, "Doctors Say 'I'm Sorry' Before 'See You in Court'," *The New York Times*, May 18, 2008.

127 See "Governor Cuomo Issues Executive Order Creating Medicaid Redesign Team," Press Release, January 5, 2011.

128 See "Redesigning the Medicaid Program: Medicaid Redesign Team Meeting," Presentation, February 9, 2011: 49-50.

129 Proposal to Redesign Medicaid (2011): "Proposal 131."

130 See, *e.g.*, Joseph Marks, "Tort Reform Group Sees Conflict in Cuomo Panel," Law360, March 9, 2011. Joel Stashenko, "State Bar Blasts Proposal to Cap Medical Malpractice Awards," *New York Law Journal*, March 1, 2011.

131 N.Y. Public Health Law § 2999-g to –j.

132 See Testimony of David C. Rich, Executive Vice President, Government Affairs, Communications and Public Policy for the Greater New York Hospital Association Before the Joint Legislative Public Hearing on the 2015-16 Executive Budget Proposal: Health/Medicaid, February 2, 2015: 8. Supporting expansion of the Fund beyond newborns to all neurologically impaired persons.

133 N.Y. Civil Practices Law & Rules § 214a.

134 2017-2018 N.Y. Leg., S. 6800.

135 See Josefa Velasquez, "Legislature Approves 'Lavern's Law' MedMal Bill," *New York Law Journal*, June 21, 2017.

136 Adam Morey, "Deciding When Statute of Limitation Begins," *Albany Times Union*, September 16, 2017.

137 N.Y. Judiciary Law § 474-a(2). The Legislature enacted this sliding scale as part of a 1985 medical malpractice package.

138 *Id.* § 474-a(4).

139 A. 8521 (introduced June 18, 2017); S. 6803 (introduced June 18, 2017).

140 See, "Auto Insurance," Insurance Information Institute.

141 See Craig Casazza, "Auto Insurance Rate Increases in New York: Up 28% Since 2011," ValuePenguin, July 27, 2017. New York's increase was 3 percent more than in other states during this period and the 13th highest of the states. See *id.*

142 See "Auto Insurance Database Report 2013/2014," National Association of Insurance Commissioners, January 2017: 26 ("NAIC Report").

143 See *id.* Other surveys of insurance rates place the average annual rate paid by New Yorkers at $1,450. "How Cities in New York Ranked Based on Car Insurance Costs," ValuePenguin.

144 See NAIC Report, *supra*, at 26.

145 See "How Cities in New York Ranked Based on Car Insurance Costs," ValuePenguin.

146 See *id.*

147 See *id.* Studies of insurance rates and expenditures may

apply different methodologies and baselines for what constitutes an "average" policyholder. Accordingly, direct comparison of average rates or expenditures among different studies may be misleading. A source that evaluates the average annual premium by zip code found that an area of Brooklyn, New York (11212) had the second highest rate in the country, $4,400. See Michelle Megna, "Most and Least Expensive ZIP Codes for Car Insurance by State," Carinsurance.com, May 31, 2017.

148 See "New York State Traffic Safety Statistical Repository," Institute for Traffic Safety Management & Research. Indicating that between 2010 and 2015 non-fatal crashes declined from 133,888 to 114,441, and fatal crashes declined from 1,060 to 1,045.

149 See Josh Barro, "Here's Why Stealing Cars Went Out of Fashion," *The New York Times*, August 11, 2014. See also NAIC Report, *supra*, at 212, showing decline in vehicle thefts in New York from 2011-13 and that New York's vehicle theft rate in 2013 was about half the national average.

150 Office of Court Research of the New York State Unified Court System data.

151 *Id.* Reporting 28,913 motor vehicle lawsuits filed in 2010.

152 See "New York State Traffic Safety Statistical Repository," Institute for Traffic Safety Management & Research. Reporting total crashes fell from 315,377 in 2010 to 294,556 between 2010 and 2015.

153 See "An Accident and a Dream," Public Policy Institute (1988): 26. Finding the number of motor vehicle tort filings in New York leaped 88 percent between 1988 and 1996 even as the number of motor vehicle accidents fell by 14 percent.

154 See N.Y. Insurance Law § 5102(d).

155 See *id.*

156 See Joseph D. Nohavicka, "Paradigm Shift in No-Fault "Serious Injury" Litigation," 78-JAN N.Y. St. B.J. 26 (2006). Stating that serious injury cases "continue to inundate the court system."

157 See, *e.g., Quaglio v. Tomaselli*, 99 A.D.2d 487, 488, 470 N.Y.S.2d 427, 429 (2d Dep't 1984).

158 See, *e.g., Knoll v. Seafood Exp.*, 17 A.D.3d 233, 233, 793 N.Y.S.2d 391, 392 (1st Dep't 2005) (rejecting plaintiff's "serious injury" claim of "relative numbness" from auto accident that was supported by physician affidavit), *aff'd*, 836 N.E.2d 1148 (N.Y. 2005).

159 See *Kennedy v. Anthony*, 195 A.D.2d 942, 943, 600 N.Y.S.2d 980, 981 (2d Dep't 1993). Other courts have found a fractured or chipped tooth does not qualify as a serious injury. See, *e.g., Sanchez v. Romano*, 292 A.D.2d 202, 202, 739 N.Y.S.2d 368, 370 (1st Dep't 2002).

160 See "Auto Insurance Database Report 2013/2014," National Association of Insurance Commissioners, January 2017, 240.

161 See "New York State Insurance Requirements," N.Y. Department of Motor Vehicles.

162 See *id.*

163 See "Auto Insurance Database Report 2013/2014," National Association of Insurance Commissioners, January 2017, 239.

164 See "Automobile Owners Resource Center," N.Y. Department of Financial Services, accessed Nov. 14, 2017.

165 See "More Than 20 Percent of New York City Area Auto Injury Claims Appear to Be Fraudulent, Says New Study of No-Fault Auto Insurance", Press Release, Insurance Research Council, January 5, 2011.

166 See *id.*

167 See *id.*

168 See *id.*

169 See *id.*

170 See "Boosted by Fraud and Buildup, Claimed Auto Injury Losses in New York City Metro Area Far Outpace Inflation," Press Release, Insurance Research Council, November 22, 2011. See also "Insurance Research Council Finds That Fraud and Buildup Add Up to $7.7 Billion in Excess Payments for Auto Injury Claims," Press Release, Insurance Research Council, February 3, 2015. Indicating that an analysis of 2012 data showed New York had a 24 percent rate of fraudulent and inflated PIP claims, a rate exceeded only by Florida.

171 See "New York Questionable Claims Rise 29 Percent 2010-2012," National Insurance Crime Bureau, December 18, 2013.

172 See *id.*

173 See "Financial Frauds and Consumer Protection Report," N.Y. Department of Financial Services, March 15, 2017, 29.

174 The reduction in no-fault fraud may be attributed to modest reforms New York adopted in 2013, when DFS amended Regulation 68, the law that implements the state's no-fault law claim settlement procedures. See "Background on: No-Fault Auto Insurance," Insurance Information Institute, February 3, 2014.

175 See "Financial Frauds and Consumer Protection Report," N.Y. Department of Financial Services, *supra*, 14.

176 *Id.*

177 See "No-Fault Insurance Fraud in New York State is Ramping Up Premiums," Insurance Information Institute, 2010.

178 See Jones Commission Report, *supra*, vol. II (1986): 130. "[I]nsurer bad faith actions have been among the most consistent generators of multi-million dollar punitive damage verdicts in the states that permit such suits and awards." See also Victor E. Schwartz & Christopher E. Appel, "Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith," *American University Law Review* 58 (2009): 1477.

179 See Peter A. Halprin & Bruce Strong, "Expert Analysis: NY's Evolving Acceptance of Policyholder Bad Faith Claims," Law360, June 14, 2016. New York's 1986 Report of the Governor's Advisory Commission on Liability Insurance, for example, stated that "New York is among the minority of States that have not moved to recognize a general tort of insurer bad faith" and recommended that the "State of New York maintain its current approach to the tort of insurer bad faith." Jones Commission Report, *supra*, vol. II: 132, 136.

180 See Eric Dinnocenzo, "Keeping the Faith in Insurance Bad Faith," *New York Law Journal*, June 10, 2015.

181 See *Bi-Economy Market, Inc. v. Harleysville Ins. Co. of N.Y.*, 886 N.E.2d 127 (N.Y. 2008); *Panasia Estates, Inc. v. Hudson Ins. Co.*, 886 N.E.2d 135 (N.Y. 2008).

182 See Melissa M. D'Alelio & Michael V. Silvestro, "Expert Analysis: NY Insurance Cases Cut Back Consequential Damages Claims," Law360, June 4, 2014.

183 See, *e.g.,* Legislative Memo, Business Council of New

York, March 3, 2017. Opposing legislation that would establish a private right of action by policyholders alleging unfair claims settlement practices by insurance companies. Legislative Memo, Business Council of New York, June 6, 2016. See also Jeff Winn et al., "Expert Analysis: No Faith In Proposed Bad Faith Legislation," Law360, Mar. 26, 2013.

184 See "No-Fault Insurance Fraud in New York State is Ramping Up Premiums," Insurance Information Institute.

185 See *id*.

186 Brief for the Defendant-Appellate The City of New York at 3, *In re New York City Asbestos Litigation*, Nos. 40000/88, 782000/17(filed July 14, 2017).

187 "Asbestos Litigation: 2016 Year in Review," KCIC, 2016, 4. KCIC's data cover three years of complaints in asbestos cases received through January 31, 2017, and is believed to be inclusive of over 90 percent of all asbestos lawsuits nationwide.

188 See James L. Stengel & C. Anne Malik, "On the Edge: New York County Asbestos Litigation at a Tipping Point," U.S. Chamber Institute for Legal Reform, August 2017, 4. Considering verdicts between 2014 and 2016.

189 Marc C. Scarcella et al., The Philadelphia Story: Asbestos Litigation Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010, *Mealey's Litigation Report: Asbestos* 27 (Oct. 10, 2012): 1.

190 "Lawyers Torch the Economy," *The Wall Street Journal Editorial*, Apr. 6, 2001, A14. See also Patrick M. Hanlon & Anne Smetak, "Asbestos Changes," *N.Y.U. Annual Survey of American Law* 62 (2007): 525, 556. Stephen J. Carroll et al., "Asbestos Litigation," RAND Corp. (2005): xxiii.

191 Michael Petro, "Asbestos Cases Linger in Courts," *Buffalo Law Journal*, May 25, 2015. Quoting Carol Snider of Damon Morey, now Barclay Damon.

192 "Medical Monitoring and Asbestos Litigation' - A Discussion with Richard Scruggs and Victor Schwartz," 17:3 Mealey's Litig. Rep.: Asbestos 5, Mar. 1, 2002. Quoting Richard "Dickie" Scruggs.

193 See, *e.g.*, *Andrews v. A.O. Smith Water Prods.*, 2016 WL 6995891, at *5 (N.Y. Super. Ct. N.Y. County Nov. 22, 2016).

194 "[P]ointing to gaps in an opponent's evidence is insufficient to demonstrate a movant's entitlement to summary judgment." *DeMartino v Aurora Pump Co.*, 2016 NY Slip. Op. 32216(U), at 3-4 (N.Y. Super. Ct. N.Y. County Oct. 27, 2016).

195 See, *e.g.*, *In re New York City Asbestos Litig. (Bartolone v. Air & Liquid Sys. Corp.)*, 2016 WL 706188, at *2 (N.Y. Sup. Ct. N..Y. County Feb. 22, 2016).

196 See, *e.g.*, *DeMartino v. Aurora Pump Co.*, 2016 WL 6459516, at *2 (N.Y. Sup. Ct. N.Y. County Oct. 27, 2016).

197 See, *e.g.*, *Berensmann v. 3M Co.*, 122 A.D.3d 520, 521 (1st Dep't 2014).

198 See *In re New York City Asbestos Litig. (Ricci)*, 2016 WL 2770279, at *1; *In re New York City Asbestos Litig. (Ricci v. A.O. Smith Water Prods. Co.)*, 2016 WL 927020, at *1 (N.Y. Sup. Ct. N.Y. County Mar. 11, 2016).

199 See, *e.g.*, *DeMartino v Aurora Pump Co.*, 2016 NY Slip. Op. 32216(U), at 3-4 (N.Y. Super. Ct. N.Y. County Oct. 27, 2016); *Andrews v. A.O. Smith Water Prods.*, 2016 WL 6995891, at *4 (N.Y. Super. Ct. N.Y. County Nov. 22, 2016).

200 See, *e.g.*, *Koulermos v. A.O. Smith Water Prods.*, 137 A.D.3d 575, 376, 27 N.Y.S.3d 157, 158 (1st Dep't 2016).

201 See Michelle J. White, "Asbestos Litigation: Procedural Innovations and Forum Shopping," *Journal of Legal Studies* 35 (June 2006): 365, 373. "In consolidated trials, there is a higher probability that at least one defendant will appear callous, and this benefits all plaintiffs."

202 See Ga. Code Annotated § 51-14-11; Kan. Statutes Annotated § 60-4902(j); Tex. Civil Practice & Remedies Code Annotated § 90.009; W. Va. Code Annotated § 55-7G-8(d)(1); Mich. Supreme Court, Administrative Order No. 2006-6, Prohibition on "Bundling" (Aug. 9, 2006); Ohio Rules of Civil Procedure 42(A)(2); Pa. Court of Common Pleas Philadelphia County, General Court Regulation No. 2013-01, Notice to the Mass Tort Bar, Amended Protocols and Year-End Report, Amended Protocol at ¶¶ 2, 6 (Feb. 7, 2013).

203 See Mark A. Behrens, "What's New in Asbestos Litigation?," *Review of Litigation* 28 (2009): 501.

204 See Stengel & Malik, *supra*, 8. See also *Matter of New York City Asbestos Litig. (Konstantin v. Tishman Liquidating Corp.)*, 121 A.D.3d 230, 244 (1st Dep't 2014), *aff'd*, 27 N.Y.3d 765 (2016). Involving two cases with different worksites, occupations, products, types and durations of exposure, diseases, plaintiff health statuses, legal liability theories, defendants, and witnesses.

205 See *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993).

206 See Patrick M. Hanlon & Anne Smetak, "Asbestos Changes," *N.Y.U. Annual Survey of American Law* 62 (2007): 525, 574. See also Michelle J. White, "Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle," *U. Cincinnati Law Review* 70 (2002): 1319. Finding that asbestos plaintiffs' probability of winning in small consolidated trials compared to individual trials is "statistically significant." Irwin A. Horowitz & Kenneth S. Bordens, "The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive Processing of Evidence," *Journal of Applied Psychology* 85 (2000): 909, 916. Study of jury behavior in controlled setting found that juries in small trial consolidations were significantly more likely on a statistical basis to find for the plaintiff and render a larger award than if the cases were tried individually.

207 See Peggy L. Ableman et al., "The Consolidation Effect: New York City Asbestos Verdicts, Due Process and Judicial Efficiency," *Mealey's Asbestos Bankruptcy Report* 1 (April 2015).

208 *Id.* at 14.

209 See Stengel & Malik, *supra*, 9-10.

210 See N.Y. Civil Practices Law & Rules § 1601.

211 See N.Y. Civil Practices Law & Rules § 1602(7).

212 See *Matter of New York City Asbestos Litig. (Maltese v. Westinghouse Corp.)*, 678 N.E.2d 467, 468 (N.Y. 1997). Gross negligence standard.

213 See *In re New York City Asbestos Litig. (Assenzio v. A.O. Smith Water Prods. Co.)*, 2015 WL 667907 (N.Y. Sup. Ct. N..Y. County Feb. 5, 2015).

214 See Stengel & Malik, *supra*, 14.

215 Jury Interrogatories, *Robaey v. Air & Liquid Sys. Corp.*, No. 190276/13 (N.Y. Super. Ct., N.Y. County, Jan. 26, 2017). See also Katheryn Hayes Tucker, "Lawyers Prepare for Appeal of $75M Asbestos Verdict," *New York Law Journal*, February 28, 2017.

216 See Thomas W. Tardy III & Taylor H. Wilkins, "Asbestos:

An Immature Tort (The Contrarian View)," *Mealey's Litig. Rep.: Asbestos* 32 (Sept. 13, 2017): 1.

217 Helen S. Freedman, "Selected Ethical Issues in Asbestos Litigation," *Southwestern University Law Review* 37 (2008: 511, 527-28.

218 Mark A. Behrens & Cary Silverman, "Punitive Damages in Asbestos Personal Injury Litigation: The Basis For Deferral Remains Sound," *Rutgers Journal of Law & Public Policy* 8 (2011): 50.

219 See *In re New York City Asbestos Litig.*, 2014 WL 1767314 (N.Y. Super. Ct., N.Y. County, Apr. 8, 2014).

220 See *Matter of New York City Asbestos Litig. (All New York City Asbestos Litigation Cases v. A.O. Smith Water Prods. Co.)*, 130 A.D.3d 489 (1st Dep't 2015).

221 See Andrew Denney, "NY Judge Rejects Delay in Implementation of New Asbestos Docket Rules," *New York Law Journal*, July 18, 2017.

222 See "ABA TIPS Section Task Force on Asbestos Litigation and the Bankruptcy Trusts," Hearing Transcript, June 6, 2013, 114-15 (testimony of Joseph W. Belluck, Esq.). "The Asbestos Litigation Tsunami - Will It Ever End?" George Mason Judicial Education Program, 7th Annual Judicial Symposium on Civil Justice Issues, *Journal of Law, Economics & Policy* 9 (Spring 2013): 489, 512 (quoting Joseph Belluck, a leading New York City asbestos plaintiffs' lawyer).

223 See "The Double-Dipping Legal Scam," *The Wall Street Journal* Editorial, December 25, 2014, A12. See also Lester Brickman, "Fraud and Abuse in Mesothelioma Litigation," *Tulane Law Review* 88 (2014): 1071, 1088.

224 See Phil Goldberg, "Asbestos Litigation Reform That Helps Victims and Businesses," Forbes, August 10, 2017.

225 Truth, Fairness, and Transparency in Asbestos Litigation Act (2017).

226 See Brian Kolb, "Carl Heastie Should Bring Asbestos Litigation Bill to the Floor," *Rochester Democrat & Chronicle*, September 12, 2017.

227 General Business Law §§ 349, 350. For example, New York's federal courts—primarily the Eastern District (Brooklyn) and Southern District (Manhattan) of New York—host over one-fifth of all class actions challenging food and beverage marketing nationwide (most class actions are decided in federal court as a result of the federal Class Action Fairness Act). See Cary Silverman & James Muehlberger, "The Food Court: Trends in Food and Beverage Class Action Litigation," U.S. Chamber Institute for Legal Reform (February 2017): 8.

228 See *Lau v. Pret A Manger (USA) Ltd.*, No. 1:17-cv-05775 (S.D.N.Y. filed July 31, 2017). The lawsuit attempts to recover on behalf of consumers nationwide or, in the alterative, seeks recovery on behalf of all people who made purchases in New York.

229 Cases are often dismissed "upon stipulation of the parties," which typically indicates that the plaintiffs' lawyers and the defendant reached a settlement in which the lawyer and the class representative, but no one else, will get paid.

230 For example, lawyers claiming New York consumers do not know that Vitaminwater is not literally "vitamins + water = all you need," as advertised, will get $2.73 million, while consumers will get changes to the label emphasizing that the product contains sweeteners, as already disclosed on the ingredients panel. See Order Granting Final Approval and Entering Final Judgment, at 6, *In re: Glaceau Vitaminwater Marketing & Sales Practices Litig. (No. II)*, No. 1:11-md-02215 (E.D.N.Y. Apr. 7, 2016), Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement, Preliminary Certification of Settlement Class, and Approval of Notice Plan at 3-4, *In re: Glaceau Vitaminwater Marketing & Sales Practices Litig. (No. II)*, No. 1:11-md-02215 (E.D.N.Y. Sept. 30, 2015).

231 N.Y. General Business Law § 349(h) (authorizing statutory damages); N.Y. Civil Practice Law & Rules § 901(b) (prohibiting class actions that seek to recover "a penalty, or minimum measure of recovery created or imposed by statute" unless that statute explicitly authorizes recovery through a class action).

232 *Belfiore v. Procter & Gamble Co.*, 311 F.R.D. 29, 39 (E.D.N.Y.), *reconsideration denied*, 140 F. Supp. 3d 241 (E.D.N.Y. 2015).

233 *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 436 (2010) (Ginsburg, J., joined by Kennedy, Breyer and Alito, JJ).

234 Some states do not authorize consumer class actions at all, allowing only individual recovery. See, *e.g.,* Alabama Code § 8-19-10(f); Ga. Code Annotated § 10-1-399(a); La. Revised Statutes Annotated § 51:1409(a); Miss. Code Annotated § 75-24-15(4); Mont. Code Annotated § 30.14-133(1); S.C. Code Annotated § 37-5-202(1), (3); Tenn. Code Annotated § 47-18-109(g). The few states that allow consumer class actions and provide for statutory damages only permit actual damages in class actions (as the New York Legislature intended). See, *e.g.,* Colo. Revised Statutes § 6-1-113(2); Ohio Rev. Code Annotated § 1345.09(e); Utah Code Annotated § 13-11-19(2). States have avoided what has occurred in New York by placing limits on class actions in the state's consumer protection law, rather than in state procedural rules that do not apply when a claim is decided in federal court. See, *e.g.*, *Greene v. Gerber Prods. Co.*, 2017 WL 3327583, at *14 (E.D.N.Y. Aug. 2, 2017) (Ohio Consumer Sales Practices Act); *Fraiser v. Stanley Black & Decker, Inc.*, 109 F. Supp. 3d 498, 506 (D. Conn. 2015) (Connecticut Unfair Trade Practices Act); *In re Ford Tailgate Litig.*, 2014 WL 1007066, at *9 (N.D. Cal. Mar. 12, 2014), *order corrected on denial of reconsideration*, 2014 WL 12649204 (N.D. Cal. Apr. 15, 2014) (Tennessee Consumer Protection Act).

235 Kenneth Lovett, "Law Firm Weitz & Luxenberg Cuts Ties with Disgraced Speaker Sheldon Silver," *New York Daily News*, January 29, 2015.

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