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Liability

ROBERT E. LITAN AND
CLIFFORD WINSTON,
EDITORS

The United States has recently witnessed an explosion of personal injury lawsuits involving medical malpractice, unsafe products, and widespread environmental hazards. Jury awards and out-of-court settlements have escalated in many cases to hundreds of thousands of dollars. At the same time, premiums for liability insurance have skyrocketed. As a result, physicians have cut back services and some municipalities and businesses have been denied liability coverage altogether.

Some experts claim that only fundamental reform of the nation's civil justice system will end this "insurance crisis." But critics of such wholesale judicial reform contend that the insurance industry has launched a "tort reform" campaign to cover its own past underwriting mistakes.

Liability brings together economists and experts in liability law and the insurance industry to assess the merits of the conflicting positions and to formulate sound public policy. Led by Robert Litan and Clifford Winston, the contributors describe the major changes in the legal environment that have contributed to the insurance crisis and provide a framework for evaluating the various policy options available.

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COMPARISONS OF U. S. TORT SYSTEM CHANGES

- 1) Notes: Tort Reform Enacted in Other States
- 2) Controlling Liability Insurance Costs
- 3) Abolition of Modification of Collateral Source Doctrine
- 4) Establishment of Prejudgment Interest Accrual Principle
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- 10) Tort Liability - Insurance
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- 16) Battle for Medical Malpractice Tort
- 17) Letter: 05/02/1989 To: Rep. Donley From: Elizabeth Kerttula,
enclosure

Special Attachment - Pre-Judgment Interest

- 1) Report: Jury Awards and Prejudgment Interest in Tort Cases

COMPARISONS OF U.S. TORT SYSTEM CHANGES

NOTES ON TORT REFORMS ENACTED IN OTHER STATES

Arizona - State Constitution (in two separate areas) prohibits liability limits. Abolition of joint liability concept; medical review panels required prior to court action; collateral source information may be introduced but offset is not mandatory; standard of care defined in statutes.

California - \$250,000 cap on non-economic damages and other major tort reforms, including: Collateral sources of income admissible as evidence; periodic payment for future damages exceeding \$50,000; provisions for arbitration of claims; shortened statute of limitations; and a sliding schedule for attorneys' contingency fees starting at 40% of the first \$50,000, 33 1/3% of the next \$50,000, 25% of the next \$100,000-\$600,000 and 15% of any amount exceeding \$600,000. These measures were enacted in 1975, when premiums in California there were higher than in New York. California premiums are now sharply lower than premiums in New York State. Highest premium: \$92,800. Average: about \$8,000.

Colorado - Cap of \$1 million on total damages, including an absolute \$250,000 cap on non-economic damages; cap may be pierced for present value of future wage loss or health care cost; introduction into evidence of payments from collateral sources; elimination of joint and several liability; punitive damages limited to three times net pecuniary loss; mandatory periodic payment of all future damages exceeding \$150,000; mandatory liability insurance; voluntary binding arbitration; statute of limitation two years, statute of repose three years. Highest premium: \$57,000. Average: \$12,500.

Florida - Cap of \$450,000 on non-economic damages; regulation of insurers; periodic payment on awards greater than \$5,000 and sliding scale of contingency fees for plaintiff attorneys; offset collateral sources against damages; limitation on joint and several liability; penalties for frivolous suits and defense; certificate of merit; mandatory pre-suit investigation by the parties; voluntary binding arbitration; no-fault birth-related neurological injury compensation system; and good Samaritan immunity for emergency room medical treatment.

Georgia - Allows awarding of costs and fees in frivolous suits; contingency fees regulated and limited to plaintiffs attorneys. A minor shall have two years from his/her fifth birthday to file a medical malpractice suit or five years from the date of the negligent act or omission if the minor was age five or older when the act or omission occurred. Except for gross negligence or willful misconduct, health care providers shall not be liable for injuries arising out of voluntary charity work done at the request of a hospital, public school, non-profit organization or government agency. Highest premium: \$70,800. Average: \$17,500.

Illinois - Structured verdicts; contingency fee limitations; abolition of punitive damages; collateral sources reduce award; itemized verdicts; expert witness rules, early dismissal of uninvolved physicians.

Indiana - \$500,000 overall cap; physician liability limited to \$100,000; allows collateral payments to be introduced into evidence. The first \$100,000 comes from carrier and for additional \$400,000 an application is made to the patient compensation fund. Highest premium: \$11,500 for \$100,000 cover. \$11,500 plus 125% surcharge to finance the patient compensation fund.

Iowa - Limitations on joint and several liability; expert witness qualifications; damage awards may not include payment from collateral sources; sanctions for "groundless" suits; periodic payment of future damages. Highest premium: \$50,100. Average: \$19,500.

Kansas - Cap of \$250,000 on non-economic damages; Itemized verdicts; expert witness qualifications; court approval of attorneys' fees; mandatory liability insurance as a condition of licensure; pre-trial settlement conferences; costs and fees awarded in frivolous claims or defenses; collateral sources may be used to offset damages. Highest premium: \$68,000.

Kentucky - Modification of joint and several liability rule; Punitive damages guidelines; Introduction into evidence payments from collateral sources; Certificate of merit; Court review of adequacy of award; Penalties for frivolous lawsuits.

Louisiana - Cap of \$500,000, excluding hospital and medical care and lost wages.

Maine - Sliding scale for attorney's fees; periodic payment of future damages; pre-trial screening panels; shortened statute of limitations; regulation of contingency fees effective July 1, 1988.

Maryland - Cap of \$350,000 on non-economic damages in all personal injury actions; periodic payment of future damages; itemized verdicts; expert witness qualifications; certificate of merit; regulation of contingency fees.

Minnesota - Increased regulation of insurers; certificate of merit; shortened statute of limitations for minors; mandatory offset of collateral sources against damages; judicial hearing prior to claiming punitive damages; allows awarding of costs and fees where there is a frivolous claim or defense; itemized verdicts; cap of \$400,000 for intangible loss in all civil

actions - Intangible loss is defined as embarrassment, emotional distress, loss of consortium but does not include pain and suffering. Periodic payment of future damages; Modification of joint and several liability rule.

Mississippi - Award of costs and fees where there has been a frivolous claim or defense. Highest premium: \$110,900 (\$5 million/\$5 million coverage). Average: \$11,100.

Missouri - Cap of \$350,000 per defendant on non-economic damages; periodic payment of future damages; modification of joint and several liability; mandatory liability insurance of \$500,000 as a condition of hospital staff privileges - only applies in counties with a population in excess of 75,000; itemized verdict; certificate of merit.

Nebraska - Overall cap of \$1,000,000.

New Hampshire - Shortened statute of limitations; cap of \$875,000 on non-economic damages in all personal injury actions; court must approve attorney's fees when settlement or verdict exceeds \$200,000; prohibits punitive damages; penalty for frivolous suits.

New Jersey - Mandatory non-binding arbitration of claims below \$20,000; damage awards offset by collateral sources of income; modification of joint and several liability; assessment of costs and fees to party making a baseless pleading. Highest premium: \$42,000. Average: \$13,400.

New Mexico - Cap of \$500,000 but provides for all past and future medical needs related to the cause of action; caps on physician liability.

Ohio - Cap of \$200,000 on non-economic damages; collateral sources may be used to offset damages.

Oregon - \$500,000 cap on non-economic damages; significant modification of joint and several liability rule; higher standard of proof for punitive damages; immunity from punitive damages for health care professionals except where actions are willful or wanton; countersuits and penalties for frivolous lawsuits; some collateral source offsets.

Rhode Island - Awarding of costs and fees in frivolous suits; collateral sources admissible as evidence; periodic payment of future damages must be considered; medical liability insurance is required.

South Carolina - Shortened statute of limitations for minors; Punitive damages guidelines; Award of costs and fees where there has been a frivolous claim or defense; Limited liability for state-employed physicians.

South Dakota - Cap of \$1,000,000 on total damages; periodic payment of future damages; judicial hearing prior to submission of issue of punitive damages to jury; allows awarding of costs and fees to defendant in frivolous lawsuits; shortened statute of limitations for minors; punitive damages guidelines; limited liability for state-employed physicians.

Texas - Limitations on joint and several liability; punitive damage restrictions; sanctions for frivolous lawsuits; exemption from personal liability for physicians performing duties under contract to Texas Health or Corrections departments or Youth Commission; reduced liability for voluntary service to charitable organizations. Highest premium: above 50,000. Average: \$10,650.

Utah - Cap of \$250,000 on non-economic damages; periodic payment of future damages; elimination of joint and several liability; mandatory offset of awards for collateral sources of income; attorney contingency fee limitations; shortened statute of limitations for adults and minors; guidelines for establishment of a Joint Underwriting Association; pre-trial screening panels; elimination of "ad damnum" clause.

Virginia - Overall cap of \$1,000,000; pre-trial screening; shortened statute of limitation; No-fault compensation system for birth-related neurological injury cases.

Washington - Sliding scale cap for non-economic damages based on life expectancy (assumes minimum life expectancy of 15 years); Minimum/maximum awards of \$117,000 for those damaged later in life and \$573,000 for damages at birth; periodic payment of future damages; shortened statute of limitation; modification of joint and several liability rule.

West Virginia - Cap of \$1,000,000 on non-economic damages; increased regulation of insurers; shortened statute of limitations; elimination of "Ad damnum" clause(see glossary); expert witness qualifications; modification of joint and several liability effective at the 25% level.

Wisconsin - Cap of \$1,000,000 on non-economic damages; itemized verdicts; sliding scale for attorney's fees; mandatory non-binding mediation (replaces pre-trial hearing); reduction of all future losses to present value, with payment at the time of award; shortened statute of limitations.

Wyoming - Assessment of costs and fees to party making baseless pleading; affidavit of non-involvement (allows early dismissal of defendant); elimination of joint and several liability.

Eleven states have adopted statutes allowing voluntary and binding arbitration in malpractice cases. Patients who do not sign arbitration agreements may not be denied treatment or otherwise be discriminated against. The laws commonly allow a revocation period by the patient (usually 30 to 60 days) following treatment. The 1986 New York legislation provided for arbitration on a pilot basis in the HMO setting, and in certain cases where the defendant concedes finality.

**CONTROLLING LIABILITY INSURANCE COSTS:
STATE ACTIONS AND FUTURE INITIATIVES
IN THE AREA OF CIVIL JUSTICE REFORM**

The rising costs and increasing unavailability of casualty insurance affects government, business and consumers, who are facing mid-term cancellations and non-renewals of their insurance, as well as society as a whole. Governments are often drawn into lawsuits and are drained financially by payment of huge awards, not because of their responsibility for the damage but because of their financial base. The price of products is increased to cover the cost of insurance. Fear of suits causes businesses to abandon new products involving risk. Research for developing technologies is hampered because companies are unable to afford the insurance necessary to test and market the research. Insurance costs for municipalities, day care centers, common carriers, schools, accountants, lawyers and physicians are doubling and tripling. Coverage for liquor liability and pollution is virtually impossible to obtain.

The question facing lawmakers is whether the problem will arrest itself or whether state legislatures will need to resolve it. A 1985 study by Insurance Services Office, a provider of statistical data to the insurance industry, projected that available property/casualty insurance may fall short of projected demand by \$62 billion in the next three years. Ninety percent of that will affect commercial lines. According to the study, three factors must be addressed in order to relieve the problem: the unpredictability of judicial awards; the size of the awards; and the litigious nature of American society.

AN OVERVIEW

The tort liability problem is two-pronged. It affects both the public and the private sectors. Because governmental activities are broader in scope than business activities, governments are more susceptible to suit. It is only recently that government has lost its immunity from suit, either by judicial or legislative action. Historically, under the doctrine of sovereign immunity, citizens could not sue the government.

With the elimination or restriction of the doctrine of sovereign immunity, governments and governmental employees are responsible for damages in the same way that private individuals are. Some legal experts maintain this is a fair and equitable situation, while others maintain that the nature of governmental activities requires that governmental immunity be regarded in different terms. These are philosophical considerations with important practical effects.

With regard to the insurance problem itself, there appear to be four aspects of the issue which require review by the states: regulation of the insurance industry; reform of tort law; education of the public regarding the impact of an increasingly litigious society; and the development of effective risk management programs. Part of the current problem can be attributed to poor management practices of the insurance companies: reliance on high interest rates for profit margins rather than charging adequate premium rates to cover losses; increase of rates in certain lines without losses to justify the increase; and undercapitalization of many new entrants

into the market. These practices could be avoided by tighter regulation of the industry.

Currently, considerable debate surrounds the role of the legal system in the insurance crisis. Critics contend that the system is responsible for the high cost of insurance (two to five times greater than in 1984) and, in some cases, its unavailability. They argue that the lengthy process, high awards and unpredictability of the outcome have made financial planning for future claims difficult and have created severe financial problems for insurance companies.

On the other hand, expanded services provided by state, and particularly local, government attract many more suits. Doctrines such as joint and several liability and the collateral source rule force governments to assume responsibility for a larger proportion of the damages than they were in fact responsible for in the past.

A corollary to the reform of the civil justice system is the litigious nature of American society. An NCSL survey (December 1985) found that even in states where tort reform legislation has been enacted and has effectively reduced the size of damage awards, there has been a steady increase in the number of suits filed. There seems to be a general perception that when the public sues the state, it is suing some abstract entity, when in fact taxpayers are ultimately the source of the money used to pay these judgments. The same is true of suing insurance companies. Policyholders buy into a risk pool with finite resources made up of the premium payments. Huge damage awards which drain this pool create deficits for insurance companies which then must increase premiums to cover losses or refuse to insure the activity due to its highly risky nature.

Effective risk management programs can minimize losses by financing and controlling exposure to risk. Elements of such a program include risk identification, risk evaluation, safety programs designed to avoid or reduce risk and funding mechanisms for losses due to unavoidable risk.

This State Legislative Report is the first in a three-part series which addresses the issue of tort liability as it affects state and local governments. This report highlights state and federal tort reform proposals, and the possible effectiveness of such proposals.

PUBLIC POLICY ISSUES

Because reform of the civil justice system involves the determination of important public policy questions, revisions in the existing system must be approached cautiously. As John Prather Brown of the Law Firm of Principal, Chase, Brown & Blaxall, Inc., points out, "The legal responsibility for personal injury is at the center of an intricate web of issues. Crafting a wise alternative to the present legal system will require care, consideration and meticulous attention to detail. The issues raised by the tort system and by the impact of possible changes are not just legal issues, and they are not just lawyers' issues. They are broad in effect and raise important political, philosophical and economic questions."

The goal of reform is the creation of a civil justice system which balances the right of the individual to recover damages for injuries resulting from the negligent acts of others and the rights of society to be free

from the specter of financial ruin resulting from the uncertainty of the results of these lawsuits. The development of a system providing fair and adequate awards for legitimate claims, which does not overcompensate or create legal rules which inhibit day-to-day activities, is not easy to achieve. Consideration must be given to balancing the litigants' constitutional rights of due process and equal protection with the necessity of streamlining court procedures.

Changes in tort law can encourage or discourage lawsuits. Lowering the cost of litigation could, for example, increase the number of cases filed because more people could afford to sue. If it were coupled with a stringent law on the filing of frivolous suits, the result might be that individuals with legitimate claims would find it easier to use the system.

Legislation can provide incentives or disincentives, so careful consideration must be given to the effects of each proposal individually and in combination with other proposals. The present system, for example, provides incentives for doctors to require additional tests that may be unnecessary to provide evidence that will show "reasonable behavior" in anticipation of a lawsuit. The lawsuit may or may not happen, but the patient has been subjected to unnecessary testing and increased medical expenses.

The needs of a variety of interest groups must be weighed within the framework of reform. Business cites the need for new product liability laws which will encourage a better climate to research, develop and market products. Professionals cite the need for freedom to practice their professions without constant fear of lawsuits and unaffordable insurance costs. Many non-profit organizations state they are unable to carry out public programs because of unaffordable insurance premiums. These interests must be balanced against the necessity of providing compensation to individuals who are injured by the carelessness and negligence of others.

Many states that did pass medical malpractice tort reforms are still experiencing problems related to medical malpractice liability insurance and raise a number of questions. Were the reforms extensive enough? Were there conflicting reforms which cancelled each other out? Did some reforms create more problems than they solved, or are other factors substantially responsible for the current situation? Should serious alternatives be considered for compensating individuals who have been injured?

The gravity of revising the civil justice system argues for evaluation and data collection in order to judge the outcome of any tort reforms.

ALTERNATIVES

Many proposals to reform the civil justice system are currently being considered by state legislatures. The following discussion provides a description of the major proposals and an example of an alternative to the present system. These alternatives are only examples and are not intended as suggested solutions.

AWARD OF DAMAGES

Establish Limits on Non-economic Damages

Because it is difficult to assign dollar amounts to non-economic damages, such as pain and suffering and mental anguish, awards vary greatly from one jury to the next. While compensation for physical, mental or emotional stress may in fact be justified, the unpredictability of jury awards has resulted in higher insurance premiums.

Alternative Measures: A \$250,000 cap on non-economic awards for medical malpractice suits enacted in California was upheld by the U.S. Supreme Court in October, 1985. Such a ceiling or cap on pain and suffering awards provides some predictability to the system and provides some rational limits to an issue which is highly emotional. A study conducted by the Rand Corporation on the effects of caps on medical malpractice suit awards found that "when a state moved to cap verdicts or eliminate specific dollar requests by plaintiffs or permit payment of awards for future losses in periodic installments, the net effect was to reduce trial awards by 30 percent, cut the average out-of-court settlement by 25 percent, raise the portion of cases dropped from 43 percent to 48 percent, and reduce the share of cases going to actual verdict from 5.1 to 4.6 percent." [The Resolution of Medical Malpractice Claims: Research Results and Policy Implications (R-2793-ICJ), by Patricia Munch Danzon and Lee A. Lillard]

Abolition or Restriction of Punitive Damages

Punitive damages are those awarded in addition to compensatory damages and designed to punish the defendants for malicious acts. Since damages are intended to provide the plaintiff with compensation for an injury, the nature of punitive damages may make the judgment overvalued in that they represent monies in addition to the cost of compensation for injury.

Alternative Measure: Punitive damages contribute to the unpredictability and size of awards. Alternatives to the complete abolition of punitive damages include options such as placing caps on awards, redefining standards of conduct and shifting the burden of proof for such awards, as well as placing limitations on multiple punitive damage awards, and may be workable alternatives.

Itemized Jury Verdicts

The unpredictability of jury awards contributes to the inability of insurance companies to plan for claims and thus encourages higher premiums. It may also result in inequities to the plaintiff since recovery for damages is dependent on the makeup of the jury and the emotional state of the jurors.

Alternative Measure: To create a more consistent standard, the jury could be instructed to itemize damages into categories based on medical expenses, lost wages, non-economic compensation and other specific items. Such an accounting could provide a framework for the jury to use.

Adoption of Structured Settlements

Lump sum payments of awards have several drawbacks. Large awards payable at one time create unnecessary financing problems for the defendant and do not necessarily work in favor of the plaintiff. For example, studies of lump sum payments in workers' compensation indicate that the money is not always wisely invested and may not sustain the injured party through his lifetime.

Alternative Solution. The adoption of structured settlements permits payment of awards in periodic payments. Such installment payments are less expensive to finance and guarantee the injured party financial security. The Danzon-Lillard study (R-2793-ICJ) concluded that structured settlements reduced the average settlement by 25 percent and reduced the number of cases going to verdict from 5.1 percent to 4.6 percent.

Abolition of Collateral Source Rule

Under the collateral source rule, the jury is not permitted to hear evidence regarding compensation which the plaintiff may receive from other sources. A plaintiff may therefore be doubly compensated since various sources of compensation are not considered. In addition, the rule may increase litigation by forcing the defendants to go through the legal process to resolve the controversy related to overpayment by one defendant.

Alternative Solution: Relaxation of the collateral source rule to allow consideration of all sources of funding available for payment of damages. Another alternative would be the mandatory offset of the collateral source rule. That is, additional recoveries received would be subtracted from the award. The Rand study suggests that this revision would result in an 18 percent savings.

Contingent Fees

Contingent fees are received by a lawyer who contracts with a client for a percentage of the award rather than receiving a fee based on an hourly rate or some predetermined amount. Attorneys' contingent fees generally range from 25-50 percent of the settlement. Contingent fees may encourage demands for higher settlements and may not reflect the time, effort, skill or value of the service rendered. A 1984 study conducted by the American Bar Association indicated that reduction in time spent on a case by an attorney resulted in savings to clients who paid an hourly rate, but not to clients who had a contingent fee arrangement.

Alternative Measure: The adoption of mandatory sliding fee schedules, such as the plan adopted in California, would allow for the legitimate benefits which are derived from contingent fees (providing legal services for those who might not otherwise be able to afford them). Sliding fee schedules also ensure a greater share for the injured client.

In November, 1985, the U.S. Supreme Court upheld a California statute limiting legal fees paid by the client. The sliding fee schedule permits a 40 percent fee when the damages are \$50,000 or less; 33.3 percent for an additional \$50,000; 25 percent on the next \$100,000; and 10 percent above \$200,000.

The Danzon-Lillard study (R-2793-ICJ) found that limitations on attorneys' contingent fees apparently "cut the average settlement by 9 percent; raised the portion of cases dropped from 43 percent to 48 percent; and reduced the share of cases going to verdict from 6.1 percent to 4.6 percent."

Abolition of Joint and Several Liability Doctrine

The doctrine of joint and several liability is based on the concept that when the negligence of two or more individuals results in injury to a person, the tortfeasors are jointly and individually liable for damages. It permits a plaintiff to recover the entire amount of the judgment from one defendant, forcing that individual to recover from the other defendants. The degree of negligence of the defendants is not a consideration since the defendant who is 1 percent negligent may end up paying the entire judgment. State and local governments, often viewed as having unlimited resources, become favorite targets in lawsuits.

Alternative Measure: One means of addressing this problem is to adopt a form of comparative negligence which allows the plaintiff to recover damages only if the defendant's negligence is greater than the plaintiff's. The justification for such a policy is the fact that a plaintiff who is more responsible for his injury than the defendant should not be able to recover damages.

Another alternative found in the Uniform Comparative Fault Act makes each defendant liable for their proportionate share based on their degree of fault. According to a national survey on governmental tort liability by the New York City Law Department, language for such a bill would be as follows:

"Upon motion made no later than [one year] after judgment is entered, the court shall determine whether all or part of the party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among other parties, including a claimant at fault, according to their respective percentages at fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment."

This alternative also has the advantage of assuring compensation to the plaintiff and distributing any portion an insolvent defendant owes among the remaining defendants based on their percentage of fault. Another alternative distributes liability proportionally but does not provide for insolvent defendants. A complete discussion can be found in Pearson, Apportionment of Losses Under Comparative Fault Laws - An Analysis of the Alternatives, 40 La. L. Rev. 343, 364 (1980) and Note, Damage Apportionment in Maine: A Proposal for Reform, 34 Me. L. Rev. 367, 396 (1982).

PROCEDURAL REFORMS

Four major proposals include:

- 1) Modification of the Statute of Limitations. A number of state laws permit negligence suits to be filed many years after the alleged negligent act occurred. Where minors are involved, the payment of damages may result 18 years or longer after the incident. A statute of limitations which would provide a more reasonable time period for discovery of the

injury and filing of the claim would contribute to an insurance company's ability to predict claims and plan for their payment.

- 2) Allow Affidavits for Noninvolvement. To discourage the practice of joining every individual in a lawsuit who may have some remote connection, a defendant should be allowed to file an affidavit of noninvolvement denying connection to the negligent act. A hearing would then be held requiring the plaintiff to show reasonable cause for naming the individual as a defendant in the suit.
- 3) Permit a System of Binding, Voluntary Arbitration. Arbitration could be used in less complex cases as a faster, less costly means of resolving small claims. By diverting these cases to an alternative system, the traditional court system would be freed to more quickly expedite more complex cases, reducing costs to the courts and litigants. The Institute of Civil Justice is currently conducting a study to evaluate litigant reactions and litigant costs in court-annexed arbitration in federal courts.
- 4) Expedite Proceedings. Patricia A. Ebener of the Rand Institute conducted a national survey of state court procedures designed to reduce delays in civil court procedures. Her study found 25 procedures implemented in 47 states. These include:
 1. "Fast tracks" for certain types of cases;
 2. Dismissal of inactive cases;
 3. Penalties for last minute settlements made after courtroom assignment and jury selection;
 4. Procedures designed to simplify and limit filing of motions and pleadings; procedures limiting discovery;
 5. Procedures which set firm trial dates;
 6. Procedures which provide faster and less expensive means of resolving disputes.

Evaluation of Reforms

Critical to the process of revising the legal system is developing procedures for measuring the effectiveness of these reforms. During the 1970s, a number of legislatures enacted tort reforms addressing the medical malpractice liability issue, but many did not establish monitoring systems to measure the effectiveness of the reforms or procedures to collect and analyze data. It is difficult to determine which reforms were effective and which were not since these states are still experiencing problems related to availability of insurance.

The Rand Institute on Civil Justice has conducted some studies on these state reforms, but they have been hampered by a lack of data. According to the Institute, "The model must be regarded as preliminary; it must be applied to more data sets before its validity can be precisely judged. Gaps and inadequacies in the data used so far make the conclusions tentative."

With these precautions in mind, certain observations on tort reform related to medical malpractice can be made.

Current practices have resulted in a system in which the cost of litigation equals the compensation received by the plaintiffs. Small claims, even with merit, are often dropped due to the cost of litigation. However, policymakers must realize that a reduction in litigation costs could result in an "increase in the number of cases filed, a decrease in the percentage dropped without payment, an increase in average settlement size and an increase in the number of cases taken to verdict." With an increase in litigation, there would be more pressure on the already congested judicial system.

Effects of Changes in Tort Law

An analysis of the Rand study provides evidence on the direction and order of magnitude of the short-run effects of some of the changes enacted in the mid-1970's. Dollar caps on awards, elimination of specific dollar claims by the plaintiff and authorization of installment payment of large awards appear to have significantly reduced jury awards and settlements in the states where they were enacted. Modification of the collateral source rule to admit evidence that the plaintiff is eligible for compensation from other sources has apparently had a much weaker effect. Statutory limits on the contingent fees charged by plaintiffs' attorneys appear to have had moderately depressive effects on settlement amounts and on the number of cases going to verdict, while somewhat increasing the proportion of cases dropped.

The study did not attempt to identify the effects of other measures enacted by various states, including measures to reduce the statute of limitations; to limit the circumstances in which a presumption of defendant liability is created (*res ipsa loquitur*); to make it easier to prove the patient's informed consent to a medical procedure; to introduce expert pre-trial panels to screen claims for their merit; or to permit binding arbitration.

This study suggests that there are standards of measurement available to evaluate tort reforms. By compiling statistics on whether there has been a reduction or an increase in suits settled out of court, whether there has been a reduction in size of judgments, whether judges have revised jury verdicts, whether there has been a reduction in the number of suits filed, legislators would have objective standards to judge the effectiveness of tort reform. It would be worthwhile, upon passage of tort reform legislation, to establish a system for collecting data to develop a statistically significant measure of the effectiveness of tort reform. Development of such information would put an end to the controversy surrounding tort reform and be useful in revision of ineffective reforms in the future.

FEDERAL INITIATIVES ON TORT REFORM

After the United States Supreme Court held that the insurance industry was subject to federal regulation (*United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944)), Congress enacted the McCarran Act of 1945, 59 Stat. 33, U.S.C. Sec. 1011 et seq., supporting the continued regulation of the insurance industry by the states. Current discussion in Washington includes a review of the efficacy of this federal position as

well as numerous other proposals to modify the regulatory scheme. Bills pertaining to the regulation of product liability and medical malpractice litigation provide examples of federal initiatives.

Product Liability

Two federal bills were introduced in 1985 dealing with product liability. Senator Bob Kasten (Wisconsin) introduced S.B. 100 to regulate interstate commerce by providing a uniform product liability law. The bill requires proof of negligence on the part of the manufacturer and provides for a two-year statute of limitations on the filing of a suit.

An alternative to S.B. 100 is an amendment to S.B. 44, The Product Liability Act, introduced in 1984. The amendment is sponsored by Senators Christopher Dodd (Connecticut) and Slade Gorton (Washington). The amendment does not require proof of negligence, but provides an alternative for injured parties to the traditional lawsuit by allowing them to receive compensation in a speeded-up claims process, which recognizes economic losses such as medical costs and lost earnings. Disagreements would be resolved by arbitration.

Medical Malpractice

The Medical Offer and Recovery Act of 1985 (H.R. 3084) sponsored by Congressmen Henson Moore (Louisiana) and Richard Gephardt (Missouri) addresses issues related to malpractice litigation. Provisions of the bill outline a model for state legislation and federal provisions for states which do not enact similar mechanisms. Provisions of the bill include:

- 1) An alternative allowing health care providers, within 180 days of incident, to authorize payment of patient's economic loss;
- 2) Foreclosure of a patient's right to sue for medical malpractice once the provider's commitment to pay for economic loss is made, with two exceptions: a) cases where the provider intentionally caused the injury; b) wrongful death;
- 3) Offer of provider must by definition encompass all of patient's economic losses;
- 4) Provider may join all other responsible parties with disputes between joined parties being settled by arbitration;
- 5) Periodic payments.

The patient's right to sue for enforcement should the provider default or breach the agreement is protected under the bill's provisions. It also allows lump sum payments under certain circumstances; assures patients of payment; permits patients to demand compensation for economic loss without going through the expensive, lengthy litigation process; requires reporting to state health care licensing authorities to reduce malpractice by incompetent health care providers.

FEDERAL COURTS AND LOCAL GOVERNMENT LIABILITY

In recent years local governments have experienced rapidly expanding liability under federal antitrust and civil rights laws. Time spent litigating these cases has proved expensive for states in terms of the attorneys' general time and private attorneys' fees and damages. According to Beth Farmer of the National Association of Attorneys General, the states received some relief in regard to antitrust laws with passage of federal legislation in May, 1985. This legislation clarified the application of the federal antitrust laws to the official conduct of local governments, reducing suits against them. The primary benefit to local government was that awards under antitrust laws included triple damages. However, litigation arising from 42 U.S.C. Section 1983 (civil rights legislation) continues to be a significant source of state litigation and may increase for several reasons. First, the argument which persuaded Congress to provide relief under antitrust laws was that the injured party could still, in many cases, file suit under 42 U.S.C. Section 1983 for damages (no triple damage awards). George Yuhas, Chairman of the American Bar Association Committee on Government Liability, points out that some suits currently filed against local governments for tort actions also carry elements of violation of civil rights actions under 42 U.S.C. Section 1983. With the passage of state tort reform laws, suits of this nature may be filed under the federal law to avoid tort reform measures such as caps, structured settlements and limitations on attorneys' fees. States should be prepared to deal with such contingencies.

SURVEY

A survey on tort reform legislation is included in this report (Appendix A). The respondents were legislative drafting offices and state attorneys' general offices.

Generally, states are listing the following topics for serious consideration: municipal immunity; limitation on pain and suffering awards; limitations on attorneys' fees; dram shop legislation; comparative negligence (several states are considering adoption of the Uniform Comparative Fault Act), medical malpractice legislation; elimination of joint and several liability doctrine; reduction of statute of limitations; limitation of governmental liability for damage or injury resulting from hazardous recreational activities; limitation of liability for providing emergency medical care rendered by a physician-trained mobile intensive care paramedic.

Topics also include abolition of jury trials in cases against public entities or trial to judge on damage issue; establishment of legal duty for various activities; limitation of liability for torts related to toxic wastes; creation of pretrial screening panels; limitation on liability for highway design, construction and maintenance; modification of statute of limitations for legal actions against architects, construction managers, professional engineers or contractors for improper or negligent improvements to real property; requiring that losing litigants pay court costs and attorneys' fees in some circumstances (similar to Federal Rules of Procedure 68).

While most states that have enacted tort reforms report that the legislation has been effective in limiting the size of awards, they note steady increases in the number of suits filed due to decline in the use of the doctrine of sovereign immunity. States also cite the increasing number of

suits filed under 42 U.S.C. 1983 statutes and the lack of control that the states have in modifying these federal statutes.

The State of Tennessee reported that portions of the "Medical Malpractice Review Board and Claims Act of 1975," Tennessee Code Annotated, Sections 29-26-114, 29-26, i21, were repealed in 1985 due to ineffectiveness. Statistics for total tort or damage suits filed in Circuit and Chancery Courts in 1974 numbered 11,064; in 1984, 11,775 (Source: Executive Secretary, Supreme Court of Tennessee, Annual Report 1974 and 1984).

Recommendations

The majority of states responding to the survey supported two proposals:

- 1) Cap on "non-economic damages," and
- 2) Modification of collateral source rule.

Various states made the following suggestions.

- 1) Limitation of punitive damages to a set amount or percentage of assets, whichever is greater.
- 2) Legislation that treats public entities and public employees identically for procedural requirements.
- 3) Legislation limiting public entities' contribution to any judgment to an amount not greater than its pro rata share of liability.
- 4) In assessing legislation, an important consideration is the ramifications of proposed legislation on practical as well as constitutional issues. Critical to the selection of appropriate legislation is the determination of the source from which the so-called problems originate--attorneys' actions, insurance industry actions or other causes.
- 5) Enactment of standards permitting waivers of rights to sue for damages for use by schools, churches, and non-profit organizations.
- 6) Enactment of market assistance plans.
- 7) Enactment of more limited standards of duty than are currently in use.
- 8) Abolition of jury trials in cases against public entities or trial to judge on damages issues;
- 9) Return to restricted form of sovereign immunity;
- 10) Creation of pretrial screening panels to determine validity of suit.
- 11) Legislation prohibiting a public entity's contributing to a judgment more than its pro rata share of liability.

12) Awards to state of any assessment of punitive damages.

Virtually every state has created a task force to study the liability insurance problem. In addition to tort reform measures, states are also reviewing regulations in the insurance industry.

Recommendations for the upcoming sessions include legislation which would: 1) place tighter restrictions on cancellation and renewal policies of insurance companies; 2) establish self-insurance plans for state and local governments; 3) regulate capital fund requirements of foreign and domestic insurers; alter structure of insurance settlement payments; 4) create joint underwriting associations; 5) modify "open competition" rating act; 6) increase insurance department's authority to regulate rates; 7) provide for an excess profits law for commercial liability rates; 8) allow for group insurance for commercial liability risks; expand to various professional groups the authority to form a self-insurance trust; and 9) revise requirements for businesses to form a limited reciprocal insurer.

The State of Montana has been able to address some of the current problems through judicial decisions. The Montana Supreme Court has recognized the tort of violation of insurer's implied-in-law duty of good faith and fair dealing. First Security Bank v. Goddard, 181 M407, 593 P.2d 1040 (1979); Fowler v. State Farm Mutual Automobile Insurance Co., 153 M74, 454 P.2d 76 (1969).

CONCLUSION

The issues surrounding the liability insurance crisis are complex and do not admit to any easy solution. They require thoughtful, careful consideration. The success or failure of reform will depend to a great extent on the development of accurate data upon which decisions will be made. The majority of the states are presently engaged in this search. This report provides some information regarding the direction that states are taking. As legislatures consider this subject in 1986, NCSL will continue to monitor the progress of the legislatures and provide this data to interested persons.

The information in this State Legislative Report is based in part on committee meetings conducted in Williamsburg, Virginia in November, 1985. Participants included David Childers, Insurance Commissioner (Arizona); Matt Coffee, Lee Ruck, National Association of Counties; Don Jones, National League of Cities; John Gunther, United States Conference of Mayors; Jody Thomas, National Governors' Association; Wayne Campbell, National Federation of Independent Business; and Winnie Austerman, Office of Management and Budget. Additional information was supplied by the states in response to surveys. State reports also supplemented the research. A complete bibliography as well as more detailed information is available upon request.

ABOLITION OR MODIFICATION OF SOVEREIGN IMMUNITY

ALABAMA	*	--
ALASKA	*	AS 09.50.250-.280; AS 09.65.070
ARIZONA		A.R.S. §12-820 et seq.
ARKANSAS		A.S.A. §12-2901
CALIFORNIA		Cal. Govt. Code §815.2
COLORADO	*	24-10-101 through 118 C.R.S. (1973); H.B. 1001 (1985)
CONNECTICUT	*	C.C.S.A. §4-165; §7-308; §4-160
DELAWARE	*	--
FLORIDA		§768.28, Fla. Stat. Ann.
GEORGIA		Article I, Sec. II, Par. IX (Georgia Constitution)
HAWAII		Haw. Rev. Stat. §662-1 (State Tort Liability Act)
IDAHO		I.C. §6-901 et seq.
ILLINOIS	*	
INDIANA	*	Ind. Code 34-4-16.5-1 et seq.
IOWA		I.C.A. §525A.1; I.C.A. §613A.1
KANSAS		K.S.A. 75-6101 et seq.
KENTUCKY		K.R.S. 44.070 (Board of Claims Act)
LOUISIANA	*	La. Const. Art. 12, Sec. 10 (1974); R.S. 13:5106
MAINE		14 MRSA §8101 et seq. (Tort Claims Act)
MARYLAND		Md. Code Ann. Art. 43, §12-104
MASSACHUSETTS	*	Massachusetts General Laws (Chapters 258 & 258A)
MICHIGAN		Mich. Stat. Ann. §3.996 (107)
MINNESOTA	*	
MISSISSIPPI		H.B. 983 (1985); M.C. §11-46-1 et seq.
MISSOURI		§537.600, RSMo (L. 1978, H.B. 1650; A.L. 1985, S.B. 323)
MONTANA	*	Chapter 675, L. 1983 (2-9-206, 2-9-207, 2-9-101 MCA)
NEBRASKA		Neb. Rev. Stat. §81-8.215 et seq.; §23-2307; §23-2413
NEVADA		NRS 41.031 et seq. (\$50,000 limit under NRS 41.035)
NEW HAMPSHIRE	*	1985 Laws, Chapter 441; N.H. Rev. Stat. Ann. §412.3
NEW JERSEY	*	N.J.S.A. §4-1-1 et seq.
NEW MEXICO		N.M.S.A. §41-4-1 et seq.
NEW YORK		Court of Claims Act, Art. II §8; N.Y. Gen. Mun. Law §50-d
NORTH CAROLINA		N.C. §143-291; N.C. §153A-435
NORTH DAKOTA		North Dakota Century Code NDCC §32-12.1-03
OHIO	*	O.R.C. §2743.01
OKLAHOMA		51 O.S.A. 1985, §151 et seq.
OREGON		ORS 30.260-30.300
PENNSYLVANIA	*	42 Pa.C.S. §8522; 42 Pa. Stat. Ann. §8540
RHODE ISLAND	*	R.I. Gen Laws §9-31-1; §9-31-2; §9-31-3; §9-31-4; §9-31-12
SOUTH CAROLINA	*	--
SOUTH DAKOTA	*	SDCL §§21-32-15 to 18
TENNESSEE		Tenn. Code Ann. §§29-20-101--29-20-407 (1980, 1985 Supp.)
TEXAS		Tex. Civ. Stat. Art. 6252-19b; Art. 6252-26
UTAH		U.C.A. §63-30-3 et seq.
VERMONT	*	Vt. Stat. Ann. Tit. 12, §5601; Vt. Stat. Ann. Tit. 29, §1403
VIRGINIA		--
WASHINGTON		R.C.W. §4.92.010
WEST VIRGINIA		--
WISCONSIN	*	--
WYOMING	*	"Closed end" (1979) W.S. 1-39-101 through 119
AMERICAN SAMOA		
GUAM		
PACIFIC TRUST		
PUERTO RICO		
VIRGIN ISLANDS		
TOTAL		

* See Comments.

ABOLITION OR MODIFICATION OF SOVEREIGN IMMUNITY - Comments

ALABAMA

Article I, Section 14 of the Alabama Constitution prohibits the state from being made a party in a lawsuit. The legislature cannot consent to suit against the state, but it can pass bills to appropriate money for persons injured by state actions.

Two judicial decisions -- Jackson v. City of Florence, 294 Ala. 592, 320 So.2d 68 (1975) and Lorence v. Hospital Board of Morgan County, 294 Ala. 614, 320 So.2d 631 (1975) abolished local government immunity. Section 11-1-2, Code of Alabama, has established liability limits to \$100,000 per claim and \$300,000 per occurrence.

ALASKA

- 1) Claims against state
- 2) Suits against incorporated units of local government

COLORADO

H.B. 1001 revised governmental immunity statutes (September 15, 1985).
Evans v. Board of County Commissioner, 174 Colo. 97, 482 P.2d 968 (1971).

CONNECTICUT

State sovereign immunity is not abolished; State Claims Commission hears and may approve claims but only under \$5,000; municipal immunity retained except in limited circumstances.

DELAWARE

Retains sovereign immunity (Article I, Section 9 of Delaware Constitution). The Supreme Court of Delaware has held that the defense of sovereign immunity may be waived only by legislative act.

FLORIDA

Caps of \$100,000/\$200,000 or greater amount for which insurance is provided.

ILLINOIS

Illinois Constitution, Article XIII, Section 4 abolishes sovereign immunity except as provided by General Assembly. Ill. Rev. Stat. 1983, Ch. 127, Par. 801 provides that the state may be a party only in the Court of Claims.

INDIANA

Campbell v. State (1972) Ind., 284 N.E.2d 733

LOUISIANA

Act No. 451-R.S. 42:1441.1-1441.4; R.S. 29:23.1
Act No. 452-R.S. 13:5106; 5109(A)
Act No. 453-R.S. 9:2798.1
Act No. 454-R.S. 9:2800

MASSACHUSETTS

\$100,000 cap per occurrence where immunity is waived.

MINNESOTA

Minn. Stat. §§3.732 and 3.736 (Supp. 1985) (State); Minn. Stat. Ch. 466 (Supp. 1985) (Political Subdivisions).

ABOLITION OR MODIFICATION OF SOVEREIGN IMMUNITY - Comments

MONTANA

Chapter 419, L. 1985; Chapter 389, L. 1985 (2-9-101, 2-9-107, MCA).
Sovereign immunity abolished in Constitutional Convention (1973).

NEW HAMPSHIRE

(Cont'd) §507-B:4.

\$100,000 cap per occurrence where immunity is waived.

NEW JERSEY

Prohibits damages for pain and suffering except in cases of severe injury where medical expenses exceed \$1,000.

OHIO

- 1) In the case of the State of Ohio, sovereign immunity was abolished in Am. Sub. H.B. 800 of the 110th General Assembly (Effective 1/1/75). R.C. 2743.01-2743.20.
- 2) In the case of Ohio's political subdivisions, sovereign immunity was abrogated by the Supreme Court in a series of decisions, but recently reestablished subject to specified areas of liability (Am. Sub. H.B. 176 of the 116th General Assembly, effective 11/20/85). R.C. 2744.01-2744.09.

PENNSYLVANIA

\$500,000 cap per occurrence where immunity is waived; damages for pain and suffering prohibited except in cases of severe injury where medical expenses exceed \$1,500.

RHODE ISLAND

\$50,000 cap per occurrence where immunity is waived.

SOUTH CAROLINA

Doctrine of sovereign immunity was abrogated by McCall v. Batson (1985), 329 S.E.2d 741, H.B. 2266 "South Carolina Tort Claims Act" is pending.

SOUTH DAKOTA

Reinstatement and strengthening. The Governor has cancelled the state's liability policy as of December 1, 1985.

VERMONT

No liability except to extent of insurance coverage.

WISCONSIN

State employees, officers and agents can be sued in tort if the claimant complies with the notice requirements of §893.82 Stats; see also 895.52.

WYOMING

Judiciary Committee sponsoring bill for 1986 session which will further limit liability for highway design, construction and maintenance.

ABOLITION OR MODIFICATION OF JOINT AND SEVERAL LIABILITY

3

ALABAMA	--
ALASKA	A.S. 09.16 (Alaska Uniform Contribution Among Tortfeasors Act)
ARIZONA	A.R.S. 12-2501 et seq.
ARKANSAS	--
CALIFORNIA	--
COLORADO	§13-21-111(3.5), C.R.S. H.B. 1231 (1985)
CONNECTICUT *	--
DELAWARE *	--
FLORIDA	No -- legislation proposed
GEORGIA	Enacted greater statutory protection against excessive exposure
HAWAII	No -- proposals for 1986 session
IDAHO	--
ILLINOIS	Ill. Rev. Stat. 1983, Ch. 70, Par. 301 et seq.
INDIANA *	
IOWA *	
KANSAS	K.S.A. 60-258a
KENTUCKY	--
LOUISIANA *	La. Civil Code Art. 2324; R.S. 9:3921
MAINE *	14 MRSA §156 (comparative negligence)
MARYLAND	--
MASSACHUSETTS *	
MICHIGAN	--
MINNESOTA *	--
MISSISSIPPI	--
MISSOURI	--
MONTANA	--
NEBRASKA	--
NEVADA *	NRS 41.141(3)
NEW HAMPSHIRE *	
NEW JERSEY	--
NEW MEXICO	--
NEW YORK *	--
NORTH CAROLINA	N.C. Gen. Stat. §1B-1 to 1B-6 (1983)
NORTH DAKOTA	NDCC §32-38-01
OHIO *	--
OKLAHOMA *	510.5 1984, §154(E)
OREGON	ORS 18.440 - 18.460 (Contribution Among Joint Tortfeasors)
PENNSYLVANIA *	See comments.
RHODE ISLAND *	R.I. Gen. Laws §10-6-3 (see 9-20-4)
SOUTH CAROLINA	--
SOUTH DAKOTA	--
TENNESSEE	--
TEXAS *	Chapters 32 and 33, Civil Practice & Remedies Code
UTAH	Enacted greater statutory protection against excessive exposure
VERMONT	Eliminated the concept of joint and several liability
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	Legislation proposed - repeal of doctrine
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

*See Comments.

ABOLITION OR MODIFICATION OF JOINT AND SEVERAL LIABILITY - Comments

CONNECTICUT

Retains state sovereign immunity; State Claims Commission hears and may approve claims under \$5,000; municipal liability retained (except in limited circumstances).

DELAWARE

State waives immunity but mandates insurance coverage; retains sovereign immunity for local governmental immunities and provides a \$300,000 cap per occurrence where immunity is waived (see §1515, Tit. 6).

INDIANA

Eliminated the concept of joint and several liability: abolished effective 1/1/85.

IOWA

Generally, there is joint and several liability, but not with respect to defendants who are found to bear less than 50% of the total fault assigned to all parties.

LOUISIANA

Generally, there is joint and several liability but not where defendant's fault is less than that of the plaintiff, in which case defendant is liable only to the extent of own fault.

MAINE

\$300,000 cap per occurrence where immunity is waived.

MINNESOTA

Generally, joint and several liability, but if plaintiff's negligence is greater than that of any of several defendants, plaintiff cannot recover at all from that defendant.

NEVADA

Generally, joint and several liability except that a defendant who is less at fault than the plaintiff is liable only for that portion of the judgment which represents the percentage of negligence attributable to him.

NEW HAMPSHIRE

Eliminated the concept of joint and several liability. \$100,000 cap per occurrence where immunity is waived.

NEW YORK

See Civil Practice Law and Rules (CPLR) 1404.

OHIO

Based upon computer searches of Ohio court decisions and statutes, this state still has instances of joint and several liability (see memo R-114-2395, which still is generally correct. However, the effect of the doctrine may be mitigated in some cases by Ohio's contributions among joint tortfeasors statutes (R.C. 2307.31-2307.32, see memo's appendices) and possibly by the comparative negligence statute (R.C. 2315.19). See also these cases: Barry v. Schorling, 2 Ohio App.3d 110 (1981); Lattea v. Akron, 9 Ohio App.3d 118 (1982); and National Mutl. Ins. Co. v. Whitmer, 70 Ohio St.2d 149 (1982).

ABOLITION OR MODIFICATION OF JOINT AND SEVERAL LIABILITY - Comments

OHIO, Cont'd

Recent legislation places a cap of \$250,000 per person and \$500,000 per occurrence, as well as a limitation on recovery for pain and suffering to cases of wrongful death or substantial permanent disability/disfigurement and \$5,000 in medical expenses.

OKLAHOMA

No joint and several liability except where damages cannot be apportioned.

PENNSYLVANIA

Generally, joint and several liability except where plaintiff's fault is greater than a defendant's in which case the defendant is liable only for the percentage attributable to him.

RHODE ISLAND

\$50,000 cap per occurrence where immunity is waived.

TEXAS

Generally, joint and several liability, but if plaintiff's negligence is greater than that of any of several defendants, plaintiff cannot recover at all from that defendant.

ABOLITION OR MODIFICATION OF COLLATERAL SOURCE DOCTRINE

4

ALABAMA	--
ALASKA	A.S. 09.55.548 (medical malpractice only)
ARIZONA	A.R.S. 12-565 (medical malpractice only)
ARKANSAS	--
CALIFORNIA	--
COLORADO	--
CONNECTICUT	P.A. 85-574
DELAWARE	--
FLORIDA	§672.7372 Fla. Stat. (automobile cases only)
GEORGIA	--
HAWAII	--
IDAHO	--
ILLINOIS	--
INDIANA	--
IOWA	--
KANSAS	--
KENTUCKY	--
LOUISIANA	--
MAINE	17-A MRSA §1322
MARYLAND	--
MASSACHUSETTS *	Yes
MICHIGAN	--
MINNESOTA	--
MISSISSIPPI	--
MISSOURI	--
MONTANA	--
NEBRASKA	--
NEVADA	N.R.S. 42.020 (limited in scope)
NEW HAMPSHIRE	--
NEW JERSEY *	N.J.S.A. 59:9-2
NEW MEXICO	--
NEW YORK *	Yes
NORTH CAROLINA	N.C. Gen. Stat. §8C-1, Rule 411
NORTH DAKOTA	--
OHIO *	--
OKLAHOMA	§10.5 (1984), §153(D)
OREGON *	Yes
PENNSYLVANIA	42 Pa.C.S.A. §8553(d)
RHODE ISLAND	R.I. Gen. Laws §9-19-34 (medical malpractice only)
SOUTH CAROLINA	--
SOUTH DAKOTA	--
TENNESSEE	--
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	--
AMERICAN SAMOA	--
PACIFIC TRUST	--
PUERTO RICO	--
VIETNAM ISLANDS	--

Comments.

ABOLITION OR MODIFICATION OF COLLATERAL SOURCE DOCTRINE - Comments

MASSACHUSETTS

Domenic Corsetti, et al. v. The Stone Company, et al., 396 Mass. 1 (September 19, 1985). Admission of collateral source evidence is a matter for the Trial Judge. Evidence may be admitted to contradict plaintiff's testimony that his injury had caused him loss of money and where relevant to his motive for staying out of work.

NEW JERSEY

Gives public entities a credit for all collateral sources except for life insurance.

NEW YORK

Civil Practice Law & Rules 4545 - actions for medical and dental malpractice and certain actions against public employers.

OHIO

Based upon computer searches of Ohio court decisions and statutes, Ohio still generally follows this doctrine. See Shearer v. Motorists Mut. Ins. Co., 53 Ohio St.2d 1 (1978); Suchy v. Moore, 29 Ohio St.2d 99 (1972); and Pryor v. Webber, 23 Ohio St.2d 104 (1970). See also Evidence Rule 411 (inadmissibility of liability insurance information). However, in the recent political subdivision sovereign immunity act, there is a requirement of the disclosure and deduction of insurance and other collateral benefit sources (R.C. 2744.05(B)); additionally, R.C. 2305.27 relates to limited consideration of collateral benefits in "medical claims" cases; and, finally, recoveries against the State of Ohio in the Court of Claims must be reduced by insurance, disability awards, and other collateral benefits (R.C. 2743.02(D)).

OREGON

- 1) O.R.S. 18.500-18.530 (advance payment by or on behalf of tortfeasor)
- 2) O.R.S. 743.792(7) (uninsured motorist coverage in motor vehicle liability policy)
- 3) O.R.S. 743.800-743.835 (Personal injury benefits protection in motor vehicle liability policy)

ESTABLISHMENT OF PREJUDGMENT INTEREST ACCRUAL PRINCIPLE

5

ALABAMA	--
ALASKA *	A.S. 09.50.280; A.S. 45.45.010
ARIZONA	--
ARKANSAS	--
CALIFORNIA	--
COLORADO	--
CONNECTICUT	C.S.C.A. §52-192a
DELAWARE	--
FLORIDA	--
GEORGIA	--
HAWAII *	H.R. Stat. §636-16; see also H.R. Stat. §661-68
IDAHO	I.C. §28-22-104
ILLINOIS	--
INDIANA	--
IOWA	--
KANSAS	K.S.A. 16-205
KENTUCKY	--
LOUISIANA	La. Civil Code Art. 2924; La. Rev. Stat. 13:5112 and 13:5117
MAINE	14 MRSA §§1427-1430
MARYLAND	--
MASSACHUSETTS	--
MICHIGAN	--
MINNESOTA	Minn. Stat. §549.09 (Supp. 1985)
MISSISSIPPI	--
MISSOURI	--
MONTANA	Chapter 523, L. 1985 (27-1-210, MCA)
NEBRASKA	--
NEVADA	N.R.S. 17.130(2)
NEW HAMPSHIRE	--
NEW JERSEY *	Rule of Court - R. 4:42-11
NEW MEXICO	--
NEW YORK *	Civil Practice Law & Rules 5001, 5002, 5003
NORTH CAROLINA	N.C.Gen. Stat. §24-5
NORTH DAKOTA *	Yes
OHIO *	Yes
OKLAHOMA	12 O.S. Supp. 1985, §727; 36 O.S. Supp. 1985, §3629
OREGON	--
PENNSYLVANIA	Pa. R.C.P. 238
RHODE ISLAND	R.I. Gen. Laws §9-21-10
SOUTH CAROLINA	§34-31-20, S.C.R.S.
SOUTH DAKOTA	S.D.C.L. §21-1-11
TENNESSEE	--
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN *	--
WYOMING	--
AMERICAN SAMOA	--
GUAM	--
PACIFIC TRUST	--
PUERTO RICO	--
VIRGIN ISLANDS	--

Comments.

ESTABLISHMENT OF PREJUDGMENT INTEREST ACCRUAL PRINCIPLE - Comments

ALASKA

State v. Phillips, 470 P.2d 266 (1970)

HAWAII

Prejudgment interest may accrue as early as date of injury.
H.R.S. §662-2 (no prejudgment interest against state).

NEW JERSEY

Public entities do not pay prejudgment interest. N.J.S.A. 59:9-2.

NEW YORK

Interest in tort actions, except certain actions dealing with property, is available from verdict, report or decision to judgment and upon judgment.

NORTH DAKOTA

North Dakota Century Code §32-03-04 only applies to situations where damages are certain or capable of being made certain by calculation and generally applies to contract actions. However, it is conceivable that if the plaintiff could show damages with some degree of certainty, i.e., legal malpractice, negligent bailment, etc., this statute would be applicable in a negligence action. However, North Dakota has not expressly adopted the prejudgment interest accrual principle.

WISCONSIN

Provisions for interest accrual from date of settlement offer - see
§807.01 Stats.

ESTABLISHMENT OF LIMITS ON NON-ECONOMIC DAMAGES

ALABAMA	--
ALASKA	--
ARIZONA	--
ARKANSAS	--
CALIFORNIA	Cal. Civ. Code §3333.2 (West. Supp. 1984)
COLORADO	--
CONNECTICUT	--
DELAWARE	--
FLORIDA	-- Legislation proposed.
GEORGIA	--
HAWAII	Hawaii Rev. Stat. Ch. 294 ("no fault" statute for autos and vehicles)
IDAHO	--
ILLINOIS	--
INDIANA	--
IOWA	--
KANSAS	--
KENTUCKY	--
LOUISIANA *	La. Rev. Stats. 13:5106; 13:5149 (punitive damages) (cont'd in comme
MAINE	18-A.M.R.S.A. §2-804 (wrongful death action)
MARYLAND	--
MASSACHUSETTS *	Yes
MICHIGAN	--
MINNESOTA	--
MISSISSIPPI	--
MISSOURI	§§383.075 to 383.083, R.S.Mo. Supp. 1985 (H.B. 657 and 337)
MONTANA *	Chapter 507, L. 1985 (27-1-221, MCA)
NEBRASKA	--
NEVADA	--
NEW HAMPSHIRE	--
NEW JERSEY *	--
NEW MEXICO	--
NEW YORK *	Yes
NORTH CAROLINA	--
NORTH DAKOTA	--
OHIO *	R.C. 2744.05(C); R.C. 2307.43
OKLAHOMA	--
OREGON	--
PENNSYLVANIA *	42 Pa.C.S.A. §8528
RHODE ISLAND	--
SOUTH CAROLINA	--
SOUTH DAKOTA	S.D.C.L. §21-3-11
TENNESSEE	T.C.A. §147-14-123 (1984) (as to claims against state only)
TEXAS	Article 4590, Section 11.02, Revised Statutes
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN *	Sec. 893.82(6)
WYOMING *	--
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO °	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

6a 7b

ESTABLISHMENT OF LIMITS ON NON-ECONOMIC DAMAGES - Comments

LOUISIANA

(Cont'd) La. Rev. Stats. 40:1299.39; 40:1299.42 and 40:1299.43.

MASSACHUSETTS

Limits under Tort Claims Act \$100,000; in Highway Defect Cases as to Commonwealth of Massachusetts, \$5,000; and on malpractice cases considered as to total damages.

MONTANA

Generally, statute providing immunity for all non-economic damages was overturned by state Supreme Court (1983). However, this amendment was passed in 1985 session in response to the increasing number of wrongful termination cases being filed, partially as a result of the Montana Supreme Court's recognition of a number of causes of action related to termination of employment.

NEW JERSEY

No limitations except for claims under wrongful death statute.
N.J.S.A. 2A-31-1 et seq.

NEW YORK

Limitation of exclusion of damages only in the case of workers' compensation (Workers' Compensation Law Section 11) and no-fault automobile insurance (Insurance Law Section 5104).

OHIO

No statute applicable to all tort cases, but in the recent political subdivision sovereign immunity act, there is a \$250,000 cap on non-economic damages in civil actions other than wrongful death actions (R.C. 2744.05(C)). The Ohio Constitution prohibits caps in wrongful death cases (Article I, Section 19A). There also is a \$200,000 cap in medical malpractice (nondeath) cases, which may apply to economic as well as non-economic damages and may be subject to constitutional challenge (R.C. 2307.43).

PENNSYLVANIA

Subject to attack on constitutional grounds; issue in state Supreme Court; Lyles v. Philadelphia.

TEXAS

Medical malpractice found unconstitutional in Baptist Hospital of Southeast Texas v. Baber, 672 S.W.2d 296 (Tex. App. Beaumont 1984, writ granted).

WISCONSIN

Applies only to limits of \$250,000 per claimant for each state employee sued and denial of punitive damages.

WYOMING

Proposal to eliminate constitutional prohibition (Article X, Section 4, Wyoming Constitution).

ESTABLISHMENT OF PROVISIONS OF STRUCTURED AWARDS

7

ALABAMA	Ala. Code §6-5-486 (1975)
ALASKA	A.S. 09.55.548 (medical malpractice only)
ARIZONA	--
ARKANSAS	Ark. Stat. Ann. §34.2619 (Supp. 1983)
CALIFORNIA	Cal. Civ. Proc. Code §667.7 (West 1980)
COLORADO	--
CONNECTICUT	--
DELAWARE	Del. Code Ann. Tit. 18 §6864 (Supp. 1984)
FLORIDA *	§768.57 Fla. Stat. (1985)
GEORGIA	--
HAWAII *	--
IDAHO	--
ILLINOIS	Public Act 84-7, Ill. Rev. Stat., Ch. 110, Par. 2-611.1
INDIANA *	Yes
IOWA	--
KANSAS	Kan. Stat. Ann. §60-2609 (1983)
KENTUCKY	--
LOUISIANA	La. Rev. Stats. 13:5114 (Act No. 45) 450
MAINE	--
MARYLAND	--
MASSACHUSETTS	--
MICHIGAN	--
MINNESOTA	Minn. Stat. 3.736 et seq.
MISSISSIPPI	--
MISSOURI	--
MONTANA *	Yes
NEBRASKA	--
NEVADA	--
NEW HAMPSHIRE	--
NEW JERSEY	--
NEW MEXICO	--
NEW YORK *	Civil Practice Law & Rules 50-A
NORTH CAROLINA	--
NORTH DAKOTA	--
OHIO *	--
OKLAHOMA	--
OREGON	--
PENNSYLVANIA	--
RHODE ISLAND	R.I. Gen. Laws §28-33-25 (workers' compensation only)
SOUTH CAROLINA *	--
SOUTH DAKOTA *	--
TENNESSEE *	Tenn. Code Ann. §7-51-202 (1985); §9-8-307 (1985 Supp.) (see comm.)
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	-- Proposed legislation
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

ESTABLISHMENT OF PROVISIONS OF STRUCTURED AWARDS - Comments

FLORIDA

Structured awards for future losses in excess of \$500,000 against health care providers.

HAWAII

Bills introduced in last session were rejected. Will be introduced again in 1986 session.

INDIANA

Permitted by custom and practice, not by statute or case law.

MONTANA

Workers' Compensation Law specifically provides for structured awards in 39-71-741, MCA (Chapter 471, L. 1985). No other statutory provisions, but method is commonly judicially applied in civil law cases.

NEW YORK

Only in medical and dental malpractice cases.

OHIO

No bill has been passed on the subject, but proposals are being considered. In Ohio's courts, structured settlements/awards have occurred without legislation on the books. See, however, the installment payments provisions in the recent political subdivision sovereign immunity act (R.C. 2744.06(B) and (C)).

SOUTH CAROLINA

Structured settlements are permitted by custom and practice, not by legislation.

SOUTH DAKOTA

Proposals for 1986 session similar to California statute regarding periodic payments for medical malpractice awards.

PENALTIES FOR FILING FRIVOLOUS SUITS

ALABAMA	--
ALASKA	A.S. 09.55.536 (medical malpractice only)
ARIZONA	--
ARKANSAS	--
CALIFORNIA	--
COLORADO	13-17-101 through 106, C.R.S. (1973 and 1985 Supp.) (see comments)
CONNECTICUT	C.G.S.A. §§52-240a; 52-568
DELAWARE	--
FLORIDA	§57.105 Fla. Stat.
GEORGIA	--
HAWAII	H.R. Stats., §§294-31; 607-14.5
IDAHO	I.R.C.P. Rule 54(e)
ILLINOIS	Public Act 84-7, Ill. Rev. Stat., Ch. 110, Par. 2-611.1
INDIANA	Ind. Code 34-4-16.5-19
IOWA	--
KANSAS	-- Statutory provisions are seldom used.
KENTUCKY	--
LOUISIANA	Yes
MAINE	--
MARYLAND	--
MASSACHUSETTS	Mass. Gen. Laws Ch. 258, §11; Mass. Gen. Laws Ch. 231, §6F
MICHIGAN	--
MINNESOTA	Minn. Stat. 1984, §549.21
MISSISSIPPI	-- See comments.
MISSOURI	§514.205, RSMo (S.B. 5, 1985)
MONTANA	--
NEBRASKA	--
NEVADA	N.R.S. 18.010(2)
NEW HAMPSHIRE	--
NEW JERSEY	--
NEW MEXICO	--
NEW YORK	Civil Practice Law & Rules 8303-a
NORTH CAROLINA	N.C. Gen. Stat. §6-21.5
NORTH DAKOTA	N.D.C.C. §28-26-01
OHIO	-- See comments.
OKLAHOMA	--
OREGON	--
PENNSYLVANIA	--
RHODE ISLAND	--
SOUTH CAROLINA	--
SOUTH DAKOTA	-- Proposed for 1986 session
TENNESSEE	Tenn. Code. Ann. §27-1-122 (1980) (frivolous appeals)
TEXAS	Chapter 105, Civil Practice & Remedies Code
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	§814.025 Stats.
WYOMING	--
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments

PENALTIES FOR FILING FRIVOLOUS SUITS - Comments

COLORADO

24-10-110(s), C.R.S. (1973), S.B. 182 (1984) - Penalties for filing frivolous suits. State Court Administrator's Office conducted a survey of use of frivolous lawsuits and found that judges do not invoke frivolous lawsuit legislation very often. A major weakness in such legislation lies in the stipulation that it cannot be used if the lawsuit involves a question of fact. In particular, whenever a party can bring in an expert witness, the issues which he testifies about become issues of fact, and as a result the frivolous lawsuit legislation cannot be used even if the action is frivolous.

FLORIDA

Awarding attorneys' fees to prevailing party where "complete absence of justiciable issue of either law or fact."

LOUISIANA

La.R.S. 3:3605; R.S. 42:11; R.S. 46:1820; R.S. 49:146
Louisiana Code of Civil Procedure Articles 863, 864 and 2164

MISSISSIPPI

See Rule 11q of Mississippi Rules of Civil Procedure.

NEVADA

Amended (1985), allows recovery of attorneys' fees when complaint "was brought with reasonable ground."

NORTH CAROLINA

Attorneys' fees awarded if court finds absence of justiciable issue.

OHIO

Under the Ohio Business Opportunity Plans Law and Consumer Sales Practices Law, the penalty of an attorney's fees award is available for groundless, bad faith actions (R.C. 1334.09 and 1345.09). In tort cases in general, there does not appear to be a general frivolous suit/penalty statute. Appellate Rule 23, however, permits courts of appeals to impose attorney's fees and court costs as penalties in the case of frivolous appeals. Additionally, in connection with frivolous tort civil actions, common law remedies (such as malicious prosecution actions) might be available against former plaintiffs who filed frivolous suits, but Ohio is strict relative to malicious prosecution recoveries. See Clermont Environmental Reclamation Co. v. Hancock, 16 Ohio App.3d (1984).

The frivolous suit issue has arisen in the past in Ohio relative to medical malpractice cases (see memo R-112-2782). The question has at times been whether attorneys as well as their clients should be pursued for frivolous suits. No legislative enactments have resulted, but several years ago legislation was discussed that would have imposed attorney's fees/court costs penalties for filing frivolous civil actions or appeals. Finally, see the memo R-116-1327 relative to attorney's fees awards in Ohio; also bear in mind that, in Ohio, prevailing parties in civil actions generally are awarded court costs under Civil Rule 54(D).

SOUTH CAROLINA

Rules of Procedure No. 54 allows costs to be allocated to prevailing party.

PENALTIES FOR FILING FRIVOLOUS SUITS - Comments

WISCONSIN

This section is of limited value because findings by a court that an action is frivolous requires the court report the attorney filing the action to the bar association, and judges are reluctant to do so.

WYOMING

Rules Committee of the Supreme Court is considering adoption of Fed. Rules Civ. Proc. Rule 11.

ESTABLISHMENT OF IMMUNITY FOR GOVERNMENT EMPLOYEES AND OFFICIALS

9

ALABAMA	--
ALASKA	Yes
ARIZONA	A.R.S. 12-820 et seq. (modified 1984)
ARKANSAS	--
CALIFORNIA	--
COLORADO	24-10-118, C.R.S (1973 and 1985 Supp.)
CONNECTICUT	C.G.S.A. §§4-160; 4-165
DELAWARE	Del. Code Ann. Tit. 10 §4011
FLORIDA *	§768.28(9)(a), Fla. Stat.
GEORGIA	--
HAWAII	Haw. Rev. Stat. §26-35.5
IDAHO	I.C. §6-901 et seq.
ILLINOIS	Ill. Rev. Stat. 1983, Ch. 85, Par. 101-1 et seq.
INDIANA	Ind. Code 34-4-16.5-3 (limited immunity)
IOWA	--
KANSAS	K.S.A. 75-6101 et seq. (Tort Claims Act)
KENTUCKY	-- Common law in effect.
LOUISIANA *	Yes
MAINE	14 M.R.S.A. §8101 et seq. (Tort Claims Act)
MARYLAND	Yes
MASSACHUSETTS *	Yes
MICHIGAN	--
MINNESOTA	Minn. Stat. 3.736 et seq.
MISSISSIPPI	H.B. 983 (1985) §11-46-1 et seq.
MISSOURI *	§537.035 (1985 H.B. 357); State Legal Expense Fund (see comments)
MONTANA	Chapter 530, L. 1983 (2-9-305, MCA)
NEBRASKA	--
NEVADA	N.R.S. 41.032; 41.033
NEW HAMPSHIRE	--
NEW JERSEY	N.J.S.A. 59:1-1 et seq.
NEW MEXICO	--
NEW YORK	--
NORTH CAROLINA	--
NORTH DAKOTA	N.D.C.C. §32-12.1-03
OHIO *	R.C. 9.85, 9.86, 2743.02; 2744.03(A)(6)
OKLAHOMA *	Yes - see comments.
OREGON	O.R.S. 30.265
PENNSYLVANIA	Case law: Pine v. Synkonis et al.
RHODE ISLAND	R.I. Gen. Laws §§91-127; 5-34-34; 45-16-5
SOUTH CAROLINA *	--
SOUTH DAKOTA	S.D.C.L. §§21-32-17 and 18
TENNESSEE	T.C.A. §9-8-307(h)
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN *	1985 Wisconsin Act 47, Section 4 (125.035)
WYOMING	
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

ESTABLISHMENT OF IMMUNITY FOR GOVERNMENT EMPLOYEES AND OFFICIALS - Comments

FLORIDA

Provides for immunity for acts in scope of employment, unless acting in bad faith, with malicious purpose, or in manner exhibiting wanton and willful disregard of human rights, safety, or property.

LOUISIANA

Louisiana Revised Statutes 9:2798.1, 13:5108.1 and 13:5108.2, 29:23.1, 40:1299.39, 42:1441.1-1441.4. This list does not include special statutes covering specific officers and functions.

MASSACHUSETTS

Massachusetts General Laws, Chapter 258 (public employees)

Massachusetts General Laws, Chapter 33 (national guard)

Massachusetts General Laws, Chapter 111C, Section 14 (medics rendering assistance in emergencies)

Massachusetts General Laws, Chapter 119, Section 51A (social workers and other mandated reporters immune from suit for filing report of suspected child abuse)

MISSOURI

(Cont'd) §§105.711 to 105.726 (S.B. 275, 1983)

OHIO

1) For state employees, see qualified immunity provisions of R.C. 9.85, 9.86, and 2743.02.

2) For political subdivision employees, see the recent political subdivision sovereign immunity act (R.C. 2744.03(A)(6)).

OKLAHOMA

1) 19 O.S. 1981, §371

2) 63 O.S., §683.14

3) 57 O.S., §553

4) 11 O.S., §§29-108 and 37-121

5) 22 O.S., §371

6) 11 O.S., §23-104

SOUTH CAROLINA

McCall v. Batson, Supra, contains some language on the subject of immunity for government officials. H.B. 2266 (pending) contains provisions on this issue.

WISCONSIN

Statute was recently enacted in response to Appellate Court decisions holding liquor dispensers liable.

MODIFICATION OF DRAM SHOP LAWS

10

ALABAMA	--
ALASKA *	A.S. 04.21.020
ARIZONA	No statute; found in case law.
ARKANSAS	--
CALIFORNIA	--
COLORADO	--
CONNECTICUT	--
DELAWARE	--
FLORIDA *	768.125 Fla. Stat.
GEORGIA	--
HAWAII	--
IDAHO	--
ILLINOIS	Ill. Rev. Stat. 1983, Ch. 43, Par. 135
INDIANA	--
IOWA	--
KANSAS	--
KENTUCKY	--
LOUISIANA	--
MAINE *	17 M.R.S.A. §2002
MARYLAND	--
MASSACHUSETTS	--
MICHIGAN	--
MINNESOTA *	Laws of Minnesota 1985, Ch. 309, §12 and 13
MISSISSIPPI	--
MISSOURI	§537.053 (S.B. 345)
MONTANA *	--
NEBRASKA	--
NEVADA *	--
NEW HAMPSHIRE	--
NEW JERSEY *	--
NEW MEXICO	§41-11-1 N.M.S.A. (1978)
NEW YORK *	General obligations
NORTH CAROLINA	N.C. Gen. Stat. §18-B-305 (1983)
NORTH DAKOTA *	--
OHIO *	R.C. Chapter 4399
OKLAHOMA	--
OREGON	O.R.S. 30.950, 30.960
PENNSYLVANIA	--
RHODE ISLAND	--
SOUTH CAROLINA *	
SOUTH DAKOTA *	S.D.C.L. §§35-11-1 and 35-6-27; 35-4-78; 35-6-27; 35-11-2
TENNESSEE	Yes
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	W.S. 12-8-301 (1985)
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

MODIFICATION OF DRAM SHOP LAWS - Comments

ALASKA

Liability of liquor licensee only for "criminal negligence" (1983)

FLORIDA

Limits liability to sale of alcohol to minors or knowingly to persons addicted to use of alcoholic beverages.

MAINE

Reduce liquor liability.

MINNESOTA

Compare: Minn. Stat. §340.95 (1984) and Minn. Stat. §340A.801 (Supp. 1985)

MONTANA

An unsuccessful attempt was made in 1985 (H.B. 395).

NEVADA

"Dram shop" laws are not recognized in Nevada.

NEW JERSEY

Proposed bill to limit liability of bars and retail liquor establishments for injuries to inebriated persons. Their liability to third parties injured by drunk persons would remain unchanged.

NEW YORK

No substantial modification of dram shop law in recent years; 1983 law cited above added coverage to persons under the legal drinking age.

NORTH DAKOTA

No change, but citation for dram shop laws: N.D.C.C. §5-01-06.

OHIO

See R.C. Chapter 4399; it is a limited law. A recently introduced bill, H.B. 733 of the 116th General Assembly, would increase civil liability (R.C. 4399.18); H.B. 488 also relates to the subject.

SOUTH CAROLINA

Christiansen v. Campbell, (1985), 328 S.E.2d 351, recognized civil liability of seller of alcoholic beverage who sells to intoxicated person in violation of penal statutes prohibiting such sales. H.B. 2802 (pending) pertains to this issue.

SOUTH DAKOTA

Abrogation of dram shop laws.

MODIFIED STATUTE OF LIMITATIONS

11

ALABAMA *	Yes
ALASKA	--
ARIZONA	--
ARKANSAS	--
CALIFORNIA	--
COLORADO	--
CONNECTICUT	§§52-577a; 52-577b and 52-577c; P.A. 84-407; P.A. 84-287
DELAWARE	--
FLORIDA *	§95.11(4), F.S., providing 2 years from discovery (cont'd in comments)
GEORGIA	--
HAWAII	--
IDaho	Limitations Tort Claims Act revised 1985, I.C. 6-901 et seq.
ILLINOIS *	--
INDIANA	Ind. Code 34-1-1-2
IOWA	--
KANSAS	K.S.A. 60-501 et seq.
KENTUCKY	--
LOUISIANA	--
MAINE *	14 M.R.S.A. §5752-A (design professionals), (cont'd in comments)
MARYLAND	Courts & Judicial Proceedings (CJ) §5-109 (actions against physicians)
MASSACHUSETTS	--
MICHIGAN	--
MINNESOTA	--
MISSISSIPPI	H.B. 63 (1985)
MISSOURI *	§516.140 (H.B. 225, 1985); §516.030 (1983, S.B.44 & 45); (see comment
MONTANA	--
NEBRASKA	--
NEVADA	N.R.S. 41A.097 (regarding health care providers)
NEW HAMPSHIRE	--
NEW JERSEY *	See comments.
NEW MEXICO	--
NEW YORK	C.P.L.R., §214-a; medical or dental malpractice
NORTH CAROLINA *	--
NORTH DAKOTA	N.D.C.C. Ch. 28-01
OHIO *	--
OKLAHOMA	510.S.1984 §156(B)
OREGON *	O.R.S. 30.275
PENNSYLVANIA	Yes
RHODE ISLAND	--
SOUTH CAROLINA *	Section 15-3-545
SOUTH DAKOTA	Chapters 15-2 and 15-2a
TENNESSEE	T.C.A. §29-26-116 (1980) (medical malpractice)
TEXAS *	§16.008; Article 4590, §10.011
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	W.S. 1-3-107 (1976)
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

MODIFIED STATUTE OF LIMITATIONS - Comments**ALABAMA**

Statute of limitations in certain civil lawsuits and workers' compensation were increased as part of a workers' compensation compromise.

ACT 85-39)
ACT 85-41) 1984 2nd Special Session

FLORIDA

(Cont'd) not to exceed four years for medical malpractice, two years for professional malpractice, two years for wrongful death. Generally, four years for torts (§95.11(3) F.S.).

ILLINOIS

See, generally, Ill. Rev. Stat. 1983, Ch. 110, Par. 13-101.

MAINE

(Cont'd) 752-B (ski areas); 752-C (sexual acts); 753 (doctors and lawyers).

MISSOURI

(Cont'd) §516.170 (S.B. 44 & 45, 1983); §516.350 (S.B. 468, 1982).

NEW JERSEY

No, except that a claimant against a public entity must file a notice of claim within 90 days of the accrual of his cause of action.

NORTH CAROLINA

See N.C. Gen. Stat. §1-15(c) (1983) (malpractice).

OHIO

See R.C. 2743.16 (two years generally against the state); R.C. 2744.04 (two years generally against political subdivisions); R.C. 2305.11 (medical malpractice actions precluded four years after act or omission occurred, despite general statute of limitations of one year after the cause of action arose (discovery rule)); and 2305.131 (a statute of repose relative to defective and unsafe real property improvements).

OREGON

Established a two-year limitation for filing claims against the state or state employees.

SOUTH CAROLINA

Medical malpractice only; S. 153 providing for architects' limitation on liability is pending.

TEXAS

Neagle v. Nelson, 678 S.W.2d 918 (Tex. 1984); Nelson v. Krusen, 685 S.W.2d 11.

LIMITATIONS ON ATTORNEY CONTINGENCY FEES

12

ALABAMA	--
ALASKA	--
ARIZONA	Ariz. Rev. Stat. Ann. §12-568 (1982)
ARKANSAS	--
CALIFORNIA	Cal. Bus. & Prof. Code §6146 (West. Supp. 1984)
COLORADO	--
CONNECTICUT	--
DELAWARE	Del. Code Ann. Tit. 18 §6865 (Supp. 1984)
FLORIDA *	Suits against state agencies §768.28(8) Fla. Stat.
GEORGIA	--
HAWAII *	Yes
IDAHO	Idaho Code §39-4213 (1976)
ILLINOIS	Public Act 84-7, Ill. Rev. Stat., Ch. 110
INDIANA	Ind. Code Ann. §16-9.5-5-1 Par. 2-611.1
IOWA	Iowa Code Ann. §147.138 (West. Supp. 1984-85)
KANSAS	Kan. Stat. Ann. §7-1216 (1982)
KENTUCKY	--
LOUISIANA	--
MAINE	--
MARYLAND *	Yes
MASSACHUSETTS *	--
MICHIGAN	--
MINNESOTA	--
MISSISSIPPI	--
MISSOURI	--
MONTANA	--
NEBRASKA	Neb. Rev. Stat. §44-2834 (1978)
NEVADA	--
NEW HAMPSHIRE	--
NEW JERSEY	Regulated by Supreme Court R. 1:21-7
NEW MEXICO	--
NEW YORK	Judiciary Law 474-a
NORTH CAROLINA	--
NORTH DAKOTA	--
OHIO *	--
OKLAHOMA *	Yes
OREGON *	O.R.S. 752.150 (limited to medical, surgical, dental treatment,
PENNSYLVANIA	--
RHODE ISLAND	--
SOUTH CAROLINA	--
SOUTH DAKOTA	-- Proposal for 1986 session
TENNESSEE	T.C.A. §29-26-120 (1980) (medical malpractice)
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	-- (limitations by Wyoming Supreme Court, 1977)
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

LIMITATIONS ON ATTORNEY CONTINGENCY FEES - Comments**FLORIDA**

Also Section 768.575, F.S., provides guidelines for reasonable fees, including percentage of recovery.

HAWAII

Hawaii Revised Statutes, Section 671-2 (applies only to medical torts and limits contingent fees to a "reasonable amount as approved by a court of competent jurisdiction").

MARYLAND

Partial (for suits against state government).

MASSACHUSETTS

Except in cases of Industrial Accident Board (20%) and victims of violent crime (15%).

OHIO

There is no general statutory limitation on chargeable attorney contingency or hourly fees in tort cases; in some civil cases, attorney's fees may be subject to regulation (e.g., workers' compensation cases) or to court approval. However, attorney's fees generally are required to be reasonable under the Code of Professional Responsibility applicable to Ohio's attorneys.

A recently introduced bill, H.B. 694 of the 116th General Assembly, would limit recoverable or payable attorney's fees in civil actions against political subdivisions of Ohio.

OKLAHOMA

Oklahoma Bar Association Advisory Opinion #26 (fee limitation of 50% or less).

OREGON

(Cont'd) omission, operations.

TORT LIABILITY - INSURANCE

STATE	TORT LAW REVISION			INSURANCE REGULATION			SPECIAL PROBLEMS			NOTES							
	* Joint/Several Liability.	* Collateral Source	* Prejudgement Interest	* Caps on Damages	* Structured Awards	* F frivolous Suits	Sovereign Immunity	* Insolvency - Guaranty Fund	Admin. Action to Promote Access	State/Local Gov'ts.	Medical Malpractice	Day Care Centers	Envir. Impairment	Schools	Non Profit/Volunt'rs.	* Dram Shop	AIDS Epidemic
ALABAMA										x	x			x			May consider revision of Insurance Code
ALASKA	x	x	x	x	x	x	x			x						x	
ARIZONA	x	x		x	x			x		x	x	x	x	x	x	x	Special commission on property/casualty insurance set up
ARKANSAS																	
CALIFORNIA	x	x	x	x	x	x	x	x		x	x	x	x				x
COLORADO	x	x	x	x	x	x	x	x		x		x			x		x
CONNECTICUT										*****	*****	*****	*****	*****	*****	*****	Unisex rates--abol. Coll. Source rule MedMal'85
DELAWARE																	Unisex rates--has authority for joint underwriting
FLORIDA	x				x				x								
GEORGIA	*****	*****	*****	*****	*****	*****	*****										Uninsured motorists a priority
HAWAII				x	x			x			x	x	x				Insurance code scheduled for revision 1987
IDAHO	*****	*****	*****	*****	*****	*****	*****			x						x	
ILLINOIS	*****	*****	*****	*****	*****	*****	*****		x	x	x	x				x	May propose citizen advocate for Insurance Board
INDIANA										x							
IOWA	x	x	x	x	x	x	x				x						
KANSAS											x						Capped punitive damages in MedMal'85
KENTUCKY						x					x				x	x	Insurance for grain elevators major problem
LOUISIANA																	Awaiting court test of cap on damage awards
MAINE				x							x	x	x			x	
MARYLAND											x						Medical Malpractice/Liability insurance task forces
MASSACHUSETTS				x							x	x	x	x		x	x
MICHIGAN	x	x	x			x					x	x		x		x	
MINNESOTA								x			x	x	x	x			x
MISSISSIPPI																	
MISSOURI											x						

****Study in Progress

TORT LIABILITY - INSURANCE

STATE	TORT LAW REVISION	INSURANCE REGULATION	SPECIAL PROBLEMS	NOTES													
	* Joint/Several Liability.	* Collateral Source	* Prejudgement Interest	* Caps on Damages	* Structured Awards	* Fruivolous Suits	* Sovereign Immunity	* Insolvency - Guaranty Fund	* Admin. Action to Promote Access	* Medical Malpractice State/Local Gov'ts.	* Day Care Centers	* Envir. Impatiment	* Schools	* Non Profit/Volunters.	* Dram Shop	* AIDS Epidemic	
MONTANA				x							x			x	x		
NEBRASKA	*****							x		x							
NEVADA										x	x	x					Insurance insolvency statute enacted '85
NEW HAMPSHIRE																	
NEW JERSEY	*****								x	x	x	x			x		Moratorium on insurance cancellations
NEW MEXICO																	
NEW YORK	x									x							Special session on medical malpractice
NORTH CAROLINA	*****							x		x							
NORTH DAKOTA	x									*****					x		
OHIO							x		x								Order signed prohibiting mid-term ins. cancellations
OKLAHOMA																	
OREGON	x							x			x	x			x		May prohibit midterm cancellation or rate increase
PENNSYLVANIA										x		x					Reviewing insurance investment rules
RHODE ISLAND	x		x			x				x		x	x				
SOUTH CAROLINA	x	x	x			x				x	x						
SOUTH DAKOTA	x	x	x	x						x		x					
TENNESSEE																	
TEXAS	*****									x	x						
UTAH										x							Major rewrite of Insurance Code in '85
VERMONT																	
VIRGINIA		x					x			x	x						Insurance code may be recodified
WASHINGTON	x	x	x		x			x		x	x	x	x	x	x	x	
WEST VIRGINIA		x		x	x					x	x	x					Major problem with fire insurance claims
WISCONSIN				x													
WYOMING	*****									x							Legislation may give increased authority to Ins. Commr.

****Study in Progress

*See "Definitions" page 4

--NCSL State Legislative Report--6

TORT LIABILITY LITIGATION

In the past year, the tort liability problem and resultant high cost or unavailability of liability insurance have captured media and legislative attention. High visibility defendants such as cities, states, doctors, and hospitals have received wide media coverage. Less well publicized, but equally affected, are small businesses, long distance truckers, directors and officers of corporations, owners of gasoline stations and the operators of grain elevators to name but a few. Social services provided by private parties are also threatened by the high cost of insurance. Child care centers are finding it difficult to buy insurance in light of lurid claims of sexual abuse. Most waste dump sites cannot be licensed without insurance, and insurance is virtually unavailable. A large percentage of the dump sites are operated by municipalities.

ROOTS OF THE PROBLEM

The insurance companies lay primary blame for the problem upon the legal system. They say the system invites high damage awards. The doctrine of joint and several liability which allows a plaintiff to sue any or all of the possible defendants for the full amount of his damage is a frequent target of criticism. Although a plaintiff cannot collect more than his legally determined damages, he may collect it from the defendant with the most resources or the "deepest pocket," irrespective of that defendant's degree of fault. This rule sometimes works against government because it is always considered as a deep pocket defendant. A city which is found to be only 10 percent fault in an accident may have to pay all or most of the damages if the other defendants have no resources. Insurers also advocate caps on the amount of damages that can be recovered, particularly for non-economic or "pain and suffering" damages. They also criticize the collateral source doctrine which keeps out evidence of compensation already received by the plaintiff from a third party.

Trial lawyers argue that the rules of tort law evolved over time and operate with substantial fairness. Tampering with them might reduce the exposure of defendants, but would be unfair to injured plaintiffs. Why, they ask, should an injured party be denied full recovery just because most of the defendants cannot pay? In their view, it is better for a negligent defendant to pay more than his share than to deny an injured plaintiff full recompense. Similarly, they argue that a plaintiff who has suffered a \$200,000 loss should not be limited to recovering \$100,000.

The loss of sovereign immunity from suit has made governments a much more attractive target of law suits. In recent years, juries have shown a consistent willingness to impose large judgments against states and cities. Insurance actuaries have not had time to fully develop the kind of data needed to decide how big a risk a particular government might be. In the face of uncertainty, they take a conservative position and either deny coverage or charge very high premiums.

Uncertainty, even when unaccompanied by a claims history, can result in escalating premiums. In an NCSL survey, 15 states reported day care centers were having difficulty keeping or affording insurance. In large part, the increase is traceable to the charges of sexual abuse which have been brought against the operators of a few day care centers. The insurers may be correct that the criminal charges are the harbingers of civil suits, but that is speculation.

Insurers can rightly be concerned about technological hazards and environmental impairment. These claims may take years to appear and in our chemically complex world, the potential for harm is open ended. Of course insurers are reluctant to assume such uncertain risks.

Long term observers of the insurance business note that it is an industry characterized by cycles. In this case, the cycle was started with the competition in the late 1970s to write as much insurance as possible in order to invest the premiums. The return on investment was quite high in those inflationary days and "cash flow underwriting" was nearly irresistible. The competition for business drove down the price of insurance, but the claims keep coming in. As return on investment has dropped with the rate of inflation, losses in the insurance industry have mounted. In the past two years, insurance companies lost more than in the previous 25 years.

Even the strength of the dollar has worked against the insurers. Lloyds of London, which reinsured many of the policies written in the United States, has withdrawn from the business because of the unfavorable differential between the dollar and the pound sterling.

POTENTIAL SOLUTIONS

It is one thing to assess blame and quite another to resolve the problem, although a number of possibilities exist.

As described earlier, certain tort law doctrines, such as joint and several liability or collateral source, might be amended to assure that defendants are assessed no more than their fair share of a claim. Limits or caps may be placed on awards to reduce potential exposure.

Sovereign or governmental immunity might be wholly or partially reasserted and extended to local governments as well as the state.

No matter what else is done, business and government can do a better job of risk management. Risk management is simply a matter of learning from experience and trying to anticipate where claims may arise. If a city is plagued by claims based on inadequate road maintenance, some research, planning, resources and action may reduce the number of claims filed. In the long run, if done properly, risk management can save money.

Insurance savings is often possible through the use of risk pools where a number of individual companies or governments get together to seek insurance as a group. A group of small communities may be more attractive to

an insurer than any one of them alone. By acting collectively, they may be able to afford higher levels of deductibility, in effect, sharing the risk with the insurer.

In part, the present problem was caused by the entry into the insurance field of irresponsible and fiscally unsound companies whose pricing practices dragged the better companies along. When the conditions changed, many of the weaker companies went out of business and the more stable faced large losses. Better regulation of entry into the field and rate review by the state insurance commissions could help level out the cycles over the long run.

Traditional concepts of insurance may be inadequate to deal with technological hazards and environmental impairment. State governments and the federal government may have to get more involved in the resolution of such unpredictable and potentially catastrophic risks.

States are already taking steps to prohibit midterm cancellations of policies unless the risk has demonstrably increased, and companies are being directed to give policy holders more notice of intent to cancel.

Although there is some risk involved, state insurance commissions are considering allowing companies not otherwise licensed in the state to write certain kinds of policies. These surplus lines of insurance may help make insurance more available, but not necessarily at low cost. In addition, since the issuing companies are not licensed in the state, future disputes over the policies may be difficult to resolve.

Insurance companies are pressing for modification of the language of the policies they write. Coverage for "claims made" rather than "occurrence" is a frequent request. If a company insures against events occurring during the term of the policy, they must pay for claims made years after the expiration of the policy, as long as the events giving rise to the claim "occurred" during the time the policy was in force. A "claims made" policy covers only those claims made during the term of the policy. Insurers also urge the counting of attorneys' fees in determining the maximum that the company can be compelled to pay.

Assigned risk pools can be established, but while such pools offer coverage when none might have been available, the cost is inevitably high.

On the assumption that judges are likely to be less generous with taxpayer money, special courts of claims can be set up to hear tort claims against government defendants. States have also established review boards to conduct preliminary reviews of complex claims involving technical issues. This approach has been used in medical malpractice claims in 22 states.

Some insurance commissioners have reported success with "jawboning" the companies. The voluntary Market Assistance Programs (MAP) are often effective in convincing insurers to continue offering certain lines of insurance or to mitigate premium increases. This approach can be used effectively by businesses as well, particularly if it is accompanied by a well thought out risk management program.

Our survey suggests that states are taking a careful and responsible approach to this problem. Governments seem willing to work with the insurance industry to help it pull itself through the current difficulty. Wholesale revision of tort law is not likely. There may be selective amendments, but the system will remain intact. States are likely to employ a range of remedies including tort law revision, industry incentives and regulation, and improved risk management. State governments and the insurance industry have a long history of cooperation and both sides seem optimistic that the present difficulties will be overcome.

The purpose of the survey was to identify issues and approaches to the problem. Such a survey is necessarily subjective and may reflect the bias of the persons we contacted. Doubtless, it underestimates the attention being paid to insurance regulation, incentive, and administrative action. Insurance commissions in most states have not yet presented all their proposals to the legislatures. A similar survey in January or February would probably show a great deal more activity. Furthermore, the fact that a study has been undertaken, or a bill has been introduced, or an issue is getting a lot of attention does not mean that the inevitable result will be statutory. As careful observers of state legislatures know, events can move quickly. This survey was conducted in October. Conditions can change by spring or even January. If the survey has value, it is in giving the reader a brief overview of how the legislatures presently perceive the issue and the kinds of actions being proposed.

DEFINITIONS:

Joint and Several Liability: allows plaintiff to collect the whole of his damages from any or all of the defendants irrespective of their relative fault.

Collateral Source Doctrine: prohibits introduction of evidence that plaintiff has already received some payment for his injury from another source.

Prejudgment Interest: assessment of interest as of the date of the filing of the claim.

Structured Awards: allows defendant to pay a claim over a period of time.

Insolvency/Guaranty Funds: actions taken to protect claimants from insolvency failure of insurance companies.

Dram Shop: statutes holding vendors of alcohol responsible for acts of intoxicated purchasers.

LITIGATION

Kansas Malpractice Victims Coalition v. Fletcher Bell

In January, 1988, the Shawnee County Court ruled that Kansas' cap on medical malpractice awards is unconstitutional. The court found that the cap violated the due process provision and equal protection clause of the Kansas constitution. In addition to the caps, the court ruled that structured annuity provisions of the malpractice law were unconstitutional.

Evangelatos v. Superior Court of Los Angeles County

44 Cal 3d 1188

In April, 1988, the California Supreme Court ruled the 1986 "Deep Pockets" Proposition 51, which limits damages for pain and suffering, is constitutional but does not apply to cases pending when Proposition 51 passed.

LITIGATION

State Farm Mutual Insurance Company, et al. v. State of Florida. (Case Nos. 86-2262, 86-2272, 86-2363)

Four insurance companies challenged the Florida Tort Reform Act of 1986 charging that its broad language was violative of provisions in the Florida Constitution which prohibit legislation from addressing more than one issue in each bill. The plaintiffs also argue that the Act violates the due process and equal protection clauses of the United States and Florida Constitutions by denying access to the courts and discriminating against injured persons. A Florida Circuit Court upheld the Act in October of 1986.

On April 23, 1987, the Florida Supreme Court ruled as unconstitutional a \$450,000 cap on non-economic damages in a decision that, for the most part, upheld the state's controversial tort reform and insurance rate regulation law enacted last year. (Ch. 86-160, LOF) In affirming the Circuit Court's ruling made last October, the Court left intact a provision which limits joint and several liability and eliminated the retroactive payment of rebates to policyholders, making rebates mandatory only on policies written or renewed after July 1, 1986.

Crystle Miller v. Boone County Hospital (Iowa Supreme Court, 118/85 - 1275)

The Iowa Supreme Court struck down the state's statute requiring claimants to file suits against municipalities within six months of the occurrence for which damages are sought. Because victims of private sector torts were not bound by the same statute of limitations, the court found the statute to be violative of equal protection.

State of West Virginia, ex rel. Charles B. Brown, Attorney General v. St. Paul Fire and Marine Insurance Company, et al. (Circuit Court of Kanawha County, West Virginia.)

The Attorney General of West Virginia brought suit against six insurers alleging that "defendants and their co-conspirators have continuously engaged in an unlawful contract, combination, or conspiracy, or in a series of unlawful contracts, combinations, or conspiracies, in per se unreasonable restraint of trade" related to the provision of medical malpractice liability insurance in the State of West Virginia.

The suit is in the discovery phase of litigation. The Attorney General's Office issued a "White Paper" on insurance in mid-February. (see Bibliography).

Boyd, et al. v. Bulala (W.D. Virginia, United States District court) C.A. No. 83-0557-A-C)

Parents brought suit on behalf of themselves and their infant daughter seeking damages for the negligence of their obstetrician, Dr. Bulala, which allegedly resulted in perinatal injuries to the infant during delivery. The

case was tried before a seven member jury which returned six verdicts against the defendant physician in amounts totaling \$8,300,000 including punitive damages of \$1,000,000 for the mother and infant each. At the time the case was originally heard, the Virginia Code (Section 8.01-581.15) provided a cap of \$750,000 in all medical malpractice actions. The court found that although the legislature may pass measures which affect the way a jury determines factual issues, such as by promulgating rules of evidence and procedure, and make rules concerning the type of damages recoverable and the way in which damages are paid, the legislature may not preempt a jury's findings on a factual issue which has properly been submitted to it. "...the legislature may not mandate the amount of judgment to be entered in a trial." The court further explained that legislative action designed to ease "a crisis of the moment" cannot prevail over the constitutional right to a trial by jury.

The Commonwealth of Virginia has been permitted by the United States District Court (Western District of Virginia, Civil Action No. 83-0557-A-C) to intervene in the action which has been certified for appeal.

Lynn D. Straight and Clarice Straight v. Clear Water Constructors, Inc.
The Chart House, Inc., 87-CV-7241

Suit was filed in Denver District Court on April 15 challenging laws which limit monetary damages and prohibit suit against landowners for simple negligence. The action arose when a delivery man was injured while making a delivery to a privately-owned restaurant. Plaintiff argues that the Colorado Constitution guarantees a remedy for every wrong - not a partial remedy. This is the first court challenge to the state's year old tort reform laws.

INTRODUCTION

In 1989, the most significant activity relative to Civil Justice reform occurred in the Courts rather than the Legislatures. In stark contrast to 1986 when thirty-six (36) state legislatures passed tort reform,¹ albeit varying in degree and significance, this year only seven (7) states enacted reforms.

¹In 1986, thirty-six state legislatures passed tort reform measures, varying in degree and significance. Perhaps the most significant reform occurred in states with small populations such as Washington, Hawaii, Alaska, Colorado and New Hampshire. However, significant reform-related activity also occurred in such high population states as New York, California, Florida and Illinois.

By means of an overview, of the thirty-six states that enacted some form of tort reform, fourteen states abolished or modified the doctrine of joint and several liability, primarily for noneconomic damages only, but in a few states, namely Colorado, Utah and Wyoming, for economic damages as well. Modifications of the doctrine ranged from abolition only in the instance of a low fault defendant such as in the state of Illinois to New York's reform, which has numerous exceptions to the application of the abolition of joint and several liability.

Sixteen states capped noneconomic damages. Eight of those states limited the cap to medical malpractice cases. Where the cap applies to other tort actions, such as cases involving products liability, the caps ranged from \$250,000 cap in the absence of a showing of clear and convincing evidence of liability in Colorado to the cap set pursuant to formula in Washington which can cap the award of noneconomic damages as low as \$177,000 to the \$750,000 cap enacted in New Hampshire.

Seventeen states imposed new or stronger penalties on frivolous suits. Most of the penalties involve costs or attorney's fees. Connecticut enacted legislation which allows payments of double the amount of costs and attorneys' fees as sanction for frivolous suits. Hawaii enacted legislation which permits courts to assess up to 25% of the amount prayed for if a claim or defense is found to be frivolous.

Thirteen states passed legislation relative to structured settlements or periodic payments of large awards. Florida, Michigan, and New York passed legislation which mandated that future damage awards in excess of \$250,000 be paid periodically. Washington and South Dakota made periodic payment of awards in excess of \$100,000 mandatory if requested by a party.

Eleven states modified the collateral source rule. Alaska, Colorado, Connecticut, and Minnesota made collateral sources of payment admissible as evidence. Michigan enacted legislation which made collateral sources of payment admissible as evidence, but after the verdict and before judgment is entered. New York and Florida required mandatory offset of most collateral source payments.

State legislative and regulatory activity concerning the liability crisis remained strong in the 1987 legislative term.

Eleven states abolished or modified the doctrine of joint and several liability in 1987. Arizona, Idaho, and North Dakota, for example, eliminated the doctrine except where the defendants acted in concert or in other limited situations. Similar legislation was passed by the Nevada and Delaware legislature. New Mexico limited the doctrine to instances of intentional conduct, vicarious liability and strict liability.

Elsewhere, the doctrine was modified to varying degrees, and Connecticut repealed changes made to the doctrine in 1986. In Oregon, joint and several liability was abolished for noneconomic damages and for economic damages when the defendant is determined to be less than 15% at fault. In Missouri and Georgia, the doctrine was modified so that defendants can escape liability only in cases where a plaintiff also shares responsibility for his injury. In other states (e.g. Montana, South Dakota, and Texas), thresholds have been set to limits on liability. In Montana, defendants who are 50% or less responsible will pay no more than twice their share of a plaintiff's economic damages. The Texas threshold is lower; only defendants who are 20% or less responsible for injuries will escape liability unless the injury resulted from environmental pollution or hazardous waste.

Only three states imposed caps on noneconomic damages in 1987. The caps imposed are very limited in their application. Oregon passed a \$500,000 cap on noneconomic damages. A \$400,000 cap approved in Idaho will expire in 1992 and in Kansas a \$250,000 cap on noneconomic damages applies to pain and suffering but not to mental anguish or other similar types of damages. The Florida Supreme Court struck down the \$450,000 cap on noneconomic damages enacted in 1986 as unconstitutional.

Six states, Alabama, Georgia, North Dakota, Missouri, Montana and Oregon, approved modifications of the collateral source rule. North Dakota and Oregon were the only states to require automatic offset of collateral source payments from jury awards. The other four states merely allowed evidence of the payments to be admissible as evidence at trial.

Four states enacted provisions for periodic payments of awards to plaintiffs. Montana legislation gave judges the discretion to require such payments. In Alabama, judges may require payments to be spread out over a 15-year period if they deem it is in the best interest of the parties. In North Dakota, courts mandate periodic payments for future economic damages only if a plaintiff requires institutional or custodial care for more than two years. Idaho enacted legislation mandating periodic payments of future damage awards exceeding \$100,000.

Eight states, Oklahoma, Alabama, Idaho, Texas, Virginia, Arkansas, Nebraska and North Dakota, passed legislation imposing sanctions for the filing of frivolous suits. Oklahoma codified Rule 11 in its laws, and Alabama, Idaho, and Virginia permit, but don't require, courts to impose sanctions for the filing of frivolous suits. Qualifications to the Texas frivolous suit provision all but swallow the rule.

Iowa and Texas approved limits on prejudgment interest on awards. Iowa repealed prejudgment interest for future

Two states, Mississippi and New Hampshire, enacted modifications to the rule of joint and several liability. Mississippi modified the doctrine such that a defendant who is less than 50% at fault is ultimately responsible for no more than 50% of the plaintiff's recoverable damages. New Hampshire abolished joint and several liability below a 50% threshold.

Three states, Arizona, Nevada and Utah, enacted punitive damages reforms in 1989. Nevada capped punitive damages awards at (a) three times damages if the compensatory award is \$100,000 or more; or (b) \$300,000 if the compensatory award is less than \$100,000. Arizona and Utah established a government standards defense to punitive damages for FDA approved drugs. Nevada and Utah elevated the standard of evidence and proof for the award of punitive damages and mandated bifurcated trials in the instance of a punitive damages claim.

Two states enacted products liability related reforms. New Hampshire provided for a state of the art defense in products liability claims and also adopted a discovery based statute of limitations. Utah reenacted its products liability statute originally passed in 1977 without the statute of repose which was found to be unconstitutional. The new Law includes a government standards defense in products actions.

In other reform related legislative activity in 1989, Texas modified its Deceptive Trade Practices Act to, *inter alia* lengthen the time period from 30 to 60 days during which a seller can offer a settlement to avoid the unique consequences of a DTPA action, and Georgia provided for penalties for frivolous suits.

On the Federal level, as was the case in 1986, 1987, and 1988, products liability legislation was proposed but not enacted.

The civil justice reform issue that commanded the most national attention in 1989 was the constitutionality of punitive damages.

The constitutionality of punitive damages can, and has been, attacked on the following grounds: (1) a higher standard of proof should be required in determining punitive liability; (2) punitive damages awards are often excessive, i.e. disproportionately high in relation to the compensatory award; (3) the standards for determining punitive liability are often vague and indefinite; and (4) claims for punitive damages should be separated from compensatory claims in a bifurcated trial.

In 1989, the United States Supreme Court in *Browning-Ferris Industries of Vermont et al. v. Kelco Disposal, Inc. et al.*, severely restricted the availability of the "excessiveness" or "disproportionality" attack on punitive damages. The "disproportionality" argument is based largely on the Eighth Amendment to the U.S. Constitution. The Eighth Amendment provides:

damages, and Texas limited the period during which prejudgment interest may accrue if the defendant has offered to settle a case. Missouri limited prejudgment interest awards to instances where the judgment exceeds the claimant's settlement demand or offer.

State legislatures continued to review proposed legislation related to the general categories of civil justice reform, insurance regulation and risk management in 1988.

There was a perceptible shift in focus in a number of state legislatures away from an examination of a link between perceived excesses in the civil justice system and availability and affordability of insurance and toward the "competitiveness" issue. Concern has grown over the effect of state products liability laws on the ability of U.S. businesses to compete in the world marketplace. This concern manifested itself in an increased number of states taking up the issue of products liability. Louisiana, for example, enacted the Louisiana Products Liability Act. The Louisiana legislation, in many respects simply codifies existing Louisiana law relative to products liability. In one important respect, however, the legislation diverges from traditional Louisiana law in that it increases the burden of proof heretofore required of products liability plaintiffs. In this regard, New Hampshire enacted legislation which allows "state-of-the-art" as an absolute defense in products liability cases.

Significant reform of a more general nature was enacted in Kansas, Kentucky and South Carolina. Kansas enacted a cap on all noneconomic damages of \$250,000 and a cap on punitive damages. Kansas and Kentucky made collateral sources admissible as evidence. Kentucky abolished the doctrine of joint and several liability and Minnesota limited the application of the doctrine in cases where defendants are less than 15% at fault. Both Kentucky and South Carolina elevated the standard of proof for the award of punitive damages. South Carolina also provided that punitive damages may not be assessed where no actual damages are awarded. Moreover, South Carolina provided for a penalty of all or a portion of attorneys' fees and court costs for frivolous claims or defenses.

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"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In *Browning-Ferris*, the Supreme Court held that the Eighth Amendment does not apply to punitive damages awards in cases between private parties. The Court reasoned that the Excessive Fines Clause does not prohibit such an award when the government neither has prosecuted the action nor has any right to recover a share of the damages awarded.

While *Browning-Ferris* severely restricted the availability of the excessive fines argument it did not extinguish it. In states such as Colorado, Florida, Iowa and Utah where recent reforms mandate that a percentage of a punitive damages award be paid to the state, and Illinois where a percentage of the punitive award may, at the discretion of the trial judge, be paid to the state, the Eighth Amendment may apply and the excessive fines argument may still be viable.

The *Browning-Ferris* Court declined to entertain the Fourteenth Amendment Due Process challenge to the punitive damages award in that case finding that *Browning-Ferris* had failed to properly raise this issue before the lower courts. In addition, following the *Browning-Ferris* decision, the Supreme Court denied certiorari in *Goodyear Tire & Rubber Company v. Dale L. Hedder* (no. 88-626), *Metromedia, Inc. et al. v. April Enterprises, Inc.* (no. 88-625), *Cudahy Company, General Host Corporation v. Cecil W. Muller et al.* (no. 88-1186), and *Combined Insurance Company of America v. Ainsworth* (no. 89-282).

Goodyear involved a \$4 million punitive damage award in Minnesota against Goodyear for inadequately warning consumers about the dangerous propensities of a tire rim of a particular brand. In *Metromedia*, plaintiff's were awarded \$14 million in punitive damages for loss of an irreplaceable video tape. In *Cudahy*, Kansas farmers were awarded \$10 million in punitive damages for the pollution of irrigation water. In *Ainsworth*, a \$6 million bad faith judgment was awarded against an insurance carrier. All four cases raised Due Process arguments.

The Supreme Court's decision not to entertain the Due Process arguments in *Browning-Ferris* and denial of certiorari in *Goodyear*, *Metromedia*, *Cudahy*, and *Ainsworth*, should not be regarded as a sign that they are not interested in the Due Process argument but rather that the Supreme Court is unlikely to take action on the issue until a lower court rules that the Due Process Clause has been violated. Indeed, Justices Brennan and Marshall in their concurring opinions and Justice O'Connor in her dissenting opinion in *Browning-Ferris* appear to have sent a clear signal to the lower courts to act on the Due Process issue.

One lower court that has focused on the Due Process issue relative to punitive damages is the Federal District Court in New Jersey. In *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053 (D.N.J. 1989) Judge Sarokin, a U.S. District Judge sitting in New Jersey, held that repeated punitive awards for a single course of conduct violates due process. In *Juzwin*, asbestos defendants attacked only the phenomenon of multiple awards in the context of "mass torts". They made three constitutional arguments in support of their contention that multiple awards of punitive damages are impermissible. They contended the concepts of double jeopardy and excessive fines in the Fifth and Eighth Amendments should be applied in the civil context to prohibit multiple awards of punitive damages for a single course of culpable conduct. They also argued that the Due Process Clause constitutionally limits the phenomenon of repeated awards of punitive damages.

The Federal District Court rejected the first two arguments but, at first, sustained the defendants' Due Process Clause argument on the ground that multiple awards violate the fundamental fairness requirement of that provision.

Following the issuance of the *Juzwin* opinion, a Federal District Court Judge also sitting in New Jersey in *Leonen v. Johns Manville*, 717 F.Supp. 272 (D.N.J. 1989), addressed the precise issue before the *Juzwin* Court but found that subjecting manufacturers to repeated assessments of punitive damages awards does not deprive them of the fundamental fairness required under the Due Process Clause. In so holding, the *Leonen* Court did not discount entirely the *Juzwin* Court's finding that due process requires that some limit be placed on the

amount of punitive damages which can be awarded against a manufacturer for the same culpable conduct. Nevertheless, the *Leonen* Court rejected what it characterized as "the easy solution of having the first litigant who reaches the courthouse door preclude all subsequent punitive damages awards to later plaintiff's as producing a harsh and inequitable result."

Following the decision in *Leonen*, Judge Sarokin, upon motion for rehearing, vacated his earlier order in *Juzwin* declaring that multiple awards of punitive damages violates the Due Process Clause of the U.S. Constitution. In his September 5, 1989 opinion, Judge Sarokin stated:

[t]he Court abides by its ruling that multiple awards of punitive damages for a single course of conduct violate the fundamental fairness requirement of the Due Process Clause but concludes that equitable and practical concerns prevent it from fashioning a fair and effective remedy. If this Court's view of the law is correct, then the need for Uniform legislation is manifest.

Judge Sarokin outlined four requirements that must be met in order to bar a plaintiff from claiming punitive damages in the context of mass tort litigation:

1. A full and complete hearing must be held, after adequate time has elapsed to investigate and discover the full scope and consequences of such conduct and during which all relevant evidence is presented regarding the conduct of the defendant against whom the claim is made.
2. Adequate representation is afforded to the plaintiff, with an opportunity for plaintiffs similarly situated and their counsel to cooperate and contribute towards the presentation of the punitive damage claim, including presentation of the past and probable future consequences of the defendant's wrongful conduct.
3. An appropriate instruction to the jury that their award will be the one and only award of punitive damages to be rendered against the Company for its wrongful conduct.
4. Other conditions that will assure a full, fair and complete presentation of all the relevant evidence in support of and in opposition to the claim.

Judge Sarokin found, on rehearing, that he could not conclude that any of the criteria outlined above was met in the context of other asbestos trials. Moreover, Judge Sarokin noted that even if these criteria could be met, "... this Court does not have the power or authority to prohibit subsequent awards in other courts notwithstanding its opinion that such subsequent awards violate Due Process rights of the defendants."

The decision vacating the earlier *Juzwin* opinion was rendered without prejudice. The Court stated that it would entertain any remedy that would be appropriate to protect an individual defendant's due process interests after any motion by a defendant who has had punitive damages awarded against it.

Damage cap reforms continued to come under strong attack in the courts in 1989. In *Sofie v. Fibreboard*, 112 Wash.2d 636, 771 P.2d 711 (1989), the Washington Supreme Court overturned the 1986 variable limit on noneconomic damages in that State on the ground that the legislation represented an unconstitutional restriction on the right to trial by jury. The Court's analysis in *Sofie* began by noting that the Washington "right to trial by jury" is more extensive than that which was protected by the Federal Constitution when it was adopted in 1789. The Washington State Constitution provides, "the right to trial by Jury shall remain inviolate." The *Sofie* decision relied, in part, on reasoning of the Washington Supreme Court in *James v. Robeck*, 79 Wash.2d 864, 490 P.2d 878 (1971). In *James*, the Court stated:

[i]f the evidence supports the verdict and the trial has been conducted without error of sufficient gravity to warrant a reversal, the trial court cannot substitute its views of damages for those of the jury. To the jury is consigned under the constitution the ultimate power to weigh the evidence and determine the facts — and the amount of damages in a particular case is an ultimate fact.

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Thus, the *Sofie* court ultimately concluded that Washington's cap on noneconomic damages unconstitutionally deprived plaintiffs of their right to a trial by jury, and thus their right to have a jury determine their damages.

The constitutionality of Maryland's 1986 cap on noneconomic damages at \$350,000 is under attack in the Maryland Courts. A Maryland Circuit Court has found the cap unconstitutional as applied to common law causes of action and the intermediate appellate court in Maryland—the Court of Special Appeals upheld the cap in the context of a statutory, wrongful death cause of action. The issue has not yet reached the final arbiter of Maryland Law—the Maryland Court of Appeals.

The Court of Special Appeals upheld Maryland's \$350,000 cap on noneconomic damages in its June 8, 1989 decision in *Potomac Electric v. Smith* (No. 1395 Md. Special App. Ct.). In *Potomac*, plaintiff, a fifteen year-old girl, was electrocuted when she came into contact with a 7600 volt electric power line owned by defendant. The jury awarded, *inter alia*, \$500,000 in noneconomic damages. The trial court, pursuant to the 1986 reform, codified in § 11-108(b) of the Courts and Judicial Proceedings Article of the Maryland Code, reduced the award to \$350,000. Plaintiffs contended that: 1) the cap should not have been applied to a wrongful death case because the legislation did not expressly include wrongful death actions within the scope of the cap and 2) the cap, if applicable, violates several state and federal constitutional provisions.

The Maryland Court of Special Appeals rejected both of plaintiff's contentions. With regard to plaintiff's contention that the cap does not apply to wrongful death actions, the court stated:

The fact that the cap does not expressly enumerate the types of personal injury actions within its ambit is a function of its breadth, not a limitation of its application. Application of the cap to wrongful death actions would effectively alleviate the legislature's intent to alleviate the perceived insurance crisis by limiting noneconomic damages in a cause of action where such damages are usually the primary component.

With regard to plaintiff's contention that the cap is violative of the Federal and the Maryland State Constitutions, the Court held that, implicit in Maryland's powers to create a cause of action or abolish a statutory cause of action such as Maryland's wrongful death statute, is the power to modify such statutory actions. Hence, limitations of the jury's determination of damages in the statutorily created wrongful death cause of action is a proper modification of the remedy available in such actions and does not violate the provisions of the Maryland Constitution. The Court expressly did *not* rule on whether Maryland's \$350,000 cap on noneconomic damages would be unconstitutional as applied to common law actions for personal injuries. The Court, adopting a rational basis standard, also rejected plaintiff's arguments that the cap violated the Equal Protection and Due Process clauses of the Maryland Constitution.

The \$350,000 cap on noneconomic damages in Maryland was also upheld by the Federal Court for the District of Maryland, applying Maryland law, in *Franklin v. Mazda Motor Corp.*, 704 F.Supp. 1325 (D. Md. 1989). The *Franklin* court reasoned in part:

If the Legislature can act within its proper sphere of authority and completely eliminate a cause of action for negligence or repeal whole categories of recoverable damages under recognized torts, then it must follow that the Legislature has the power to define causes of action and limit categories of recoverable damages for reasonable policy considerations without offending the Seventh Amendment.

In a September 18, 1989 decision *Murphy v. Port East Transfer Co.*, (No. 88-CG 2152, Balt. Cir. Ct. Md.), however, a Maryland Circuit Court ruled that Maryland's \$350,000 cap on noneconomic damages is unconstitutional as applied to common law tort cases. Accordingly, the *Murphy* court let stand a \$510,000 award for pain, suffering, inconvenience, physical impair-

ment and disfigurement in a personal injury case rather than reducing the award to the \$350,000 called for by the Maryland cap. In so holding, the court distinguished the case from the holding in *Potomac Electric v. Smith* finding that that decision was limited to the context of a wrongful death action, an action created by statute. The *Murphy* court applied a "heightened scrutiny test" to the cap on noneconomic damages. The court found that application of this test compels the conclusion that the cap is unconstitutional.

The *Murphy* court also held, in *dicta*, that \$245,000 awarded to the plaintiff for "loss of consortium" i.e. loss of household services was an "economic loss" and hence, was not subject to reduction by the cap on noneconomic damages.

The validity of the 1987 and 1988 "\$250,000" cap on pain and suffering and noneconomic damages in Kansas remains in question. The rationale of *Farley v. Engelken*, 241 Kan. 663, 740 P.2d 1058 (1987) and *Malpractice Victims Coalition v. Bell* 243 Kan. 333, 757 P.2d 251 (1988) which respectively declared unconstitutional the collateral source provisions in the 1985 Medical Malpractice Act and overruled the Legislature's attempt to cap noneconomic damages in medical malpractice actions, appeared to preordain the Kansas Supreme Court's ultimate rulings on the 1987 and 1988 caps on noneconomic damages applicable to all tort actions. On May 30, 1989, however, in *Samsel v. Wheeler Transport Services, Inc., et al.*, 244 Kan. 726, 771 P.2d 71 (1989) the Kansas Supreme Court in a brief memorandum decision, without explanation or rationale found that the 1987 cap on pain and suffering awards does not violate the Kansas Constitution. Following the issuance of the memorandum decision, however, and before a formal opinion was issued, the plaintiffs in *Samsel* settled with the defendants. The settlement in *Samsel* effectively mooted the question certified to the Kansas Supreme Court (whether the \$250,000 cap on pain and suffering awards is unconstitutional under Kansas law) as to that case. Accordingly, the Kansas Court will not be issuing a formal opinion in *Samsel* and the validity of the cap remains in question.

In other significant judicial activity, New York's Court of Appeals in *Hymowitz v. Eli Lilly*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989) upheld the revival of time barred DES claims pursuant to New York's 1986 Revival Legislation and adopted "market share" liability in DES cases in New York. California's Supreme Court in *Calfarm Insurance Company v. Deukmejian*, (No. 500 7838 (May 4, 1989)) upheld, in substantial part, the validity of Proposition 103, enacted in 1988, which made significant changes to the regulation of insurance in California. Virginia's Supreme Court in *Ethridge v. Medical Center Hospitals*, 1989 Virginia LEXIS 27, 1989 WESTLAW 2142 (1989), upheld the constitutionality of the \$750,000 cap on damages in medical malpractice actions in Virginia and the 1987 cap of \$250,000 on punitive damages in Alabama is under attack in *Trawick v. Michaels of Oregon*, (Z V-8E 5-413 N). In *Trawick*, the jury, after a three-day trial, returned a verdict which included a \$1 million punitive damages award. The punitive damages verdict was reduced to \$250,000 pursuant to the 1987 punitive damages reform. Plaintiffs contend that the reform is unconstitutional because the legislature was wrong in believing that its enactment would be socially useful. The attack is reminiscent of *Carter v. Fibreboard, et al.*, No. 87-203555-7 (King County Wa. 1988) where the Court noted "as a matter of fact I do not believe the statute (a cap on noneconomic damages) has a substantial relationship to the availability and affordability of insurance, and is most certainly not substantially related to the equitable distribution of the costs and risks of injury," and *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988), where the Texas Supreme Court said it invalidated that State's cap on awards on medical malpractice awards in part because of independent research that indicated "[n]o relationship between a damage cap and increases in insurance rates." Aside from the troublesome separation of powers concerns raised by the arguments in *Trawick* and the decisions in *Carter* and *Lucas*, these cases work well to illustrate the power of the state judiciary to strike or interpret out of existence enacted reforms that offend their sensibilities. With this in mind, manufacturers and insurers are wise to hold in

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abeyance decisions based on the anticipated benefits of a reform, pending the development of case law interpreting these reforms.

In general, although state legislatures have reviewed thousands of bills addressing the Civil Justice System and insurance regulation, disputes persist as to what precisely are the problem areas, and solutions to the perceived problem areas remain elusive. It is likely that state legislative activity will continue in the area of civil justice reform and the courts will be entertaining arguments relative to the interpretation and validity of those reforms for some time.

What follows is a state-by-state overview of liability and insurance reform enacted on the state level from 1986 through October of 1989, a review of the major products liability reform bills introduced in the Congress, and a brief overview of the McCarran-Ferguson Act and current legislative initiatives relative to it.

APPENDIX C

**TORT REFORM SUMMARY BY REFORM
(1986, 1987, 1988, 1989)**

**ABOLITION OR MODIFICATION OF JOINT AND
SEVERAL LIABILITY**

1986

California

Joint and several liability is abolished for noneconomic damages.

Colorado

Joint and several liability is totally abolished.

Connecticut

Modified to prohibit joint liability except where liable party's share of judgment is uncollectable (1987 legislation, however, limited this reform to noneconomic damages only).

Florida

Joint and several liability is abolished in cases of more than \$25,000. The abolition does not apply to:

- damages for pollution
- intentional torts
- actions governed by a specific statute providing for joint and several liability

Hawaii

Joint and several liability is abolished for defendants 25% at fault or less. The abolition applies for noneconomic loss only and does not apply to auto, product or environmental claims.

Illinois

Joint and several liability is abolished for low fault defendants (25% of fault or less). The abolition does not apply to:

- medical expenses
- medical malpractice or environmental cases

Michigan

Joint and several liability is completely abolished for municipalities. There is no abolition where plaintiff is fault-free and no abolition for products liability actions.

New York

Joint and several liability has been limited; a defendant who is 50% or less at fault is only severally liable for noneconomic damages. The limitation, however, does not apply to:

- actions in reckless disregard of rights of others
- motor vehicle cases
- actions involving the release of toxic substances into the environment
- intentional torts

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- contract cases
- products liability cases where the manufacturer cannot be sued
- construction cases
- other specific actions

Utah

Joint and several liability is totally abolished.

Washington

Joint and several liability is abolished except for cases in which:

- defendants acted in concert
- plaintiff is fault-free
- hazardous or solid waste disposal sites are involved
- business torts are involved
- manufacturing of generic products is involved

Wyoming

Joint and several liability is totally abolished.

* * * * *

1987

Arizona

Joint and several liability is abolished except in cases of:

- intentional torts
- hazardous waste

Georgia

Joint and several liability will not apply when plaintiff is found at fault also.

Idaho

Joint and several liability is abolished except in cases of:

- intentional torts
- hazardous wastes
- medical and pharmaceutical products

Louisiana

Joint and several liability applies only to the extent necessary to cover 50% of the plaintiff's damages.

Missouri

Joint and several liability will not apply when plaintiff is found at fault also.

Montana

Joint and several liability is abolished for those who are 50% or less responsible.

Nevada

Joint and several liability is abolished except in:

- products cases

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- cases involving toxic wastes
- cases involving intentional torts
- cases where defendants acted in concert

New Mexico

Codified common law application of several liability except in:

- cases involving intentional torts;
- cases in which the relationship of defendants could make one defendant vicariously liable for the acts of others
- cases involving the manufacture or sale of a defective product. (In these cases the manufacturer and retailer can be held liable for their collective percentage of fault but not the fault of other defendants.)

North Dakota

Joint and several liability is abolished except for:

- intentional torts
- cases in which defendants acted in concert
- products liability cases

Ohio

Joint and several liability is abolished for noneconomic damages when the plaintiff is also at fault.

Oregon

Joint and several liability is abolished with regard to noneconomic damages when the defendant is less than 15% at fault. The abolition does not apply to some environmental torts.

South Dakota

Defendants who are 50% or less responsible pay no more than *twice* their apportioned share of damages.

Texas

Joint liability is abolished for those who are 20% or less responsible unless damages resulted from environmental pollution or hazardous waste.

* * * * *

1988

Alaska

Joint and several liability was abolished through a ballot initiative; Proposition 2 on November 8, 1988.

Kentucky

Joint and several liability is totally abolished.

Minnesota

Defendants who are less than 15% at fault can pay no more than four times their allocated share of liability.

1989

Mississippi

Modified joint and several liability. Liability for damages caused by two or more persons shall be joint only to the extent necessary for the person suffering injury to recover 50% of his recoverable damages.

New Hampshire

Abolishes joint and several liability below a 50% liability threshold.

CAP ON NONECONOMIC DAMAGES

1986

Alaska

\$500,000 cap (except for physical impairment or disfigurement).

Colorado

\$250,000 cap (unless court finds "clear and convincing evidence" in which case up to \$500,000 can be awarded).

Hawaii

\$375,000 cap, but cap applies only to actual physical pain and suffering; other noneconomic damages have no limit.

Maryland

\$350,000 cap.

Minnesota

- \$400,000 cap on all awards based on loss of consortium, emotional distress, or embarrassment
- No cap for pain and suffering
- Court may not inform the jury of existence of limitation

New Hampshire

\$875,000 cap.

Washington

\$177,000-\$493,000 (cap set by formula = approximately 1/2 the average annual wage in state multiplied by the life expectancy).

* * * * *

1987

Idaho

\$400,000 cap—adjusted for annual wage increase—sunsets on July 1, 1992.

Kansas

\$250,000 cap on pain and suffering (not other noneconomic losses).

Oregon

\$500,000 cap on noneconomic damages.

**REDUCTION OF COMPENSATORY AWARDS BY
COLLATERAL SOURCES**

1986

Alaska

Collateral sources admissible as evidence.

Colorado

Collateral sources admissible as evidence.

Connecticut

Collateral sources admissible as evidence.

Florida

Mandatory offset of collateral source payments.

Hawaii

- Provides for payment of valid liens (arising out of claim for payment made from collateral sources for costs and expenses arising out of injury) from special damages recovered.
- The collateral source rule prevents double recoveries by allowing subrogation liens by insurance companies or other sources. Third parties are allowed to file a lien and collect the benefits paid to plaintiff from the plaintiff's award. The amount of damages paid by the defendant to the plaintiff is not affected.

Illinois

- Collateral sources for medical benefits over \$25,000 are offset.
- Judgment cannot be reduced by more than 50%.

Indiana

Court may reduce awards at its discretion. Jury may be instructed to disregard tax consequences of its verdict.

Michigan

Evidence that expense or loss was paid by collateral source is admissible after the verdict and before judgment is entered.

The court will reduce the amount paid by collateral source by an amount equal to premiums paid for this benefit by the plaintiff, the plaintiff's family or employer.

Minnesota

Collateral sources admissible as evidence.

New York

Compels courts to offset awards by amounts received from collateral sources.

* * * * *

1987

Georgia

Collateral sources are admissible as evidence toward reducing damages claimed.

Missouri

Collateral sources are allowed as evidence but defendant waives the right to credit for that amount if allowed as evidence.

Montana

Collateral Source Rule Abolished—Reimbursement from a collateral source is admissible in evidence and unless the source of reimbursement has a subrogation right under state or Federal law, judge is required to reduce personal injury judgments of \$50,000 or more.

North Dakota

Mandatory offset of collateral sources.

Ohio

Mandatory offset of any collateral source benefits which are not subrogated.

Oregon

Judge is allowed to reduce awards for collateral sources named in the bill. Awards will not be reduced by:

- life insurance and other death benefits;
- benefits for which plaintiff has paid premiums;
- retirement, disability, and pension plan benefits; and
- Federal social security benefits.

* * * * *

1988

Kansas

Collateral sources allowed as evidence.

Kentucky

Collateral sources, except life insurance, value of premiums paid and known subrogation rights, admissible as evidence.

LIMITS ON CONTINGENCY FEES

1986

Connecticut

Sliding scale percentage limits.

Hawaii

Party may request court review; limited to "reasonable" amount.

New Hampshire

Mandatory filing and court review where more than \$200,000 in damages awarded.

LIMITS ON PUNITIVE DAMAGES

1986

Alaska

Standard of proof has been elevated to clear and convincing evidence.

Colorado

Punitive award may not exceed compensatory award: one-third of the award goes to the state water conservation board's construction fund; the court may reduce the award if deterrence is achieved without it, but may also increase it to three times compensatory damages if misbehavior continues during trial.

Florida

Punitive award may not exceed three times compensatory damages unless evidence is "clear and convincing." Sixty percent of the award goes to State's General Fund.

Illinois

Plaintiffs are no longer able to plead punitive damages in original complaint. The subsequent motion to add punitive claim must show at hearing reasonable chance that the plaintiff will win punitive award and trial. The defendant must be shown to have acted willfully and wantonly; and the court has discretion to apportion a punitive award among plaintiff, plaintiff's attorney, and the State Department of Rehabilitation Services.

Iowa

Punitive damages may only be awarded where willful and wanton disregard for the rights and safety of another is proven. 75% or more of the award goes to the State.

Minnesota

Plaintiffs are no longer able to plead punitive damages in original complaints. The plaintiff must make a *prima facie* showing of liability before an amendment of pleadings is permitted by the court.

New Hampshire

Prohibits punitive damages.

Oklahoma

Award of punitive damages may not exceed compensatory award.

South Dakota

Clear and convincing evidence of willful, wanton, or malicious misconduct must be shown.

* * * * *

1987

Alabama

\$250,000 cap on punitive damages awards. Trial and appellate judges will review all punitive damage awards and reduce those that are excessive.

California

Standard of proof for punitive damages is elevated to "clear and convincing evidence."

Georgia

\$250,000 cap on punitive damages, products, however, are excluded from the cap. Only one punitive award is allowed against any given defendant for a given product.

Idaho

Punitive damages standard of proof is elevated to "a preponderance of evidence."

Iowa

Standard of proof for punitive damages is elevated to "preponderance of clear, convincing and satisfactory evidence that the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another."

Kansas

Punitive damages are capped at the lesser of defendant's highest annual gross income during the preceding five years or \$5 million dollars. If the defendant earned more profit from the objectionable conduct than either of these caps, the court may award a sum of up to 1 and 1/2 times that profit.

Missouri

Bifurcated trials are required for punitive damages.

New Jersey

The standard of proof for punitive damages is elevated to a preponderance of evidence of "actual malice" or "wanton and willful disregard" of the rights of others. Bifurcated trials for punitive damages are also required, with the judge setting the punitive damage award. An FDA government defense is available to defeat claims for punitive damages.

North Dakota

Plaintiffs are no longer able to plead punitive damages in original complaints and must show *prima facie* evidence and oppression, fraud or malice in order to make a claim for punitive damages.

Ohio

Standard of evidence for punitive damages is elevated to "clear and convincing evidence." The judge sets the amount of punitives awarded. Punitives cannot be awarded unless there are "actual damages" sustained by the plaintiff.

Oregon

Changes standard of proof for award of punitive damages to "clear and convincing evidence."

Texas

Caps punitive damage awards at four times the actual damages or \$200,000, whichever is greater. Plaintiff must show defendant's conduct was fraudulent, malicious or grossly negligent.

Virginia

Caps punitive damages at \$350,000.

* * * * *

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1988

Kansas

Cap on punitive damages at lesser of defendant's annual gross income or \$5 million. If the court finds that the profit gained by the defendant's misconduct exceeds this limit, the limit shall be elevated to one and one-half times the profit that the defendant gained.

Kentucky

Standard of evidence for punitive damages is elevated to "clear and convincing evidence."

South Carolina

Standard of evidence for punitive damages is elevated to "clear and convincing evidence" of malice, fraud, etc. In most cases, punitive damages may not be assessed where no actual damages awarded.

1989

Arizona

Establishes a government standards defense to punitive damages for FDA approved drugs.

Nevada

Establishes a clear and convincing evidence standard and a higher standard of proof. Requires bifurcation of trials involving punitive claims. Limits punitive damage awards to (a) three times compensatory damages if compensatory damages are \$100,000 or more; or (b) \$300,000 if compensatory award is less than \$100,000.

Utah

Provides for a higher standard of proof, a government standards defense to FDA approved drugs, bifurcation of trials involving claims for punitive damages, a clear and convincing evidence standard and the payment of 50% of punitive damage awards over \$20,000 to the State fund.

PERIODIC PAYMENT OF AWARDS

1986

Alaska

Permission for courts to structure payments for future damages only.

Connecticut

Awards paid periodically when future economic damages exceed \$200,000.

Florida

Periodic payment of awards mandated, when requested by a party, if economic damages exceed \$250,000.

Iowa

Periodic payment of awards, at the discretion of the court, when requested by a party.

Michigan

Periodic payment of awards mandated where future damages exceed \$250,000.

New York

Periodic payment of awards mandated where future damages exceed \$250,000.

South Dakota

Periodic payment of awards mandatory, if requested by a party, where future damages exceed \$100,000.

Washington

Periodic payment of awards ordered by the court, at the request of a party, where future damages exceed \$100,000.

* * * * *

1987

Alabama

Award may be split into separate payments over a period of 15 years if it is in the best interest of both parties when damages exceed \$150,000.

Idaho

Periodic payment of awards for future damages over \$100,000.

Montana

Periodic payment of awards permitted when the judge feels they would be in plaintiff's best interest.

North Dakota

Court allows periodic payment of awards for future economic damages if institutional or custodial care involves more than two years.

Ohio

Judges may provide for periodic payments in cases where the *future* damages for economic losses exceeded \$200,000 and represent more than 25% of the total jury award.

Rhode Island

Periodic payment of awards for damages in excess of \$150,000.

PENALTIES FOR FRIVOLOUS SUITS

1986

Connecticut

Payment of double the amount of costs and attorney fees as sanction for frivolous suits.

Georgia

Costs and attorney fees for frivolous lawsuits or defenses.

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Hawaii

Courts assess penalties if a claim or defense is found to be frivolous. The penalty may not exceed 25% of the amount prayed for.

Illinois

Court may assess fees for frivolous suits.

Indiana

Court may award prevailing party costs and fees if it finds allegation or defense unreasonable.

Iowa

Courts may assess penalties for frivolous lawsuits or deceptive tactics.

Michigan

Awards of attorney fees are available as sanctions for frivolous suits.

Minnesota

Court holds discretion to assess a penalty for a frivolous claim (costs and attorney fees).

New Hampshire

Court holds discretion to assess penalty for a frivolous suit.

New York

When finding frivolous claims and counterclaims, the court shall award to the successful party costs and attorney fees, not to exceed \$10,000.

Oklahoma

Awards of attorney fees available as sanctions for frivolous suits.

Washington

Awards of attorney fees are available as sanctions for frivolous suits.

Wyoming

Plaintiffs in frivolous suits are liable for payment of reasonable court expenses and attorney fees.

* * * * *

1987

Alabama

Allows court to assess court costs and attorney fees against parties bringing frivolous suits.

Idaho

Judge may assess attorney fees in frivolous suits.

Ohio

Allows court to assess attorney fees in frivolous suits.

Oklahoma

Codified Rule 11 of the Federal Rules of Civil Procedure on sanctions for frivolous suits.

Oregon

Requires court to provide sanctions for frivolous suits both attorney personally or their clients which include attorney fees, court costs, and other expenses.

Rhode Island

Allows court to assess penalties for frivolous suits.

Texas

Allows courts to impose sanctions on attorneys and parties who file frivolous suits.

Virginia

Authorizes courts to impose sanctions for frivolous suits.

* * * * *

1988

Louisiana

Allows courts to impose costs and attorneys' fees as costs for frivolous suits or defenses.

Mississippi

Allows courts to assess transaction costs and attorneys' fees for frivolous claims and defenses.

South Carolina

Penalty of all or a portion of attorneys' fees and court costs for frivolous claims or defense/abuse of process.

APPENDIX D

APPENDIX D

January 1986 through December 1986

State	Relevant Products Liability Related Bill Identification Numbers	Cap on Noneconomic Damages	Collateral Source Rule	Limitation on Contingency Fees	Restrictions on Punitive Damages	Penalties for Frivolous Suits	Periodic Payment of Judgment	Modification of Joint and Several Liability
Alabama ¹	HB 213 ² HB 215 HB 217 HB 218	—	—	—	—	—	—	—
Alaska	SB 377	\$500,000 ³	X	—	X	—	X	X
Arizona ⁴	HB 2377	—	—	—	—	X	—	—
Arkansas	—	—	—	—	—	—	—	—
California	Proposition 51	—	—	—	—	—	—	X
Colorado	SB 67 SB 69 SB 70 HB 1192 HB 1197	250,000 ⁵	X	—	X	X	—	X
Connecticut	HB 6134	—	X	X	—	X	X ⁶	X
Delaware	—	—	—	—	—	—	—	—
District of Columbia	—	—	—	—	—	—	—	—
Florida	Tort Reform Act of 1986	450,000	X	—	X	X	X	X
Georgia	HB 1146 (Act 1670) HB 1185 (Act 1486)	—	—	—	—	X	—	—
Hawaii	Special Session Legislation	375,000	X	X	X	X	—	X
Idaho	HB 1469	—	—	X	—	—	—	—

¹ Targeted by reform groups for concerted action next session.² Proposed—not passed or enacted.³ No damage cap for cases involving disfigurement.⁴ Ballot initiative to amend Arizona Constitution to allow legislators to limit noneconomic damages, punitive damages and contingency fees.⁵ Where "clear and convincing" evidence, \$500,000 can be awarded.⁶ Only for future economic and noneconomic exceeding \$200,000.

U.S. TORT REFORM 1989

State	Relevant Products Liability Related Bill Identification Numbers	Cap on Noneconomic Damages	Collateral Source Rule	Limitation on Contingency Fees	Restrictions on Punitive Damages	Penalties for Frivolous Suits	Periodic Payment of Judgment	Modification of Joint and Several Liability
Illinois	SB 1200 ⁷	—	X ⁷	—	X ⁷	X ⁴	—	X ⁷
Indiana	SB 393 } SB 304 }	—	X	—	—	X	—	—
Iowa	—	—	—	—	X	X	X	—
Kansas	—	—	—	—	—	—	—	—
Kentucky	—	—	—	—	—	—	—	—
Louisiana	HB 339-341 ⁸ } HB 1457 ⁸ } HB 1465 ⁸ } HB 1459 ⁸ }	—	—	—	—	—	—	—
Maine	—	—	—	—	—	—	—	—
Maryland	SB 558	\$350,000	—	—	—	—	—	—
Massachusetts	—	—	—	—	—	—	—	—
Michigan	HB 5154	—	X	—	—	X	X	—
Minnesota	HF 1950	400,000 ⁹	X	—	X	X	—	—
Mississippi	—	—	—	—	—	—	—	—
Missouri	SB 742	—	—	X	—	—	—	—
Montana	—	—	—	—	—	—	—	—
Nebraska	—	—	—	—	—	—	—	—
Nevada	—	—	—	—	—	—	—	—
New Hampshire	HB 513	875,000	—	X	X ¹⁰	X	—	—
New Jersey	AB 2400 ¹¹ } SB 2312-2323 ¹¹ }	—	—	—	—	—	—	—

⁷ Passed—but not enacted. Active lobby by business and insurance industries for Governor to veto.

⁸ Not passed or enacted—under consideration.

⁹ Excluding pain and suffering.

¹⁰ Codifies existing practice of outlawing punitive damages.

¹¹ Not passed or enacted—under consideration.

APPENDIX D

State	Relevant Products Liability Related Bill Identification Numbers	Cap on Noneconomic Damages	Collateral Source Rule	Limitation on Contingency Fees	Restrictions on Punitive Damages	Penalties for Frivolous Suits	Periodic Payment of Judgment	Modification of Joint and Several Liability
New Mexico	—	—	—	—	—	—	—	—
New York	SB 9351-A A-10663 A-10664 S-9391-A	—	X	—	—	X	X	X
North Carolina	SB 873	—	—	—	—	X	—	—
North Dakota	—	—	—	—	—	—	—	—
Ohio	AM SB 329 ¹² AM SB 331 ¹² Sub. SB 333 ¹² Sub. SB 334 ¹² Sub. SB 338 ¹² SB 339 ¹² SB 336 ¹² HB 879 ¹² HB 881 ¹² HB 897 ¹²	—	—	—	—	—	—	—
Oklahoma	SB 488	—	—	—	X	X	—	—
Oregon ¹³	—	—	—	—	—	—	—	—
Pennsylvania	HB 2425 ¹⁴ HB 2426 ¹⁴	—	—	—	—	—	—	—
Rhode Island	—	—	—	—	—	—	—	—
South Carolina	—	—	—	—	—	—	—	—
South Dakota	SB 280 SB 281	—	—	—	X	—	X	—
Tennessee	—	—	—	—	—	—	—	—
Texas ¹⁵	—	—	—	—	—	—	—	—

¹² Not passed or enacted — under consideration.

¹³ Not in session in 1986.

¹⁴ Not passed or enacted — under consideration.

¹⁵ Not in session in 1986.

U.S. TORT REFORM 1989

<i>State</i>	<i>Relevant Products Liability Related Bill Identification Numbers</i>	<i>Cap on Noneconomic Damages</i>	<i>Collateral Source Rule</i>	<i>Limitation on Contingency Fees</i>	<i>Restrictions on Punitive Damages</i>	<i>Penalties for Frivolous Suits</i>	<i>Periodic Payment of Judgment</i>	<i>Modification of Joint and Several Liability</i>
Utah	SB 64	—	—	—	—	—	—	X
Vermont	—	—	—	—	—	—	—	—
Virginia	—	—	—	—	—	—	—	—
Washington	SB 4630	Range of \$117,000 to \$493,000	—	—	—	—	X	X
West Virginia	HB 149	—	—	—	—	—	—	X
Wisconsin	—	—	—	—	—	—	—	—
Wyoming	HB 14 SF 17 }	—	—	—	—	—	X	X

APPENDIX E

APPENDIX E

January 1987 through December 1987

State	Relevant Products Liability Related Bill Identification Numbers	Cap on Noneconomic Damages	Collateral Source Rule	Limitation on Contingency Fees	Restrictions on Punitive Damages	Penalties for F frivolous Suits	Periodic Payment of Judgment	Modification of Joint and Several Liability
Alabama ¹	Act 87-185 87-187 87-186 87-183	—	X	—	X ¹	X	X	—
Alaska	—	—	—	—	—	—	—	—
Arizona	SB 1036	—	—	—	—	—	—	X
Arkansas	HB 1223	—	—	—	—	X	—	—
California	Proposition 51 ²	—	—	—	—	—	—	X
Colorado	SB 22 HB 1232	—	—	—	—	—	—	—
Connecticut	—	—	—	—	—	—	—	X
Delaware	SB 120 HB 281	—	X	—	X	—	—	X
District of Columbia	—	—	—	—	—	—	—	—
Florida	Sup. Ct. decision	Remove Cap	—	—	—	—	—	—
Georgia	SB 1	—	X	—	X ³	—	—	X
Hawaii	—	—	—	—	—	—	—	—
Idaho	SB 1223	\$400,000 ⁴	—	—	X	X	X	X
Illinois	—	—	—	—	—	—	—	—
Indiana	SB 2 HB 1273	X	—	—	—	—	—	—

¹Cap on punitive damages of \$250,000.

²Case law on the effective date of proposition 51 enacted in 1986.

³Cap on punitive damages of \$350,000.

⁴Will expire in 1992.

U.S. TORT REFORM 1989

State	Relevant Products Liability Related Bill Identification Numbers	Cap on Noneconomic Damages	Collateral Source Rule	Limitation on Contingency Fees	Restrictions on Punitive Damages	Penalties for Frivolous Suits	Periodic Payment of Judgment	Modification of Joint and Several Liability
Iowa	SF482	—	X	—	X	—	X	—
Kansas	HB 2021 HB 2024 HB 2025 HB 2472	\$250,000 ⁵	—	—	X	—	—	X
Kentucky	—	—	—	—	—	—	—	—
Louisiana	—	—	—	—	—	—	—	—
Maine	—	—	—	—	—	—	—	—
Maryland	—	—	—	—	—	—	—	—
Massachusetts	—	—	—	—	—	—	—	—
Michigan	—	—	—	—	—	—	—	—
Minnesota	HF 392	—	—	—	—	—	—	—
Mississippi	HB 1000	—	—	—	—	—	—	—
Missouri	HB 700	—	X	—	X ⁶	—	—	X
Montana	SB 48 SB 51 SB 375 HB 567 SB 375 SB 380 SB 121 HB442	—	X	—	X	—	X	X
Nebraska	LB 71 LB 261	—	—	—	—	X	—	—
Nevada	SB 511	—	—	—	—	—	—	X
New Hampshire	—	—	—	—	—	—	—	—
New Jersey	N.J. Laws CH, 197	—	—	—	X	—	—	—
New Mexico	SB 164	—	—	—	—	—	—	X
New York	—	—	—	—	—	—	—	—

⁵ Applies to pain and suffering, but not mental anguish, etc.

⁶ Capped at the lesser of a defendant's highest annual gross income during preceeding five years or \$5 million.

APPENDIX E

<i>State</i>	<i>Relevant Products Liability Related Bill Identification Numbers</i>	<i>Cap on Noneconomic Damages</i>	<i>Collateral Source Rule</i>	<i>Limitation on Contingency Fees</i>	<i>Restrictions on Punitive Damages</i>	<i>Penalties for Frivolous Suits</i>	<i>Periodic Payment of Judgment</i>	<i>Modification of Joint and Several Liability</i>
North Carolina		—	—	—	—	X	—	—
North Dakota	HB 1571 SB 2058 HB 1084 }	—	X	—	X	X	X	—
Ohio	—	—	—	—	—	—	—	—
Oklahoma	—	—	—	—	—	—	—	—
Oregon	SB 323	\$500,000	X	—	X	—	—	X
Pennsylvania	—	—	—	—	—	—	—	—
Rhode Island	—	—	—	—	—	—	—	—
South Carolina	—	—	—	—	—	—	—	—
South Dakota	SB 263	—	—	—	—	—	—	X
Tennessee	SB 279	—	—	—	—	—	—	—
Texas	Special session Legislation	—	—	—	\$200,000 ⁷	X	—	X
Utah	—	—	—	—	—	—	—	—
Vermont	—	—	—	—	—	—	—	—
Virginia	HB 400 SB 402 }	X ⁸	—	—	—	—	—	—
Washington	—	—	—	—	—	—	—	—
West Virginia	—	—	—	—	—	—	—	—
Wisconsin	—	—	—	—	—	—	—	—
Wyoming	SF 299	—	—	—	—	—	—	—

⁷ Punitive damages are capped at \$200,000 or four times the plaintiff's economic damages whichever is greater.

⁸ A Virginia circuit court judge ruled a 1983 measure limiting damages to \$1 million was unconstitutional.

APPENDIX F

January 1988 through August 1988

State	Relevant Products Liability Related Bill Identification Numbers	Cap on Noneconomic Damages	Collateral Source Rule	Limitation on Contingency Fees	Restrictions on Punitive Damages	Penalties for F frivolous Suits	Periodic Payment of Judgment	Modification of Joint and Several Liability
Alabama	-	-	-	-	-	-	-	-
Alaska	-	-	-	-	-	-	-	X ¹
Arizona	-	-	-	-	-	-	-	-
Arkansas	-	-	-	-	-	-	-	-
California	-	-	-	-	-	-	-	X ²
Colorado	-	-	-	-	-	-	-	-
Connecticut	-	-	-	-	-	-	-	-
Delaware	-	-	-	-	-	-	-	-
District of Columbia	-	-	-	-	-	-	-	-
Florida	-	-	-	-	-	-	-	-
Georgia	-	-	-	-	-	-	-	-
Hawaii	-	-	-	-	-	-	-	-
Idaho	-	-	-	-	-	-	-	-
Illinois	-	-	-	-	-	-	-	-
Indiana	-	-	-	-	-	-	-	-
Iowa	-	-	-	-	-	-	-	-
Kansas ³	HB 2692 HB 2731	\$250,000	X	-	X	-	-	-
Kentucky	HB 551							
Louisiana	Products Liability Act	-	-	-	-	-	-	-

¹ Voters initiative on ballot in November, 1988 seeks to completely abolish joint and several liability.² Proposition 51 abolishing joint and several liability for noneconomic loss held *not* retroactive.³ Constitutional challenge in 1988.